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WILLIAMS MULLEN
ENVIRONMENTAL NOTES

ENVIRONMENTAL CONSULTANTS FACE POTENTIAL LEGAL LIABILITY

BY: RYAN W. TRAIL

Some companies subjected to environmental enforcement or cleanup actions may believe others should take the blame or share in the costs. When environmental consultants have been involved, the finger can point in their direction. Accordingly, consultants should be aware of scenarios that could present them with potential liability both under common law and by contract. Likewise, clients should understand what the law expects of environmental consultants and form reasonable expectations around those requirements.

When the relationship between an environmental consultant and its client or a third party goes awry, the most often used common law causes of action brought against the consultant are negligence and negligent misrepresentation. In negligence actions, aggrieved parties may claim the consultant owed them a legal duty to render services at a certain level of professional care, but failed to do so, causing damages. In negligent misrepresentation actions, a party may claim it was justified in relying on information provided negligently by the consultant, which resulted in financial detriment.

In such cases, three questions are commonly at issue:

(1) Did the consultant owe the plaintiff a legal duty of care?

Courts in most jurisdictions hold the environmental consultant/client relationship is similar to the doctor/patient or attorney/client relationship, in that it automatically gives rise to a duty of care. The contention made here is that simply because of the fiduciary nature of the relationship, the consultant owes its client a duty of professional care. Many courts hold this duty of care does not extend to third parties (e.g. neighboring property owners, subsequent purchasers, subcontractors) unless it is reasonably foreseeable that the consultant's conduct will result in damages to a third party.

(2) When a legal duty of care is owed, what is the standard the consultant must meet?

Most courts hold the professional to a "reasonable consultant" standard of care. The "reasonable consultant" is one who renders services using the same level of care and skill ordinarily exercised in similar circumstances by consultants performing comparable services in the same area or region. To articulate what the "reasonable consultant" standard is in a particular case, a plaintiff must use testimony of an expert witness who has knowledge, skill, experience, training and education in the applicable field.

(3) Did the consultant meet the "reasonable consultant" standard?

While each case is fact specific, some common practice scenarios present questions as to the "reasonableness" of a consultant's conduct. For example, many jurisdictions hold the reasonable consultant must take advantage of new technologies and methods available within the profession. A failure to utilize those technologies or methods in rendering services may be all a court needs to find the reasonable consultant standard was breached. If damages result from the consultant's use of outdated technology, the consultant may be exposed to liability.

Next, a consultant may feel tempted to provide assurances to a client regarding results, "We will get you this permit." However, such guaranteed results may be outside a reasonable consultant's conduct. If a client relies on the promise of a permit, incurs planning costs and capital expense in anticipation of project approval, and then the consultant fails to deliver the promised permit, the consultant may be exposed to liability.

Most environmental consultant/client relationships are memorialized by contract, meaning breach of contract claims are common between clients and consultants. The environmental consultant contract provides a mechanism for both parties to articulate what duties apply and to fine tune liability. For example, parties may include a "Standard of Care" clause in the contract, which sets an expectation for the consultant's conduct. A consultant may also choose to limit its scope of work in the contract to a specific set of tasks, which in turn, may limit its exposure to claims related to issues outside the stated scope. Many jurisdictions uphold "Limitation of Liability" clauses in consultant contracts; some even allow a consultant to limit its total liability to the amount of fees paid by the client. Finally, consultants may insert terms in the contract to reduce applicable statutes of limitations, to indicate the circumstances under which it may report information to regulators, and to address issues of confidentiality and ownership of documents.

Both consultants and clients should understand potential liabilities associated with the environmental consultant/client relationship. It is important to remember that the environmental consultant/client relationship automatically gives rise to a duty to render services as a reasonable consultant would. The contract gives both parties an opportunity to further define the standard of care, scope of work, limitations of liability, duty of confidentiality, and other conditions relevant to the engagement. Failure to pay attention to and negotiate the terms and conditions of the contract can lead to unanticipated consequences if something goes wrong.

EPA RELEASES NEW GUIDANCE ON CERCLA LANDOWNER LIABILITY PROTECTIONS

BY: CHANNING J. MARTIN

EPA recently issued a guidance document (the "Guidance") that supersedes and clarifies its 2003 guidance on what prospective purchasers of real estate must do to qualify for one of CERCLA's three landowner liability protections ("LLPs"). Although the 33-page Guidance does not have the force of law, it is the definitive source of EPA's views on this issue.

Background

Congress amended CERCLA in 2002 to add three defenses to CERCLA liability, being the "bona fide prospective purchaser" defense, the "contiguous landowner" defense, and the "innocent landowner" defense. The bona fide prospective purchaser ("BFPP") defense is the most useful because a prospective purchaser who qualifies for it is not liable for existing hazardous substances at the property even if the prospective purchaser takes title knowing the property is contaminated. (Note: The term "hazardous substances" in CERCLA is defined to exclude petroleum. Thus, with few exceptions,

the LLPs do not provide a defense to petroleum contamination.)

All three defenses have threshold criteria that must be met, followed by certain continuing obligations. The threshold criteria are that the prospective purchaser must:

- conduct "all appropriate inquires" by performing a Phase I environmental site assessment in accordance with the applicable ASTM Standard (1527-13 or 2247-16) or with 40 CFR Part 312, and
- have no affiliation with any party liable for the hazardous substance contamination.

After taking title to the property, the purchaser must meet the following continuing obligations:

- no additional disposal of hazardous substances may occur,
- compliance with, and no impedance of, land use restrictions and institutional controls,
- "reasonable steps" must be taken with respect to existing releases or threatened releases of hazardous substances,
- providing environmental agencies with cooperation and access to the property,
- compliance with requests for information from environmental agencies, and
- providing legally required notices.

Most of these continuing obligations – also known as "common elements" – are straightforward and easy to meet. Some of them, however, are subject to interpretation, and that's been a source of controversy. EPA's guidance clarifies EPA's views on these issues. Of particular note are EPA's views on the following:

What constitutes "reasonable steps" regarding releases of hazardous substances?

Court cases and previous guidance by EPA have caused considerable unease about what's enough to meet the obligation to take "reasonable steps" regarding releases of existing hazardous substances at the property. The Guidance states that, although a landowner asserting the defense would not be expected to take the same actions expected of a party responsible for the contamination, the landowner would still be required to act reasonably to prevent ongoing releases. Further, the Guidance notes that any knowledge of the contamination and the ability to plan for dealing with it will be important considerations in EPA's determination of whether "reasonable steps" have been taken. The Guidance suggests that persons seeking to qualify for an LLP consult with environmental professionals to determine what the "reasonable steps" are at a given site.

EPA has added an Appendix to the Guidance that provides examples of "reasonable steps" under certain scenarios. Some of these scenarios recount "reasonable steps" EPA has included in so-called "comfort letters" issued to prospective purchasers under similar facts. Are these examples of "reasonable steps" helpful? Yes, but only to a degree. The problem is that EPA caveats the Guidance repeatedly with warnings that each site is different and that whether "reasonable steps" have been taken depends on a site-specific determination of whether the person acted reasonably and prudently under the circumstances. That means the determination will be a subjective one, and one that will be made after the person has closed on the property.

The Guidance indicates EPA personnel have authority to issue "comfort/status letters to parties suggesting "property-specific reasonable steps that EPA staff believe a party should take at the property…." Is it a good idea to ask EPA to define "reasonable steps" at your property? Not unless you are prepared to do whatever EPA decides. Consider this scenario: The agency tells you it believes you need to do X, Y and Z to meet the "reasonable steps" obligation of the defense. You believe what EPA wants is far more than necessary, so you do X and Y, but not Z. Now you end up in court with the agency or a third party contending you do not qualify for an LLP and therefore are liable for existing contamination at the property you just purchased. Here's the problem you face: The judge is unlikely to second-guess EPA, meaning she's likely to give credence to EPA's determination that X, Y and Z needed to be performed to meet the "reasonable steps" requirement. If you'd never asked the agency, but instead relied upon your legal counsel and environmental consultant, you would still have to defend your position in court, but at least you wouldn't face the prospect of having EPA say, "Judge, we told them they needed to do X, Y and Z, but they declined." The bottom line is that, rather than asking EPA for its opinion, it may be better to determine "reasonable steps" with your environmental attorney and consultant, and then document your reasoning in writing. This is especially so since any "comfort letter" from the agency probably won't contain the

degree of comfort you want. For example, the "comfort letter" is unlikely to say that if you do X, Y and Z, you will qualify for an LLP. (A good resource to review in determining "reasonable steps" is ASTM's Standard Guide for Identifying and Complying with Continuing Obligations (E-2790)).

What does "disposal" mean?

One of the continuing obligations is to ensure there is no "disposal" of hazardous substances after taking title to the property. The problem lies in the significant number of court cases that have dealt with what that word means. The Guidance notes that there are two types of disposal – "initial" and "secondary." The initial disposal is self-explanatory; secondary disposal is the continued or subsequent migration or movement of contaminants (by human means or otherwise) previously released to the environment. The issue of whether an action constitutes "disposal," and what "reasonable steps" must be taken in connection with the same, is particularly important for developers where grading of soil containing hazardous substances will be required. EPA says that if the landowner acted reasonably in conducting the grading "given the type, amount and location" of the contamination and took reasonable steps to prevent exacerbating the contamination, then enforcement personnel should consider exercising their enforcement discretion not to treat the grading as nullifying the LLP. Further, if the landowner performed the grading in connection with implementing a remedy or to otherwise remove or remediate contamination, then EPA says any such grading would also be appropriate for an exercise of enforcement discretion.

What has to be done to comply with and not impede land use restrictions and institutional controls?

EPA has now linked the continuing obligation to comply with institutional controls to the continuing obligation to cooperate with the agency. Thus, if a purchaser takes title before land use restrictions are recorded or institutional controls are established in connection with an ongoing cleanup, EPA's position is that the purchaser must cooperate with the applicable agency by recording those restrictions and/or establishing those controls. If that cooperation does not occur, the Guidance indicates enforcement personnel may contend the purchaser no longer qualifies for an LLP.

The Guidance also takes the position that impeding the effectiveness of an institutional control can include applying to change the zoning of property. The example given is of a landowner who "applies for a zoning change or variance from the current designated use of the property when the remedy relies on that designated use to act as an [institutional control]." Thus, if a landowner sought to rezone property from industrial to residential when the risk assessment on which the cleanup was based assumed future use of the property would remain industrial, EPA could view that as an impedance. The good news for purchasers is that the Guidance recognizes that land use restrictions don't necessarily have to remain in place forever. If circumstances have changed – for example, if the contaminants have naturally degraded below levels of concern – then the landowner may seek to change the restriction as long as it follows the prescribed procedures for doing so. This means, among other things, that if permission from the agency that required the restriction is necessary to remove it, the landowner has sought and obtained that permission.

Conclusion

The Guidance repeatedly notes that its application depends on site-specific facts and circumstances. This means it provides little in the way of hard and fast rules one can rely on to make decisions. Nevertheless, courts deciding whether a purchaser qualifies for an LLP will certainly review it, and both sides in the litigation are likely to cite it to support their positions. Wise prospective purchasers therefore should review the Guidance carefully and get help from an environmental attorney and consultant in applying it to the facts and circumstances at the property they are considering buying.

Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners (EPA July 29, 2019)

HAZARDOUS WASTE GENERATOR IMPROVEMENTS RULE PROVIDES EPISODIC EXCEEDANCE RELIEF

BY: ETHAN R. WARE

Generators of hazardous waste risk triggering comprehensive hazardous waste storage permit requirements when unplanned events cause hazardous waste generated onsite to exceed maximum limits for very small quantity generators (VSQG) or small quantity generators (SQG). In 2016, EPA codified the Hazardous Waste Generator Improvements Rule (the "Improvements Rule"), providing a safe harbor for generators from that potential outcome when the excursion is due to a qualifying episodic event. Although the Improvements Rule was issued three years ago, a number of generators still are not aware of this safe harbor.

Hazardous waste requirements for any facility are determined by the generator classification applicable to the operator of the facility. A VSQG is an operator whose facility generates less than 100 kg (about 220 lbs.) of hazardous waste in a calendar month. VSQGs are largely exempt from requirements for storing and managing hazardous waste, except VSQG hazardous waste may be disposed only at a permitted facility. An SQG is an operator whose facility generates more than 100 kg but less than 1,000 kg (about 2,200 lbs.) of hazardous waste in a calendar month. SQGs must comply with most container and storage area requirements applicable to large quantity generators (LQG), but a full-blown contingency plan is not required, and additional time is provided for shipping hazardous waste offsite. To maintain its classification, a VSQG may not accumulate more than 1,000 kg of hazardous waste at any one time, and an SQG may not accumulate more that 6,000 kg of hazardous waste at any one time.

The consequences of exceeding maximum generation and accumulation caps at a VSQG or SQG may be significant. The VSQG must be in immediate compliance with SQG regulations on the day of the exceedance, and a violating SQG must have in place a hazardous waste permit to store the hazardous waste, which often may take months or years to obtain.

EPA attempts to remedy the risk of noncompliance for exceeding generation or accumulation thresholds at a VSQG or SQG in the regulations. The Improvements Rule contains an "episodic event exemption" which protects VSQGs and SQGs from permit requirements in the event of an excursion above regulatory caps on generation or accumulation of hazardous waste. This exemption, however, comes with a set of qualifying conditions.

An "episodic event" may be planned or unplanned and still qualify for the exemption. According to EPA, a "planned episodic event" is one in which the generator prepares or plans for the additional hazardous waste to be generated as a result of facility operations, such as additional hazardous waste from tank cleanouts, short term projects, and removal of excess or obsolete chemicals in inventory. "Unplanned episodic events" are those where the generator "reasonably did not expect [the event] to occur" and includes by regulation process upsets, product recalls, spills, and "Acts of God."

A facility's ability to claim the exemption is not unlimited under the Improvements Rule, however. A VSQG or SQG may request relief only once per year as a matter of right and may file a "written petition" for a second exemption under certain conditions. The petition for a second exemption must include a good faith reason for the second event, the amount of time of the event, and a description of how the waste will be managed.

There are several pre-conditions a VSQG or SQG must satisfy in order to receive relief from a change in a generator classification under the Improvements Rule:

1. The facility must have an EPA RCRA Identification Number ("EPA ID") or obtain a new one, even though VSQGs are otherwise not required to obtain an EPA ID;
2. Notification to a delegated state or EPA of the episodic event must be submitted 30 days before a planned event or within 24 hours after the unplanned event, as applicable;
3. Accumulation of the excess hazardous waste must comply with "applicable standards" for the proper generator classification, such as container management regulations, labeling, and storage requirements;

4. Containers storing those hazardous wastes accumulated above the threshold must include the phrase "Episodic Hazardous Wastes" on the label, state the "Hazard" for which the additional waste is listed or characterized by use of words or pictogram, and record the date the episodic event began;
5. Manifest requirements for LQGs must be met, and the episodic hazardous wastes must be taken offsite within 60 days to a hazardous waste facility;
6. Records of the qualifying episodic event and destination of episodic hazardous waste must be maintained for three years; and
7. Letters from the implementing agency approving of the exemption must be kept onsite for three years.

In the past, states periodically allowed VSQGs and SQGs to escape more complex hazardous waste management requirements due to an unplanned increase in hazardous wastes generated onsite, but only as a matter of policy and only when coaxed by the generator. Now, the relief is part of EPA's national regulatory program. Most delegated states have now incorporated it into their hazardous waste management regulations.

81 Fed. Reg. 85732 (Nov. 28, 2016); 40 CFR 262, Subpart L

NEW EPA POLICY EMPHASIZES COOPERATIVE FEDERALISM IN ENVIRONMENTAL ENFORCEMENT

BY: BENJAMIN MOWCZAN

Part of EPA's FY 2018-2022 Strategic Plan is an emphasis on cooperative federalism in the compliance and enforcement process, with the goal being that states authorized, delegated, or approved to implement federal environmental programs take the lead in enforcing those programs. In furtherance of this objective, EPA recently issued a policy directive framing the desired roles of states and EPA in civil enforcement and compliance work (the "Partnership Policy").

The cornerstone of the Partnership Policy is communication and joint planning between states and EPA. During the joint planning process, EPA and each state agency are encouraged to collaborate to identify (1) the environmental compliance problems in the state; (2) national, regional, and state compliance priorities; (3) emerging issues; and (4) how the combined resources of EPA and the state could be used to address these needs. The joint planning process is a commitment by EPA to reach clear agreements with states on their respective roles in inspection and enforcement and to build rapport between EPA regions and state agency personnel.

Of particular interest to the regulated community, the Partnership Policy directs EPA regions and states to confer in developing their inspection plans to avoid duplicate inspections and reduce the burden on regulated facilities, with the intent being that a facility would not be subject to overlapping inspections for the same regulatory requirements within a twelve-month period. In terms of enforcement, the Partnership Policy continues EPA's policy of granting primacy to the states in enforcing authorized programs. Despite this general deference to state decisions, the Partnership Policy outlines nine examples where the regulated community may expect EPA involvement in the enforcement process:

1. a state requests EPA assistance;
2. violations that are part of an EPA national compliance initiative;
3. emergency situations where there is substantial risk to human health or the environment;
4. where a state lacks adequate resources or expertise;
5. situations involving multi-state or multi-jurisdictional interests;
6. significant violations where a state fails to take timely and appropriate action;
7. serious violations requiring EPA's criminal enforcement authority;
8. periodic review of state program efficacy; and
9. enforcement at federal and state owned or operated facilities.

Accordingly, facilities can expect their primary interactions with inspectors and enforcement authorities to be at the state level, but should be prepared for EPA involvement at all times, particularly if any of these nine scenarios are present.

For the regulated community, the Partnership Policy is a step toward more consistency across state and EPA actions. If the increase in communication and

cooperation functions as planned, it should mean fewer discrepancies and conflicts among the respective positions taken by EPA and the states. Given their more local function and geographical proximities, state agencies often have closer working relationships with facilities than do their EPA counterparts. With the more open channels of communication between states and EPA under the Partnership Policy, the regulated community should use the opportunity to achieve increased compliance by working with their local state agencies to better understand EPA trends, initiatives, or hot-button issues deserving of extra care and scrutiny at their facilities.

Memorandum from Susan Parker Bodine to EPA Regional Administrators: Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work (July, 11, 2019).

WHY COAL ASH REGULATION SHOULD BE ON EVERYONE'S WATCH LIST

BY: LIZ WILLIAMSON

Recently, the use of coal has been most highlighted in the power production industry, although coal has been used for generations in many industries. For example, steel, paper, chemicals, and oil refining industries utilize coal. Some industries also use coal combustion byproducts because they can be substituted for cement in some applications. Because the Coal Ash Combustion Residuals Rule (CCR Rule) only impacts electric utilities, other industries have been watching from the sidelines. However, the regulatory framework in the CCR Rule could have far-reaching impacts regardless of industry. EPA is creating a record that may be used as the basis for future regulations on coal ash disposal and reuse outside of power generation, so all companies that use coal or coal combustion byproducts should pay attention. Issues such as beneficial use of CCR, location restrictions on coal ash disposal, monitoring, and closure of disposal areas are issues of concern for all coal ash byproducts.

The most recent development in coal ash regulation for electric utilities is an August 2019 Proposed Rule that addresses beneficial use of coal ash and the public access to coal ash data (the "Proposed Rule"). The comment period on the Proposed Rule closed on October 15, 2019:

- Beneficial Use of Coal Ash. Presently, the CCR Rule has a numerical mass-based threshold of 12,400 tons, above which a user must demonstrate that environmental releases to groundwater are comparable to analogous products that do not contain CCR. EPA is considering eliminating this requirement and replacing it. EPA could replace it with location-based criteria derived from the current CCR location requirements, a new mass-based value based on current risk-based information, or a combination of both.
- Temporary storage of CCR. The CCR Rule currently regulates piles of CCR on-site as a CCR landfill but regulates storage of CCR materials off-site differently because those materials may qualify for "beneficial use." EPA is proposing to establish a single set of requirements that apply to all temporary placement of unencapsulated CCR on land.
- Annual Groundwater Monitoring and Corrective Action Report. EPA is seeking comment on standardizing the information and the way it is presented in the Annual Groundwater Report required by the CCR Rule.
- Boron. EPA is proposing to establish an alternate risk-based groundwater protection standard for boron.
- CCR Public Websites. EPA is seeking comment on whether to add website requirements to ensure that CCR information is available to the public, such as prohibiting website sign-in portals and ensuring that website URLs are locatable and current.

EPA is preparing to publish two more proposed rules that will further impact the CCR Rule. The proposed rules are expected to address permitting for CCR units and the deadline for closure of CCR units. Both proposed rules are presently at the Office of Management and Budget for review.

In summary, all industries that create or use coal combustion byproducts should track developments concerning the CCR Rule. We see a trend toward increased public access to CCR reports and data and evolving requirements for permitting, CCR storage, and beneficial use. EPA's rationale for the closure deadline will also be instructive. By the end of this year, EPA will have provided the public the opportunity to comment on all of these aspects of CCR regulation.

Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities; Final Rule, 80 Fed. Reg. 21302 (Apr. 17, 2015).

Enhancing Public Access to Information; Reconsideration of Beneficial Use Criteria and Piles, 84 Fed. Reg. 40353 (Aug. 14, 2019).

Proposed rules not yet published: "Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities: Federal CCR Permit Program" and "Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; A Holistic Approach to Closure Part A: Deadline to Initiate Closure."

EPA ANSWERS TRUMP'S CALL FOR LESS STATE AUTHORITY UNDER THE CLEAN WATER ACT

BY: JESSIE J.O. KING

EPA recently published a proposed federal rule ("Proposed Rule") aimed at limiting the authority of states to deny certifications of compliance with state water quality requirements under Section 401 of the Clean Water Act (CWA). The move is no surprise to those watching the battle over permitting of large energy and export terminal projects. A concern of many, however, is that the rule will have a much broader impact.

CWA Section 401

The CWA was enacted to protect and restore the quality of our Nation's surface waters. To this end, the CWA requires persons desiring to engage in activities that result in direct or indirect discharges into navigable waters to apply for a permit or license. Permits and licenses include CWA Sections 402 and 404 permits, Federal Energy Regulatory Commission (FERC) hydropower licenses, and United States Army Corps of Engineers (USACE) permits for construction of bridges, dams, or dikes under the federal Rivers and Harbors Act.

Section 401 of the Clean Water Act prohibits the issuance of these federal permits or licenses without prior state certification that the project will not impair applicable state water quality standards. States are required under Section 401 to make a certification decision within "any reasonable time not to exceed one year." A state may waive the certification either by written waiver or inaction.

For the last twenty-five years, the scope of the states' authority under Section 401 has been broadly interpreted due to the 1994 United States Supreme Court decision in Public Utility District *No. 1 of Jefferson County v. Washington Department of Ecology* ("PUD"). In PUD, the Supreme Court ruled a state has broad authority under Section 401 to require a hydroelectric project to meet minimum stream flow limits in order to protect the river's salmon population. Also, more recently, FERC has issued conflicting decisions on whether New York waived the right to deny certification requests where it failed to act within one year, despite the applicant's withdrawal and reapplication prior to the one year deadline. The influx of new hydroelectric and gas pipeline projects has brought political attention to the timing and scope of the 401 permitting process and what Congress intended with the 401 certification process.

Background

In April of this year, President Trump signed an Executive Order directing EPA to update existing guidance and regulations dealing with states' authority under Section 401 of the CWA. The Executive Order is presumably a reaction to concerns expressed by FERC and applicants complaining states aren't acting fast enough and are illegally expanding the scope of the CWA authority to kill, impose burdensome restrictions on, or delay projects.

In June 2019, EPA issued updated CWA Section 401 guidance and recommendations as required by Trump's Executive Order (the "Guidance"). The Guidance provided insight on the statutory and regulatory timelines and the appropriate limited scope of Section 401 certification review and conditions. EPA cautioned that states have no authority under the CWA to wait to start the one year or less clock until they determine the request to be "complete." In addition, EPA said that, where a state does not make a decision within a reasonable time not to exceed one year of receiving a request (whether complete or incomplete when first made), the right to make a certification decision is waived and federal agencies may issue

the permit. Regarding scope, the Guidance stated that the certification review should be limited to an evaluation of water quality impacts and nothing else. Allowable reasons for denial or for conditions in a certification were said to include effluent limitations and monitoring requirements necessary to comply with the water quality standards. If a state denied a certification or conditioned it on issues outside of water quality protection, the Guidance directed federal permitting agencies to seek legal and EPA advice on whether to issue the permit or license without the conditions or despite the denial. Finally, the Guidance stated that a 401 certification need not wait on a completed environmental assessment or impact statement where NEPA is involved. In fact, the Guidance went so far as to say that a state waiting for completion of the NEPA process before taking action may result in waiver of the certification.

The Proposed Rule

The Proposed Rule proposes to make the June 2019 EPA Guidance a regulatory requirement, and it builds on the Guidance to create a clearer path for regulators. The preamble to the Proposed Rule explains that the existing regulations do not reflect the language of Section 401 and do not address important procedural and substantive components of a 401 certification.

The Proposed Rule contains the following specific procedural and substantive requirements for 401 certifications.

1. 401 Certifications are required only if the proposed activity has the potential to result in (1) a discharge; (2) from a point source; (3) into waters of the United States.

This language clarifies three issues that have arisen over the years that potentially enlarged the scope of authority given to the states under the CWA. First, the Proposed Rule clarifies that the need for a 401 certification is not triggered by whether a proposed "activity" could impact water quality standards, but whether a "discharge" could impact water quality standards. Second, as EPA has consistently held, the process is not triggered unless the discharge is from a "point source," not an indirect discharge. Finally, the discharge must be into waters of the United States – not non-navigable waters such as isolated wetlands.

2. The reasonable timeframe for certifying authorities to act on a 401 certification request is within one year of receipt of a "certification request." A "certification request" triggering the one year clock is no longer interpreted by EPA as a "complete application"; instead, it now includes receipt of a request with the following components:

- The name of the project proponent(s) and a point of contact;
- A description of the proposed project;
- The applicable federal license or permit sought;
- The location and type of any discharge that may result from the project and the location of receiving waters;
- The methods and means proposed to monitor and to treat or control the discharge;
- All other federal, tribal, state, or local agency authorizations required for the proposed project (including all approvals and/or denials already received); and
- The following statement: *"The project proponent hereby request [sic] that the certifying authority review and take action on this CWA section 401 certification within the applicable reasonable time frame."*

3. The term "receipt" for purposes of triggering the one year or less timeframe is defined as "the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures."

4. The one year or less time frame to act upon a certification request may not be tolled or extended for any reason. Withdrawing and resubmitting the same 401 request does not restart the clock. To avoid delays, the Proposed Rule requires a proponent to request a pre-filing meeting with the certifying authority at least 30 days prior to submission of the 401 certification request. The agency has only 30 days after a 401 certification request is received to seek additional information that (a) is within the scope of the law; and (b) can be provided within the reasonable time (not to exceed one year of the receipt of the request).

5. The certifying authority may take only one of four potential actions on a request: (1) grant certification; (2) grant with conditions; (3) deny; or (4) waive its right to provide a certification by

express waiver or failure/refusal to act. In taking any of the above-listed actions, EPA explains in the preamble that the certifying authority may consider only whether the discharge to waters of the United States will meet appropriate state or tribal "water quality requirements" as defined by the Proposed Rule. Any conditions placed under a grant "must be necessary to assure compliance with water quality requirements." "Water quality requirements" are limited to "applicable provisions of §§ 301, 302, 303, 306 and 307 of the CWA and EPA-approved state or tribal CWA regulatory program provisions." "State or tribal CWA regulatory program provisions" are defined to include only those water quality requirements established under State or tribal law that are more stringent than those under the CWA, but only if they are EPA-approved. Any conditions imposed by a certifying authority must have a nexus to protection of water quality, refer to the law requiring the condition, and analyze whether a less stringent condition could also satisfy the standards.

6. The rule allows states only to add conditions that are "within the scope of certification," which is limited to "assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." If a specific condition added by a state is deemed by the federal agency issuing the permit not to satisfy the proposed water quality requirements, the federal agency may give the state an opportunity to remedy the condition only if the one year time period has not expired. If it has expired or the state does not modify the condition within one year of receipt of the request for certification, the condition is not required to be included in the federal permit or license.

Conclusion

The Proposed Rule seeks to prevent unnecessary delays and illegal conditions imposed on 401 certifications. Delays and unwarranted conditions cost money and often kill projects. EPA touts the rule as needed to ensure the scope of the 401 certification process is not expanded to exceed the intent of Section 401 of the CWA, being to protect water quality from impairments caused by direct discharges to navigable waters. However, it is a certainty that some states will see this as a dilution of the authority granted to them by Congress under the CWA. That means this issue will surely be litigated. The comment period on the Proposed Rule closed on October 21, 2019.

84 FR 44080 (Aug. 22, 2019)

DON'T GET LOST IN THE STORM: A RECAP OF VIRGINIA'S RENEWED, GREATLY AMENDED AND NOW EFFECTIVE CONSTRUCTION STORMWATER DISCHARGE GENERAL PERMIT

BY: HENRY R. "SPEAKER" POLLARD, V

This summer brought typical thunderstorms, but it also brought a shower of new and changed requirements for construction activities as part of the recently renewed regulation for the General VPDES Permit for Discharges of Stormwater from Construction Activities ("Construction General Permit"). Functioning as a permit-by-rule, renewed every five years, and serving as Virginia's default stormwater discharge permit for regulated construction activities, the Construction General Permit contains standardized requirements to protect water quality from pollutants expected in such discharges. However, the renewed Construction General Permit includes many significant amendments warranting close attention, including changes in stormwater management practices, recordkeeping, reporting, and compliance assurance. Is your site ready?

The following is a summary of the most important of these recent changes:

1. Registration statement. The registration statement serves as the request for confirmation of Construction General Permit coverage or renewal thereof. These latest amendments advance the deadline by which a registration statement must be filed for renewal of coverage, from the date of coverage expiration on

June 30 to at least 60 days prior to such date. Also included are several new and revised requirements for the registration statement, such as:

- A site map of ongoing or proposed land disturbance areas to be covered;
- The name and address of locations used for off-site support activities;
- For activity covered under the 2014 Construction General Permit,
  - the date of approval of the project's erosion and sediment control ("E&SC") Plan; and
  - confirmation if land-disturbance activities have commenced; and
- A letter from a nutrient credit bank confirming availability of nutrient credits to offset permanent increases in nutrient (nitrogen and phosphorous) loads in the stormwater discharged.

2. Late registration statements to renew coverage for projects. This change clarifies that a coverage renewal registration statement filed after the end of the permit term on June 30 will not cause renewed permit coverage to apply retroactively to that expiration date. New text notes that any unauthorized discharges during that gap period are subject to enforcement actions.

3. Stormwater Pollution Prevention Plan ("SWPPP") requirements. Changes made to SWPPP standards and obligations include:

- For permittees electing to perform SWPPP site inspections on a ten business-day cycle, a reduction in the time allowed to complete a SWPPP inspection after a measurable storm event, from 48 hours to 24 hours;
- Clarified, additional, and more stringent SWPPP elements, practices and self-inspection timelines for discharges to:
  - Waters listed as impaired for the presence of polychlorinated biphenyls ("PCBs"), or for which a PCB-based total maximum daily load ("TMDL") has been issued, where the permitted project includes demolition of a structure that was built or renovated prior to 1980 and has floor space greater than 10,000 square feet; or
  - Waters listed as impaired for nutrients or sediments, or for which a nutrient or sediment-based TMDL has been issued; and
  - "Exceptional waters," as defined in Virginia Water Quality Standards regulations;
- A new allowance for delaying self-inspections due to safety considerations arising from adverse weather, and related recordkeeping duties;
- A new deadline for logging site inspections in the SWPPP, now four business days after the inspection is completed;
- Revisions related to changes in site conditions, site stabilization work and effectiveness, and evidence of discharges prior to inspections; and
- A new duty to cover or close waste containers during wet weather and daily at close of business, or to take "similarly effective" measures, unless no discharge of pollutants will result from the exposure of the waste.

4. Homebuilder written notification to homebuyers of importance of final site stabilization measures and related recordkeeping. The definition of "final stabilization" has included for individual residential home lots an option to complete only temporary soil stabilization so long as notice is made to the homeowner of the importance of reaching final soil stabilization. The amendments clarify that such notice must be in writing and that the SWPPP must include a record of such notice and a certification that the notice was delivered to the homeowner. Copies of the notification and certification must be kept for at least three years following the expiration or sooner termination of the Construction General Permit for the project.

5. Termination of the Construction General Permit Coverage. The amendments clarify requirements as to eligibility for and agency approval of termination of coverage:

- A notice of termination by the permittee to DEQ or the locality is not required where a registration statement was not required pursuant to exemptions for construction of single-family detached structures;
- For individual lots subject to residential construction activities only, completion of "final stabilization" as newly defined (and discussed above) triggers the duty to file a notice of termination for such lots; and
- The notification of termination must now include:
  - A construction record drawing for permanent stormwater management facilities that is prepared, sealed and signed

by a professional engineer registered in the Commonwealth of Virginia;
- Certification by such professional engineer that any permanent stormwater management facilities have been constructed in accordance with the approved plans for such facilities;
- Evidence of recordation in the local land records of any required Stormwater Management Maintenance Agreement; and
- For individual lots subject to residential construction activities only, and per the new definition of "final stabilization," where temporary soil stabilization is established, a copy of the certification of notice to the homebuyer of the need for final soil stabilization.

Note that several of the new or revised registration, recordkeeping, notice and reporting requirements could create admissions of unpermitted regulated land-disturbing activities or indicate violations of specific provisions of the Construction General Permit or the VSMP regulations. In addition, agency delay or denial of confirmation of Construction General Permit coverage (or termination of coverage) is likely until a complete registration statement (or notice of termination) including these newly required items is provided. This potential dilemma may be significant, especially for projects with land disturbance already underway, but failure to obtain coverage (or have it timely terminated) only increases the risk of regulatory liability.

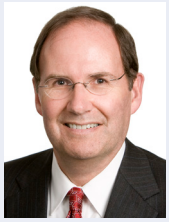
Agency inspections are like wet weather – more a matter of when than if – so the next storm may bring more than rain to your site. Given the many new or more stringent requirements in the renewed Construction General Permit, parties engaged in or planning to start regulated construction activities should ensure they have accounted for these changes and make any needed adjustments quickly.

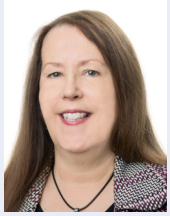
General VPDES Permit for Discharges of Stormwater from Construction Activities, 35 Va. Reg. Regs. 2260 (May 13, 2019), *codified at 9 VAC 25-880.*

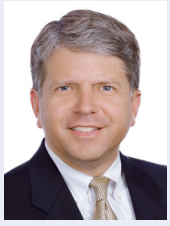
CONTACT US

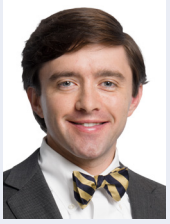

Jay Holloway
Washington, D.C.
202.293.8127


Jessie King
Columbia, SC
803.567.4602

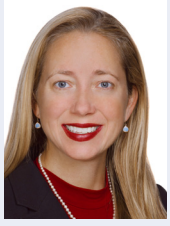

Channing Martin
Richmond, VA
804.420.6422

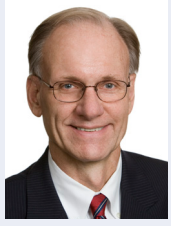

Mona O'Bryant
Raleigh, NC
919.981.4091

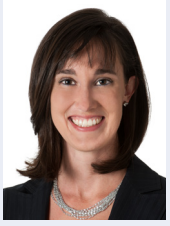

Speaker Pollard
Richmond, VA
804.420.6537


Ryan Trail
Columbia, SC
803.567.4605


Ethan Ware
Columbia, SC
803.567.4610


Liz Williamson
Washington, D.C.
202.293.8123


Amos Dawson
Raleigh, NC
919.981.4010


Ruth Levy
Columbia, SC
803.567.4613


Benjamin Mowczan
Columbia, SC
803.567.4611


Pierce Werner
Columbia, SC
803.567.4606