

WILLIAMS MULLEN ENVIRONMENTAL NOTES



BYE, BYE SEPs

BY: CHANNING J. MARTIN

The United States Department of Justice has terminated its policy of allowing companies to perform supplemental environmental projects (SEPs) in lieu of paying civil penalties for violations of federal environmental laws. The new policy was announced in a March 12, 2020 memo by Jeffrey Clark, Assistant Attorney General for the Environment and Natural Resources Division (ENRD). The policy does not, however, affect SEPs that are already approved under a Consent Decree.

SEPs are environmentally beneficial projects included as part of a settlement with EPA or a state environmental agency for alleged violations of environmental laws. They are voluntary projects that, by definition, cannot be compelled or required, and they are in addition to what the alleged violator is required to do to come back into compliance. Under EPA and state SEP policies, an alleged violator will generally pay lower civil penalties if it voluntarily agrees as part of a settlement to undertake a SEP closely related to the violations being resolved. In this way, SEPs can provide benefits to citizens and the environment that go above and beyond those otherwise expected under the law.

The recent death of SEPs is the culmination of a concern within DOJ about the use of settlements to make payments to third parties. That concern began in 2017 and was addressed by DOJ policies issued

in 2017 and 2018 prohibiting such payments. At the time, SEPs were excepted from these policies.

That changed to a degree in August 2019 when Mr. Clark issued a memo to ENRD attorneys. The memo expressed concern that SEPs were being misused in Clean Water Act settlements with local governments over alleged violations at their wastewater treatment plants. It noted that the Attorney General had issued a directive in November 2018 prohibiting settlements with municipalities if the settlement extracts a form of relief that could not be obtained from litigating the alleged violations to judgment. SEPs fall into that category. The memo went on to say that SEPs appear to intrude on local government accountability by allowing local governments to commit to funding projects not otherwise authorized by local laws. The memo concluded by saying that, going forward, any CWA settlements with local governments that included a SEP would be subject to “close, case-by-case scrutiny.”

Although not addressed in the memo, an unstated concern and the reason for increased scrutiny was that environmental groups were using SEPs as a means to accomplish pet projects. The allegation was that environmental groups would file a citizen suit against a local government, and then the (often friendly) local government would agree to a settlement that involved funding a project desired by the environmental groups.

In the March 2020 memo doing away with SEPs across the board, DOJ noted that such “in-kind

payments in exchange for a reduction of a penalty are as problematic as direct cash payments to third parties.” DOJ also noted that EPA’s SEP policy allowed defendants to reduce their civil penalties by as much as 80% in return for performing a SEP. This, said DOJ, circumvents the Miscellaneous Receipts Act, a statute that prevents money from settlements with the United States from being diverted to third parties.

This action was not unexpected. The Trump Administration has long contended that the Obama Administration looked the other way while environmental groups put pressure on companies and local governments to use SEPs to fund environmental groups’ projects. Still, it seems likely that SEPs are not gone forever. A future administration could very well bring them back because SEPs have widespread support on both sides of the aisle.

EPA has used SEPs for years in its administrative settlements, and DOJ’s new policy does not bind EPA. So does that mean EPA will keep using SEPs? The agency has not said anything official yet, but we doubt it. That’s a shame because SEPs can provide real environmental benefits when used correctly. With this said, though, we expect many states will continue using SEPs in state enforcement actions as long as they are legally able to do so.

[Supplement Environmental Projects in Civil Settlements With Private Defendants. Memorandum by Jeffrey Bossert Clark, Assistant Attorney General \(March 12, 2020\).](#)



END OF THE LINE? EPA AND CORPS OF ENGINEERS FINALIZE NEW DEFINITION OF “WATERS OF THE UNITED STATES”

BY: HENRY R. “SPEAKER” POLLARD, V

As reported in a number of our newsletter articles over the past several years, both the Obama Administration, through its Clean Water Rule, and the Trump Administration have pursued major changes to the scope of federally-regulated waters under the Clean Water Act. The focus of attention has been on the definition of “waters of the United States” (WOTUS). The latest step in this effort has now been issued as a final rule, called the Navigable Waters Protection Rule (NWPR). It supplants the placeholder definition issued last fall as an interim replacement of the Clean Water Rule. The definition of WOTUS is critical to federal regulation and protection of surface waters under various Clean Water Act programs and even other environmental statutes, so the changes in the NWPR have great significance for federal permitting, enforcement, and review of projects that may impact surface waters and wetlands.

Scheduled to take effect June 22, 2020, the NWPR addresses certain categories of regulated/ jurisdictional waters and unregulated/nonjurisdictional waters with more specificity than previous definitions under the Clean Water Rule. In doing so, it offers some notable new exceptions to jurisdictional coverage, especially certain ephemeral water features, isolated wetlands, and artificial water bodies and conveyances.

1. **What’s in.** The NWPR expressly includes certain water bodies within the scope of jurisdictional “waters of the United States,” though significant complexities exist. They are:
 - *Territorial seas and traditional navigable waters.*
 - *Perennial and intermittent tributaries that contribute surface water flow to [territorial seas and traditional navigable waters]. A “tributary” is defined as “a river, stream or similar naturally occurring surface water channel that contributes surface water flow to*

a territorial sea or traditional navigable water in a typical year either directly or indirectly through other tributaries, jurisdictional lakes, ponds, or impoundments, or adjacent wetlands.”

- *Certain lakes, ponds and impoundments of jurisdictional waters.* These terms are defined as “standing bodies of open water that contribute surface water flow in a typical year to a territorial sea or traditional navigable water either directly or through a tributary, another jurisdictional lake, pond, or impoundment, or an adjacent wetland.” A “lake, pond or impoundment of a jurisdictional water” retains its jurisdictional status in the same manner as with tributaries.
- *Wetlands adjacent to other jurisdictional waters.* The NWPR defines the term “wetlands” to mean “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.” The notion of adjacency is also defined, so that “adjacent wetlands” are only those that (i) “abut” one of the previously listed jurisdictional waters or an impoundment thereof; (ii) are inundated by flooding from one of these jurisdictional waters or an impoundment thereof during a “typical year;” (iii) are separated from one of them or an impoundment thereof “only by a natural berm, bank, dune, or similar natural feature;” or (iv) are separated from one of them or an impoundment thereof “only by an artificial dike, barrier, or similar artificial structure” (e.g., a culvert, flood or tide gate, or pump) if there is still a “direct hydrological surface connection to one of those waters in a ‘typical year.’”

2. **What’s out.** Other water bodies and water features are expressly excluded from the definition of “waters of the United States” and therefore are nonjurisdictional. They are:

- Groundwater, including that drained through subsurface systems;

- Ephemeral features that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills and pools;
- Diffuse stormwater runoff and directional sheet flow over upland;
- Ditches that are not traditional navigable waters or tributaries, or that are not constructed in adjacent wetlands, subject to certain limitations;
- Prior converted cropland;
- Artificially irrigated areas that would revert to upland if artificial irrigation ceases;
- Artificial lakes and ponds that are not jurisdictional impoundments and that are constructed or excavated in upland or non-jurisdictional waters;
- Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity and pits excavated in upland or in nonjurisdictional waters for the purpose of obtaining fill, sand or gravel;
- Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate or store stormwater runoff;
- Groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters; and
- Waste treatment systems.

3. **Other Nuances.** As is clear from the summary of main elements of the definition and exclusions, many nuances exist as to when such water bodies may retain their jurisdictional status even when seemingly unregulated features are in play. In this regard, and even as to the basic determination of jurisdictional status, certain revised or new definitions play key roles and need to be thoroughly considered, particularly the definitions of “abut” and “typical year.”

4. **Federal v. State Jurisdiction.** Finally, and as has been discussed in our previous newsletter articles, the changes made through the NWPR only pertain at the federal level. Many states have their own programs to regulate surface water, wetlands and groundwater that are

unaffected by these changes. Therefore, even if the NWPR offers new and clearer exclusions for ephemeral streams and certain relatively isolated waters and wetlands, state law may yet require permitting for impacts to these resources. Even with the NWPR, then, projects discharging to surface waters remain subject to regulation at the federal and/or state levels, so plan accordingly.

The running debate on the proper scope of WOTUS, especially since the U.S. Supreme Court's 2006 opinion in *Rapanos v. United States* (discussed in prior newsletter articles), will no doubt continue. Environmental groups and/or regulated parties are certain to challenge the NWPR. As a result, the fate of the full meaning of WOTUS continues to be far from certain.

[The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 \(April 21, 2020\).](#)



EPA ISSUES FINAL RULE FOR CIVIL COMPLIANCE INSPECTION PROCEDURES

BY: RYAN W. TRAIL

EPA recently issued a final rule governing how EPA personnel are to conduct certain inspections at regulated facilities. The rule was developed in response to an Executive Order issued by President Trump, and it sets forth protocols EPA inspectors must follow before, during and after a civil

compliance inspection. The rule does not replace EPA's media specific compliance inspection manuals, which provide detailed inspection guidelines for specific program areas, but rather provides a broad-brush standard for what every EPA inspection should look like. In addition, the rule does not apply to the investigation of potential environmental crimes.

The rule sets forth "a general overview of the process for conducting on-site civil inspections" and instructs agency personnel to conduct a civil compliance inspection in the following manner:

Timing of Inspections and Facility Notification

Although emergency situations may require otherwise, inspectors should attempt to conduct inspections during normal work hours and work with the facility to agree on a schedule for the inspection. However, the rule notes EPA maintains authority to conduct inspections without prior notice.

Inspector Qualifications

The rule requires that EPA inspectors must have "valid credentials" to perform the inspection. Valid credentials are media-specific and are issued to inspectors only when they have completed training in the relevant statutory program. If an EPA inspector is trained in air compliance inspections, but not in NPDES permit compliance, that inspector may not conduct an NPDES compliance inspection.

Obtaining Consent To Enter

EPA inspectors must present their "valid credentials" to the facility and describe both the authority for and purpose of the inspection. The inspector should first seek the facilities' consent to enter. If consent is denied, EPA may then seek a warrant for entry. Some statutes also require the facility to sign a "Notice of Inspection" form at the time of entry.

Opening Conference

Whenever possible, the inspector should request an opening conference with facility representatives. The opening conference is an opportunity for EPA to present the objectives of the inspection. During the opening conference, the inspector may request interviews with facility employees, access to facility records, and a facility tour.



Physical Inspection

The inspector must inspect those areas, units, sources and processes relevant to the scope of the inspection. The inspector will document their observations with photos and notes.

Managing Confidential Business Information (CBI)

The inspector must manage any documents or information produced by the facility during inspection and claimed as Confidential Business Information in accordance with 40 CFR Part 2, subpart B.

Interview Facility Personnel

The inspector may conduct interviews with any employees or contractors working in the area or areas of interest to the inspection. Names and titles of those interviewed must be documented, along with the places and dates of the interviews.

Records Review

The inspector may request copies of reviewed records, including those produced as paper documents and those electronically scanned or downloaded. The inspector should also make a record of the copies of documents taken from the facility. Records may be requested before, during, or after an inspection.

Sampling

The inspector may take samples and should offer facility personnel the opportunity to obtain split samples or collect duplicates.

Closing Conference

Whenever possible, a closing conference should be conducted to discuss outstanding issues and the

process for follow up. The closing conference may also include a summary of any potential “areas of concern” identified by the inspector. Finally, the rule requires EPA to produce and share an inspection report with the facility following the inspection.

Most of the procedures set forth in the rule were already being followed by agency personnel during civil compliance inspections. Until now, however, these steps were articulated in various ways, such as through media-specific inspection manuals and guidance documents, but were not standardized. Although the final rule does not fundamentally alter the typical civil inspection process, it gives facilities a template by which to hold an EPA inspector accountable. Facilities should review the final rule in detail and train environmental personnel on EPA inspection requirements.

[On-site Civil Inspection Procedures, Final Rule, 85 Fed. Reg. 12224 \(March 2, 2020\)](#)

[Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, Executive Order 13892 \(October 9, 2019\)](#)

ENFORCEMENT TRENDS UNDER THE CLEAN AIR ACT'S GENERAL DUTY CLAUSE

BY: ETHAN R. WARE

Comprehensive Risk Management Plans (RMP) under Section 112(r) the Clean Air Act (Act) are not just required for facilities processing listed regulated substances in excess of regulatory thresholds. Recent EPA enforcement trends suggests the



agency believes the Act's General Duty Clause requires plants storing or processing unlisted chemicals to have an RMP if a catastrophic release of those chemicals could pose a significant risk to human health or the environment.

Scope of RMP

The RMP program generally requires a facility to “prevent the accidental release and to minimize the consequences of release of any substance listed [as a regulated substance] or extremely hazardous substance.” §112(r)(1) CAA, 42 U.S.C.A 7412(r)(1). EPA promulgated an elaborate regulatory scheme to implement RMPs in 2004, 40 CFR Part 68, and published the list of “regulated substances” at 40 CFR 68.130. While other statutes reference lists of extremely hazardous substances (EHS), there is no defined list of EHS under the Act.

The RMP program is not unlimited, of course. Articles or manufactured items are exempted, along with chemicals used as structural components, for routine janitorial services, products regulated by FDA and in wastewater treatment.

Once subject to RMP requirements, a covered facility must develop an RMP and file a copy with EPA every 5 years. The RMP must include the following components:

- **Hazard Assessment:** The assessment must detail the potential effects of an accidental release and the facility's accident history for 5 years, and evaluate “worst-case” scenarios;
- **Prevention Program:** A program must be developed to implement safety protocols and

necessary maintenance, monitoring, and employee training to minimize catastrophic events; and

- **Emergency Response Program:** A program must be developed to provide information and emergency response, employee training measures and procedures for public notice in the event of release.

These requirements are more than 15 years old.

Covered Chemicals

What is new under the Act is how EPA interprets what chemicals trigger RMP requirements. If a facility provides, processes, stores, or handles any chemicals, the RMP Plan can be triggered:

The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty...to identify hazards which may result from such release using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental release which do occur.

§112(r)(1) CAA, 42 U.S.C.A 7412(r)(1) (emphasis added). EPA coined the phrase “General Duty Clause” for this provision.

The General Duty Clause applies to stationary sources “producing, processing, handling, or storing” any EHS, regardless of whether the chemical substance is a listed Section 112(r) regulated substance. Because EHS is not defined in the Act, there is no specific list of chemicals a facility handling such substances may consult to determine whether it is now covered by the General Duty Clause.

There is some guidance on what is meant by the term EHS in a 1990 Senate Report that was issued when Section 112(r) of the Act was passed. There, the United States Senate stated a substance may be presumed to be an EHS requiring an RMP if release of the chemical substance could:

- Cause death or serious injury due to acute toxicity or explosion; or

- Result in substantial property damage by blast, fire, corrosion, or other reaction.

Community Right-to-Know, Vol. 33, No. 2, p. 4 (November, 2019). This is a broad array of substances and not limited to the Act's list of regulated substances.

Moreover, EPA regulations under the Act do not provide guidance on what threshold amount of an EHS may require action under the General Duty Clause. Consequently, the release of any amount of a chemical substance which may cause acute toxicity, explosion or substantial property damage may be enough to trigger the need for an RMP.

As a result, a large number of facilities may be subject to the RMP program under the General Duty Clause and not know it. At a minimum, regulated substances covered by Section 112(r) of the Act would be included, but apparently it is not necessary for the regulated substance to exceed promulgated thresholds to be

covered. A plant with substances listed as extremely hazardous substances under the Emergency Planning and Community Right-to-Know (EPCRA) regulations, 40 CFR 355, App. A and B, may be covered, but nowhere does the RMP rule require EPCRA-listed substances be onsite at any one time in excess of EPCRA "threshold planning quantities" to trigger the General Duty Clause.

Recent EPA Action

In recent years, EPA has stepped up enforcement against companies not implementing RMPs under the General Duty Clause. In July, 2019, a cold storage operation was fined \$80,000 and paid more than \$200,000 in corrective measures to upgrade alarms, replace rusted pipes/values, improve ventilation and modify emergency response

procedures for failing to implement an RMP, even though all Section 112(r) regulated substances onsite were less than regulatory thresholds. The facility used anhydrous ammonia for refrigeration purposes in small quantities.

Shortly thereafter, a facility producing windshield wiper fluid paid almost \$400,000 in fines and corrective action costs to come back into compliance with the RMP program. There, EPA alleged the company did not have adequate spill containment for and did not ground methanol equipment; EPA also claimed the facility's lack of ventilation for storage tanks and insufficient employee training and personal protection equipment violated the General Duty

Clause. Methanol is not a listed regulated substance under the RMP rules.

Next Steps

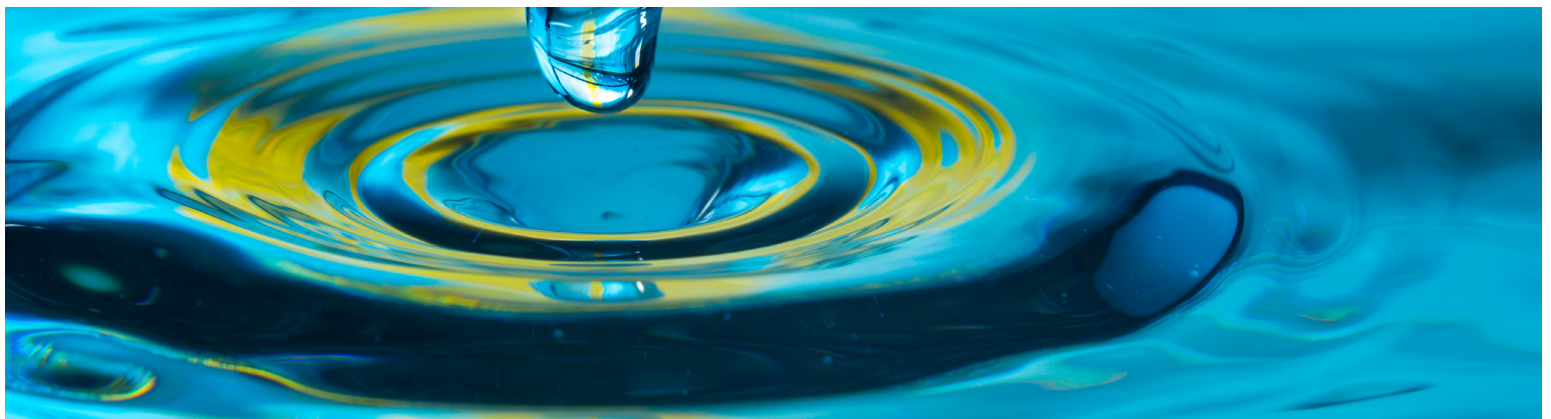
Every facility is left to evaluate its own chemical processes, production, handling, and storage of chemicals to determine if its chemicals are acutely toxic or explosive, or could cause substantial

property damage if released. The General Duty Clause and its requirements are not detailed by EPA in any regulations. Accordingly, a stationary source must make its own determination and must recognize that it will be "second-guessed" if a catastrophic event occurs.

To avoid the risk of liability under the General Duty Clause, each facility should consider the following steps:

- Identify Hazards from chemicals onsite, focusing on potential risks of acute toxicity or explosion and the likelihood of substantial property damage, even if the RMP program does not appear to apply;
- Design the RMP and maintain the facility to prevent and minimize the consequences of any





release of unlisted chemicals when such risks exist; and

- Respond in accordance with the RMP with trained and prepared personnel when a release occurs.

SUPREME COURT HOLDS THAT NPDES PERMIT CAN BE REQUIRED FOR DISCHARGES TO GROUNDWATER THAT REACH SURFACE WATERS

BY: HENRY R. "SPEAKER" POLLARD, V

As we have reported in previous articles, controversy over whether the Clean Water Act (CWA) regulates discharges of pollutants that travel through groundwater into surface waters has led to significant litigation across the nation. This culminated in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, a case recently decided by the U.S. Supreme Court. The decision resolves a cadre of previous and varying holdings on this issue in the lower courts, but it also leaves many issues open.

The Court held in a 6-3 decision that a discharge of pollutants from a point source that travels through a groundwater pathway into regulated waters can indeed be regulated and required to be permitted pursuant to the CWA. The Court ruled that a permit is needed "if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters." In other words, "an addition [of pollutants] falls within the statutory requirement that it be 'from

any point source' when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means."

The CWA prohibits the discharge of pollutants – that is, the addition of pollutants – to regulated waters (i.e., "navigable waters") unless the discharge is subject to a permit or otherwise allowed pursuant to the CWA. Under the CWA's National Pollutant Discharge Elimination System (NPDES) program, discharges of pollutants in wastewater and stormwater to "navigable waters" must be permitted unless otherwise exempt. Similarly, discharges of dredge or fill materials to "navigable waters" require a permit unless exempt. "Navigable waters" is defined in the statute as "waters of the United States," a term that is defined in regulations of the EPA and U.S. Army Corps of Engineers. However, to be subject to permitting, such discharges to "navigable waters" (or "waters of the United States") must occur from a "point source." A "point source" is defined as "any discernible, confined and discrete conveyance," such as a "pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft." (Certain agricultural stormwater discharges and irrigation return flows are excluded, though.) The discharge at issue in the case resulted from the County treating sewage at its wastewater reclamation facility and then pumping it into the ground through four wells. The effluent then traveled about a half mile through groundwater to the Pacific Ocean. The Hawaii Wildlife Fund argued that the discharge required a permit because the pollutants technically could be traced back through groundwater to an ultimate source and proximate cause of the pollutants

(i.e., the “fairly traceable test”). The Court disagreed, noting that the fairly traceable test is overly inclusive of discharges that could be very remote in distance and time. It said it would be unreasonable to expect such remote discharges to be contemplated within the CWA program purposes.

On the other hand, the Court felt it was too narrow to read the CWA to say, as the County and even EPA argued, that any discharge where pollutants travel through groundwater before entering regulated surface waters is not a regulated discharge subject to permitting. This argument (i.e., the “means-of-delivery test”)

means that no permit is required if the point source itself is not the means of discharge of the pollutants directly into navigable waters. The Court said if this test were applied, it could lead to undermining the permit program protections clearly intended by the CWA. Furthermore, the Court rebuked EPA for its change in position regarding which test to apply in the case, and it said this negated any deference EPA’s interpretation may otherwise have been due.

The Court’s approach tacked between the positions taken by the parties in the case and many other parties in most lower court cases on this issue, and its assessment of these positions is telling about the middle ground the Court sought to occupy here. The Court held that a permit is required when there is a direct discharge from a point source *or when there is a functional equivalent of a direct discharge.*

The Court’s new standard announced in an opinion by Justice Breyer is very practical, though vigorous dissents by other justices complain that it ignores the plain language of the CWA in several respects. As the Court acknowledged, its “functional equivalency test” raises issues that can only be resolved with a

fact-specific analysis by the lower courts. Context is key here for the Court. For example, it noted that “[w]hether pollutants that arrive at navigable waters after traveling through groundwater are ‘from’ a point source depends upon how similar to

(or different from) the particular discharge is to a direct discharge.” A key question, then, will be whether the passage of pollutants through groundwater as an intermediate medium emulates a direct discharge to regulated waters. Still, this approach clarifies at least that not every situation involving groundwater as an intermediate medium for pollutants

reaching surface waters should be considered a regulated discharge of pollutants under the CWA. Also, a clear inference from the Court’s holding is that groundwater itself is not a type of water regulated pursuant to the NPDES program. This is consistent with EPA’s just-announced redefinition of “waters of the United States” that expressly excludes groundwater.

EPA and states authorized by EPA to administer the NPDES program now need to consider how they will implement the Court’s decision, with states and regulated parties looking to EPA for guidance or a rulemaking. Given the urgency of the issue for most stakeholders, guidance seems like a better bet in the near term.

[County of Maui, Hawaii v. Hawaii Wildlife Fund, 2020 WL 1941966, No. 18–260 \(U.S. April 23, 2020\).](#)





EPA ISSUES RULE STREAMLINING PROCESS FOR TITLE V PERMIT PETITIONS

BY: JAY HOLLOWAY

EPA recently issued a final rule streamlining the process for filing petitions to object to the issuance or revision of Title V operating permits for major air pollution sources (the “Rule”). States typically issue, revise and ensure compliance with Title V permits. However, after states issue a new or revised Title V permit, EPA has 45 days to object to it. After this 45-day review period, there is a 60-day period in which third parties can file petitions asking EPA to object to the permit.

The Rule addressed three areas of the petition process. The Rule:

- clarifies the submission process, with a preferred electronic filing option;
- establishes content and format requirements; and
- requires permitting authorities (typically states) to respond in writing to significant comments on draft Title V permits. When applicable, these responses to comments should be submitted to EPA, along with the statement of basis for the draft permit.

In the preamble to the Rule, EPA notes that these changes will ensure a more complete permit record for both the 45-day EPA review period and the 60-day third party review period. EPA believes this more complete record will reduce the need for EPA to grant third party petitions to object, because EPA’s review will be more thorough.

Petition Submission

The Rule adds a new provision to Part 70 that encourages petitions to be filed through EPA’s Central Data Exchange (CDX): <https://cdx.epa.gov/>. The site will forward the petitions to the appropriate EPA staff. Petitions may also be filed by email to titlevpetitions@epa.gov. Paper filings can still be sent to:

U.S. EPA, Office of Air Quality Planning & Standards Air Quality Policy Division,
Operating Permits Group Leader
109 T.W. Alexander Dr. (C504-05)
Research Triangle Park, NC 27711

Petitioners must send copies of the petition to the permittee and the permitting agency.

Petitions must identify the permit being objected to, by permit number, version number or other information readily identifying the permit. Petitions must make a full presentation of the basis of objections. The bases for EPA to object must be contained in the petition and attachments; they cannot be incorporated by reference. Complete petitions must include:

- References to the specific permit terms or conditions at issue;
- Identification of the applicable requirement(s);
- An explanation of how the permit term is not adequate to meet the applicable requirement;
- Specification of any claimed fault in public participation procedures;
- A demonstration that the objection is based on a comment made during the public comment period or that it was impractical to raise the issue within the comment period; and
- A citation to where the permitting authority addressed this issue in the record and why the response was inadequate or not addressed.

The effective date of the Rule was April 6, 2020. EPA expects that the Rule will be implemented without any additional regulatory action needed by permitting authorities. However, EPA will address any needed program revisions on a case-by-case basis under 40 CFR 70.4(i), under which program revisions are made.

[85 Fed. Reg 6431 \(Feb. 5, 2020\)](#); 40 CFR 70.4(i).

SUPREME COURT RULING CREATES CERCLA UNCERTAINTY

BY: CHANNING J. MARTIN

The United States Supreme Court recently decided a case that will create considerable uncertainty for companies involved with cleanups under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, also known as “Superfund”). The question they will now have to ask is this: Who controls the level of cleanup that must be performed? Is it EPA or state judges?

The case involved a smelting site near Butte, Montana that is contaminated with arsenic and lead and is listed on the National Priorities List as a Superfund Site. The lateral extent of contamination at the site is immense, covering an area of approximately 300 square miles. More than 800 residential and commercial properties are within the boundaries of the site. Atlantic Richfield, the successor to the company that owned the now-closed smelter, has worked with EPA for more than 35 year to implement the remedial plan EPA selected in its Record of Decision (ROD) for the site.

In 2008, 98 landowners within the 300-square mile site sued Atlantic Richfield in Montana state court seeking damages to restore their properties under trespass, nuisance and strict liability causes of action. Under Montana state law, these plaintiffs first had to show that their properties could be restored and what the costs would be before they could be entitled to collect any such damages. The remediation plan they proposed was more stringent than the ROD that EPA approved, and the total cost of the plan was estimated at \$50 to \$58 million. In

sum, the extent of cleanup their plan proposed went far beyond EPA’s plan, which the agency had already determined was “protective of human health and the environment.”

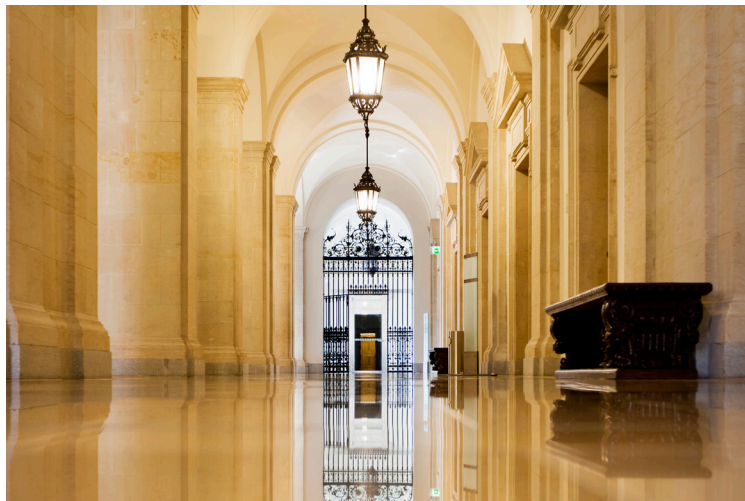
Atlantic Richfield moved to dismiss the case and said the plaintiffs were barred from pursuing these state court actions because of the interplay between CERCLA § 113(b) and (h). Without going into detail, Atlantic Richfield claimed CERCLA § 113(h) limits the ability of a plaintiff to challenge EPA’s cleanup decisions in federal court, and that CERCLA § 113(b) extended that limitation to state court. The Montana trial court and, ultimately, the Montana Supreme Court disagreed and allowed the case to proceed. Atlantic Richfield then appealed to the U.S. Supreme Court.

The U.S. Supreme Court overturned the decision by the Montana Supreme Court, but not on the basis that such state court actions are absolutely barred.

In a 7-2 decision, Chief Justice Roberts writing for the Court began by saying that, while CERCLA § 113(h) deprives federal courts of jurisdiction to review certain challenges to EPA’s cleanup plans, it has no effect on the ability of state courts to hear state law claims that may have an effect on those plans. He then turned to whether that meant the plaintiffs’

claims could proceed. The Court’s answer was no, at least not yet.

Atlantic Richfield argued the plaintiffs were themselves “potentially responsible parties” (PRPs) under CERCLA because they are “owners” of contaminated land within the Superfund site even though they did not cause the contamination. This issue was significant because CERCLA § 122(e)(6) prohibits PRPs from taking remedial action without EPA approval. The Montana Supreme Court did





not agree the plaintiffs were PRPs, but the U.S. Supreme Court said the mere fact that contamination had come to be located on their properties made the plaintiffs PRPs.

Accordingly, the U.S. Supreme Court sent the case back to the Montana courts to determine whether the plaintiffs' proposed cleanup plan had been approved by EPA. In sum, the Court determined that Atlantic Richfield could be held liable to pay for the plaintiffs' own remediation beyond that required by CERCLA "so long as the landowners first obtain EPA approval for the remedial work they seek to carry out."

For environmental attorneys and companies involved with Superfund cleanups, the case opens doors long believed to be closed and raises a host of questions. First and foremost, it creates a "lawyer's playground" for plaintiffs' lawyers to file lawsuits. Second, it creates an "end around" for parties who own land on or near a Superfund site. Rather than engaging in the public participation process provided by CERCLA to influence the remedy EPA chooses, parties can instead seek to pursue state law claims for additional cleanup later. Third, the certainty about cleanup remedies previously provided by a Consent Decree will no longer exist. Henceforth, companies will have to take into account that third parties can use state litigation to broaden the cleanup obligations they have already agreed upon with EPA. Finally, the court gave no guidance on how plaintiffs are to obtain EPA "approval." Exactly how is that to happen, and what form must it take?

By opening this door, the Supreme Court has significantly changed how EPA and parties cleaning up sites will proceed. Among other things, how

Consent Decrees are negotiated and structured will change. And the ruling will no doubt encourage more litigation by landowners on or near Superfund sites. Where previously such claims would be dismissed on grounds that the claim sought to impermissibly challenge EPA's decision-making authority, the ruling makes that much less likely to happen.

What was once thought to be clear is no longer clear. It's a safe bet this ruling will lead to multiple lawsuits in the lower courts and an inevitable trip back to the Supreme Court.

[Atlantic Richfield Co. v. Christian, Docket No. 17-1498 \(U.S. Sup. Ct. Apr. 20, 2020\).](#)

CRYSTAL-BALLING THE COAL ASH CLOSURE REGULATIONS FOR THE ELECTRIC GENERATION SECTOR

BY: LIZ WILLIAMSON

On April 17, 2015, EPA issued the final coal combustion residuals (CCR) Rule (the 2015 CCR Rule), providing the first federal regulatory scheme for the disposal of CCR materials. The 2015 CCR Rule regulates only facilities in the electric generation sector. EPA chose to regulate CCR under Subtitle D of the Resource Conservation and Recovery Act (RCRA) as a solid waste. Since 2015, the CCR federal regulatory scheme has been fluid due to ongoing litigation with industry and environmental non-governmental organizations (eNGOs) and subsequent rulemakings tweaking the rule or responding to remands by the court.

EPA recently proposed two regulations that substantially revise the closure regulations for CCR-regulated Units (CCR Units), which are either surface impoundments or landfills that contain CCR material at electric generation facilities. The Closure Part A Rule revises the date when unlined CCR impoundments or those failing the CCR Rule's location restrictions must begin closure by ceasing placing CCR in the impoundment. The Closure Part A Rule also provides extension opportunities for facilities that lack alternate capacity for CCR disposal. EPA also proposed the Closure Part B Rule that offers facilities an opportunity to make a site-specific demonstration that the existing impoundment's liner is sufficiently protective so that there is "no reasonable probability of adverse effects on health or the environment." The Closure Part B Rule is crucial to some facilities because these demonstrations will dictate whether such facilities have to close their impoundments altogether.

The comment period for both proposed rules has now closed. Industry's reception of the concepts proposed by the rules has generally been positive. However, industry commented on rulemaking assumptions, such as how long it takes for some units to obtain alternate capacity for CCR disposal. Alternate capacity hinges on a facility conducting a project to retrofit an impoundment by adding a compliant liner, repowering from coal to natural gas, or converting from a wet coal combustion byproduct handling process to a dry handling process. eNGOs filed comments in opposition to the Closure Part A and B Rules, objecting to EPA granting extensions beyond the CCR Rule closure commencement deadline and opposing the inclusion of a site-specific liner demonstration process.



Looking at the current rulemaking course, the closure regulations for EGUs should be settled in the next six months. Many of the deadlines that EPA has proposed for closure commencement extensions (June 30, 2020) and initial liner demonstration applications (after the Final Rule) will happen in 2020. EPA will also promulgate final closure rules this year. EPA should also have an opportunity to process many of the site-specific closure commencement extension requests in 2020. However, complete liner demonstration packages will not be due until 2021. EPA's review of site-specific technical information to demonstrate that a liner is sufficiently protective will take place in 2021. Only upon completion of that review will those facilities have certainty as to whether the impoundment in question must close.

The tough news for the electric generation sector is that politics could shake up the CCR regulatory scheme, as it is presently proposed. If there is a change in presidential leadership in 2021, the proposed rules could be subject to rulemaking rollbacks. Site-specific closure commencement extensions that EPA issues in 2020 are unlikely to change once they are finalized. Conversely, site-

specific determinations that EPA does not finalize in 2020 are at the most risk. The process for an alternate liner demonstration is the most vulnerable. These demonstration decisions are slated for 2021. Even if the liner demonstration process is hypothetically still available (e.g., it is not rolled back by a subsequent rulemaking), EPA

will have the authority to interpret the criteria for showing a successful demonstration very narrowly. In other words, EPA could simply deny all of the demonstrations. Obviously, the coming presidential election will be a pivotal point for the future and finality of the CCR closure process.

My article entitled “Why Coal Ash Regulation Should Be On Everyone’s Watch List” in the November 2019 [issue](#) of Environmental Notes highlights how any source that has combusted coal should be following the developments in the coal ash regulations that apply to the electric generation sector. For other industries, it continues to be important to follow the outcome of the rulemaking, judicial, and political processes on the closure regulations for the CCR Rule. Future state and federal standards regulating coal ash outside of the utility sector will grapple with the same closure issues on impoundment liner protectiveness, flexibility to seek alternate CCR disposal capacity, and the practical meaning of the RCRA Subtitle D Protectiveness Standard.

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

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, 84 Fed. Reg. 65941 (Dec. 2, 2019).

Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure; Legacy Units, 85 Fed. Reg. 12478 (Mar. 3, 2020).

42 U.S.C. § 6944(a) (The RCRA Subtitle D protectiveness standard for CCR units is to ensure there is “no reasonable probability of adverse effects on health or the environment.”).

EPA TAKES HIT IN PROPOSED BUDGET FOR FY2021

BY: PIERCE WERNER

The Trump Administration’s proposed budget for fiscal year (FY) 2021 proposes \$4.829 trillion in outlays and is purported to balance the budget within fifteen years. COVID-19, which arrived in the United States after the budget was released, now throws both propositions in serious doubt. Outlays are now likely to be less than previously proposed, and a balanced budget anytime soon seems to be a pipe dream. Much of the balancing in the proposed



budget comes from various cuts and reforms to mandatory spending programs, such as Medicare and Medicaid, and welfare, but other programs will see reductions, too. One budgetary cut is to the Environmental Protection Agency, coinciding with its 50th anniversary.

The estimated enacted FY2020 budget for EPA was \$9.057 billion. The agency’s proposed budget for FY2021 is 26 percent less, for a total of \$6.658 billion. The budget proposes to cut EPA’s core Environmental Programs & Management (EPM) by 16 percent, from \$2.663 billion to \$2.236 billion, including a cut to the EPM enforcement account of about 7 percent. The budget also includes cuts to clean air funding by 40 percent by eliminating some voluntary greenhouse gas programs, reducing federal support for air quality management, and reducing funding for stationary source regulation. In addition to regulatory programs, EPM’s Brownfield’s account is proposed to be cut by about 25 percent from \$23.6 million to \$17.8 million.

Other major cuts to EPA funding include: Science & Technology by about 32 percent, from \$716 million to \$484 million; CERCLA response actions by 14 percent, or about \$113 million; underground storage tank pollution prevention program by about 47 percent, from \$91 million to \$48 million; and funding to state programs by around 33 percent, from \$4.25 billion to \$2.85 billion. However, there are areas where the proposed budget would increase or create funding for certain environmental priorities of the Administration, including: \$45 million to support the Lead Exposure Reduction initiative; almost \$2 billion

for the Clean Water and Drinking Water Revolving Funds to support investments in water infrastructure repair, replacement and modernization; \$6 million for implementation of the per- and polyfluoroalkyl substances (PFAS) action plan; and \$22.4 million to address and reduce harmful algal blooms. While the proposed budget for FY2021 would greatly reduce funding to EPA overall, including areas that by extension reduce funding to many state programs reliant on federal funding, this budget must still make it through a Congress which has been skeptical of steep reductions in EPA funding proposed by the Trump Administration. Whether the economic effects of COVID-19 change that is anyone's guess. Nevertheless, the proposed budget provides important insights into the environmental policies and priorities of the White House.

[Fiscal Year 2021 EPA Budget in Brief, United States Environmental Protection Agency Office of the Chief Financial Officer, EPA-190-S-20-002 \(Feb. 2020\).](#)

[United States Environmental Protection Agency Fiscal Year 2021, Justification of Appropriation Estimates for the Committee on Appropriations, EPA-190-S-20-001 \(Feb. 2020\).](#)

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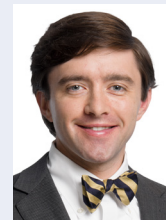
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