

WILLIAMS MULLEN ENVIRONMENTAL NOTES



WHAT'S NEXT FOR ENVIRONMENTAL REGULATION IF BIDEN WINS?

BY: CHANNING J. MARTIN

If Joe Biden is elected President there will be significant changes in environmental regulation for American businesses. Some changes can (and likely will) take place very quickly, with the stroke of a pen. These could include revocation of certain EPA directives and guidance documents and many of President Trump's Executive Orders – such as his October 2019 Orders limiting the ability of agencies to regulate through guidance and his January 2017 Orders requiring federal agencies to streamline the environmental permitting process. Other changes will require rulemaking under the Administrative Procedures Act (APA) or legislation by Congress.

How quickly could a President Biden roll back regulations? The answer is: It depends. Regulations that have been proposed, but are not yet final, can be pulled back by a Biden Administration. Final regulations -- yes, even final regulations published in the Federal Register on the last day of the Trump Administration -- are more difficult. They must go through the APA rulemaking process to repeal or amend them, and that's not something that can happen quickly or is done easily. Moreover, any amendment or modification will require justification

to protect it from being deemed “arbitrary and capricious” by a court.

There are other ways the new Administration could address regulations it does not like. It could de-emphasize their enforcement or ask Congress to withhold or not appropriate funds to implement them. As to final regulations issued in the waning days of the Trump Administration, Congress could use the Congressional Review Act (CRA) to pass a joint resolution disapproving of the regulations. A regulation becomes void if the President signs the resolution or if his veto of it is overridden by two-thirds of both houses. Congress passed 14 such resolutions in 2017 after President Trump won in 2016, and President Trump signed all of them. These included rollbacks of several of the Obama Administration's key environmental regulations, including rules amending the Clean Air Act's Risk Management Program, regulations restricting methane emissions from oil and gas production, and revisions of standards for certain streams under the Surface Mining Control and Reclamation Act.

The CRA really only comes into play if Biden wins the presidency *and* Democrats have majorities in both houses of Congress come January 2021. But assuming that happens, how far back can the CRA be used to void Trump Administration regulations? The “look-back” period under the CRA is any regulation published 60 session days or less prior

to a Congress adjourning *sine die*. Exactly when that 60-day cut-off date occurred in 2020 can only be projected at this point, but at the moment the date appears to be May 13. Thus, any final rules published from that date forward are likely to be subject to the CRA.

Perhaps the most significant environmental final rule published in recent months was the Navigable Waters Protection Rule defining “waters of the United States.” The rule was important to developers, agricultural interest and other businesses because it scaled back the Obama Administration’s Clean Water Rule and narrowed the scope of waters, including wetlands, over which the federal government has jurisdiction. Can that rule be voided by the CRA? No, it was published in the Federal Register on April 21, 2020, so it is outside the 60-day “look-back” period and not within the grasp of the next Congress. That does not mean, however, that a Biden Administration cannot take steps to repeal or modify it administratively through the rulemaking process.

Will business interests have reason to fear and environmental groups have reason to cheer if a Blue Wave emerges on November 3. Probably. And that will be even more so if the Democrats control the Senate, do away with the filibuster, and need only 51 votes to pass legislation.

Buckle up, folks. This election will be one heck of a ride.

EPA POLICY OF ONCE IN, ALWAYS FOR CAA SECTION 112 BECOMES ONCE IN, SOMETIMES OUT

BY: CARRICK BROOKE-DAVIDSON

Section 112 of the federal Clean Air Act (CAA) requires major sources of hazardous air pollutants (HAPs) to, among other things, control emissions using the maximum achievable control technology (MACT). A major source is a source that emits or has the potential to emit (PTE) 10 tons of any single HAP or 25 tons of any combination of HAPs. Sources that are not major sources are deemed area sources.

In 1995, EPA issued a guidance memorandum on timing issues for MACT standards that couched EPA’s policy as once in, always in (OIAI). This 1995 policy specified that sources of HAPs that were major on the compliance date for an emission standard would always remain subject to those major source MACT emission standards. The issue as framed in the 1995 memorandum was EPA’s stated desire to avoid potential backsliding by major sources. If a major source otherwise subject to MACT could reduce its emissions or PTE below the major thresholds, it might emit more HAPs than if it were required to comply with MACT. This OIAI policy meant that if a source was major on the date a National Emission Standard for Hazardous Air Pollutants (NESHAP) became applicable to the source, the source was considered major permanently, even if it subsequently reduced

Williams Mullen Strengthens Environmental Practice



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emissions or PTE below the major source threshold through controls or federally enforceable permit limits.

This policy was criticized as discouraging HAP sources from undertaking voluntary emission reductions efforts. It was also controversial in that, as applied by EPA, sources that had controls or permit limits in place on the NESHAP compliance date that allowed the source to be classified as an area source would be considered major sources subject to MACT if a subsequent noncompliance resulted in major source level emissions or PTE. The OIAI policy was applied in these circumstances, even if resolution of the noncompliance would bring the source back below the major source limits.

EPA published a proposed rule in 2007 which would have overturned the OIAI policy to allow major sources to become area sources at any time. This rulemaking was never finalized. In January of 2018, EPA issued a new guidance memorandum which superseded the 1995 OIAI memorandum and removed any timing restrictions on the ability of major sources of HAPs to reduce emissions or PTE to allow them to reclassify as area sources. The 2018 memorandum also stated EPA's intention to engage in a rulemaking to formalize the policy stated in the 2018 memorandum.

In 2019, EPA published a proposed rule formally overturning the OIAI policy. After notice and comment and a public hearing, the final rule was signed by EPA Administrator Wheeler on October 1, 2020 and is awaiting publication in the Federal Register. The rule will become effective 60 days after its publication in the Federal Register

In order to effectuate the change in policy, the final rule amends the applicability section in the general provisions of 40 CFR Part 63 to state that “[a] major source may become an area source *at any time* upon reducing its emissions of and potential to emit hazardous air pollutants . . . to below the major source thresholds . . .” (emphasis added). The rule also alters the definition of PTE to remove the word “federally” from the phrase “federally enforceable.” Thus, any physical or operational limitation on the

capacity of a source needs only to be legally and practicably enforceable by a state or local permitting authority, and need not be federally enforceable, in order for the source to limit its PTE to become an area source.

The final rule also states that area sources that become major sources generally must comply with the applicable emission limits upon startup, i.e. no grace period, if the source meets the definition of a new source, or the date specified for existing sources if it qualifies as such. The rule also adds notification requirements so sources that change status, either area to major or major to area, must electronically notify EPA within 15 days.

The final rule also clarifies that changes in source status do not affect enforcement actions for violations of requirements that applied prior to the change, e.g. changing from major to area source status does not absolve a source from potential liability for violations of major source requirements that occurred prior to the change. The converse is also true for sources that become major sources that have prior area source violations.

This rulemaking culminates a decades long effort by EPA under Republican administrations to overthrow the OIAI policy. But looming on the horizon is a national election, and the possible application of the Congressional Review Act to this and other Trump EPA rulemakings. But that is another story

[84 FR 36304 \(July 26, 2019\) \(proposed rule\)](#)
[Pre-publication version of Final Rule \(October 1, 2020\)](#)



SCARED OF WHAT YOUR AIR PERMIT REALLY MEANS?: TOP 5 PITFALLS

BY: LIZ WILLIAMSON

It is a universal truth that closely reviewing an air permit will cure the worst case of insomnia. Isn't that why you hire a lawyer? The pages are dense with legalese and technical jargon that make no practical sense. There are nuances that require Clean Air Act experience and a course of dealing with the permitting authority to determine what can be changed, how, and when.

Close inspection of an air permit often highlights problematic areas. For example, the plant engineer may say, "Oh, but our inspector knows what this requirement really means even if the permit doesn't spell it out." But, what if that local inspector leaves, a third party files a lawsuit alleging that the source is out of compliance, or EPA enters the scene? For these reasons, regular review of your air permit should be part of your risk reduction protocol.

The air permit world lives by the mantra that a permit should contain a regulatory requirement, a corresponding measure of compliance, and a means of monitoring compliance. Compliance should

be documented by reporting and recordkeeping requirements. Following this basic formula benefits the source by keeping the source's obligations definable, achievable, and immune to adverse interpretation.

Despite the state's preferred format, local requirements, permit complexity, or facility-type, primary flaws in permits fall into basic categories. Here are five categories of flaws that we often identify when performing a legal audit of air permits:

1. An emissions limitation is present, but there is no achievable compliance measure. There is an emission limitation, but the permit fails to identify a corresponding way to measure compliance with the limitation, such as through a continuous emissions monitor or stack testing. The source could be exposed by this ambiguity. For example, a third party may assert that the emission limitation is instantaneous, rather than measured over a typical averaging period, or in another instance, the source may be measuring compliance via fuel records when the state anticipates compliance measurement by emissions monitors.

2. There are emission units at the plant that are not in the permit or vice versa. The emission units governed by the permit should be unmistakable.

Each emission unit should be identified explicitly in the permit, and the equipment on-site should match the description in the permit. Over time, plants will commission and decommission emission units. Sometimes units are renamed. These housekeeping updates should be made in the permit to avoid a concern that an emission unit is not permitted. The source should also closely review equipment description ratings, often originating from the original equipment manufacturer, as discussed with regard to the next concern.

3. The description of the emission unit should not be viewed as an emissions limitation. Third parties, EPA or the permitting authority may assert that the description of the emission unit is a limit. For example, if the emission unit description contains a unit rating, is it possible to say that the rating is a cap on unit operation? Some rating descriptions were derived from a number provided by the original equipment manufacturer. Many times this OEM rating is lower than the unit's designed capabilities. Ratings in permit descriptions have been used as a basis for New Source Review lawsuits, arguing that the source modified the unit to enable it to operate above the descriptive rating. Sources should consider building a record to defuse any such concerns.

4. Are there recitations of regulations that have been updated, repealed and replaced? Regulatory agencies may choose to recite regulations in the permit to which the source is subject. These recitations are user friendly because the permit clearly encompasses all of the requirements in its four corners. However, the benefit to these recitations ends when the regulations frequently change via federal and state regulatory activity. The source must then update its permit to fix the recital to match the underlying regulation. For this reason, a citation referencing and incorporating the regulation may be preferable.

5. Do emissions limitations or work practice requirements in the permit have an underlying federal or state regulatory requirement? Air permits, by design, compile the source's regulatory requirements. However, an audit may reveal permit requirements with no basis in statute or regulation, or there may

be an all-purpose regulation cited as the basis, even though the emissions requirement is much more specific. Sources should recognize emissions limitations and work practice standards that have a thin legal basis. If the requirement is nonsensical, impractical or problematic to meet, the source should consider a discussion with the permitting authority regarding the requirement at issue.

Using these tips, you should review your permit with an eye for detail. Evaluate the flaws you find and assign risk to them. That process will help you decide whether to approach your permitting authority. Reopening a permit is a significant step that carries its own risks, such as new, unwanted permit changes that you did not request or adverse public comments. Therefore, the flaws must justify the risks of reopening.



MODERNIZING THE EPA IGNITABILITY TEST: ALCOHOL, THERMOMETERS, AND MULTI-PHASE SUBSTANCES

BY: ETHAN R. WARE

It took nearly thirty years, but EPA has updated the test methods used to determine whether a waste is an ignitable hazardous waste under the Resource Conservation and Recovery Act (RCRA). The revisions are intended to provide greater clarity and flexibility for generators navigating the alcohol exclusion, use of mercury-free thermometers, and evaluation of multi-phase wastes.

Background

Subtitle C of RCRA establishes a cradle-to-grave scheme for management of hazardous waste. A solid waste is a hazardous waste if it exhibits characteristics of ignitability, corrosivity, reactivity, or toxicity or is otherwise listed as a hazardous waste by EPA. 40 CFR 261.3(a); 261.21-24. Ignitable hazardous wastes are designated Hazardous Waste Code No. D001. 40 CFR 261.21.

Under applicable regulations, solid wastes that are regulated as ignitable hazardous waste include:

1. Certain liquids with a flashpoint less than 60° C (140° F);
2. Non-liquids capable of causing fire through friction, absorption, or spontaneous chemical changes, which burn so vigorously and persistently they cause a hazard;
3. Ignitable compressed gases; and
4. Oxidizers.

40 CFR 261.21 (a)(1)-(4). EPA's updates relate only to liquid wastes under category (1).

Discussion of Final Ignitability Rule

In April 2019, EPA published a proposed rule modernizing the test for ignitable liquids and updating related regulatory requirements. The final rule promulgated in July 2020 adopted only revisions to the test for ignitable liquids. As noted below, the final rule differed in a number of respects from what was proposed in April 2019.

1. Alcohol Exclusion

As stated in the proposed rule, EPA intended initially to expand on the exclusion for alcohol-related liquid ignitable waste. EPA suggested revising the test to (1) replace the undefined term "aqueous" with "at least 50 percent water by weight," and (2) clarify that "alcohol" means "any alcohol or combination of alcohols" except for alcohol that had "been used for its solvent properties and is one of the alcohols specified in EPA Hazardous Waste No. F003 or F005." The effect of this change was to narrow

regulated alcohols to those also listed as Hazardous Waste Codes F003 and F005.

These two proposed revisions were derived from an "EPA Monthly Hotline Report," EPA530-R-92-014g (July 1992), pages 3-4. The EPA Hotline Report states, "aqueous" means a solution containing at least 50 percent water by weight, and the term "alcohol" in 40 CFR 261.21(a)(1) refers to any liquid alcohols designated in EPA Hazardous Waste Code Nos. F001-F005 when used for their solvent properties.

After some push back by environmental groups, EPA decided to finalize only the revision defining "aqueous." The regulatory change incorporated in the final rule is specific to the term aqueous within 40 CFR 261.21, so other RCRA regulations also using the term "aqueous" are unaffected by the final rule. EPA decided against restricting regulation of ignitable alcohols to those used exclusively for solvent properties and listed in the listing description for F003 and F005, as was stated in the proposed rule. The Preamble discussion in the final rule suggests this may avoid confusion over the proper Hazardous Waste Code for alcohol-related wastes. For example, generation of spent alcohol used for solvent properties remains Hazardous Waste Code No. F003 or F005, not D001.

2. Mercury Thermometers in Air Emission Testing

The second significant revision to the ignitability test involves an exclusion with broader application: revising the underlying test method to remove use of mercury thermometers as a requirement in determining flashpoint. The proposed rule proposed to update SW-846 air sampling and stack emissions Test Methods 0010, 0011, 0020, 0023A, and 0051 (all adopted by reference in the ignitability tests) to allow use of alternative temperature-measuring devices. This was proposed because EPA determined that "removal of the requirement to use mercury thermometers does not change the underlying technology of the test methods and is not expected to affect the precision or accuracy of the test methods." 85 Fed. Reg. at 40597. An added benefit

of this proposed change was reducing the potential release of mercury to the environment from mercury thermometers.

EPA finalized the proposed changes to EPA Test Methods 0010, 0011, 0020, 0023A and 0051. This was accomplished by incorporating the Test Methods by reference into SW-846 at 40 CFR 260.11 and 40 CFR part 261 Appendix IX, Tables 1 and 2. The changes will allow the use of non-mercury thermometers or mercury thermometers by generators (and air emission sources), providing flexibility in the testing protocols for stack tests and waste determinations.

3. Specific Sampling Protocols

The final rule does not codify how to properly test multi-phase wastes for an ignitability determination, but does adopt specific guidance for generators dealing with these unique waste streams. In short, all phases of a containerized waste must be considered.



The proposed rule sought to codify existing EPA policies requiring generators to make a hazardous waste determination on multi-phase wastes at the “point of generation.” The point of generation as defined by regulation is the “act or process produc[ing] hazardous waste identified or listed in part 261 of this chapter or [the] act, which first causes a hazardous waste to become subject to regulation.” 40 CFR 260.10 (defining “Generator”). The proposed rule posited this means the test for ignitability applies when a single phase of a waste is first generated and during the course of normal management of that waste. Therefore, if multi-phase separation occurs during storage of a liquid, the proposed rule would have required the facility to consider each individual phase to be a separate waste stream.

The proposed rule also proposed codifying EPA guidance on how to sample multi-phase wastes. Historical EPA guidance instructs the generator to “separate multiphase waste samples into all of their different solid and/or liquid phases for individual evaluation, to the extent practicable...to determine whether that phase exhibits the characteristic of ignitability.” 85 Fed. Reg. at 40597. EPA also suggested multiphase waste “should be tested for flash point as a whole if the individual phases cannot be separated without an appreciable loss of volatiles such that the ignitability test results may be affected.” *Id.* The proposed rule recommended use of Method 1311 for assessing the presence of an ignitable liquid

for wastes that do not yield a free liquid phase using Method 9095 (i.e., Paint Filter Liquids Test or PFLT). This policy is particularly important when one considers the different triggers for ignitability of liquid phase vs. solid phase wastes: Liquid phase wastes are evaluated objectively by flashpoint, but solid phase wastes are tested subjectively.

After consideration of a variety of public comments, EPA elected not to adopt the proposed rule as written “because it created...confusion...” 85 Fed. Reg. at 40601. Instead, EPA said it “is ...reiterating and clarifying...existing Agency guidance for hazardous waste determinations of ignitable liquids with multiple phases.” Specifically, EPA said:

1. A generator of a waste should consider the individual liquid phases of a multiple phase waste under the criteria in 40 CFR § 261.21(a)(1) and non-liquid phases of a multiple phase waste under the criteria of 40 CFR § 261.21(a)(2) when those liquid or solid phases are representative samples of the waste as a whole;
2. A generator should rely on the Paint Filter Liquids Test to be the minimum threshold for determining whether a solid phase waste



- contains a liquid phase, but other tests or evaluations are not precluded;
3. When determining whether a waste contains multiple phases, the generator should consider the waste's physical properties during storage, if "normal management" of the multi-phase waste includes storage; and
 4. Generators must consider testing and/or knowledge of individual phases of multiple phase wastes when any individual phase likely exhibits the ignitable characteristic and therefore may cause the entire waste to pose a risk of fire during treatment, storage, or disposal.

85 Fed. Reg. at 40601.

That EPA elected not to codify the multi-phase regulation does not mean generators should avoid relying on the preamble discussion as guidance. Generally, EPA preamble discussions carry weight during enforcement actions.

Conclusion and Recommended Action

Revision to the ignitability test for non-listed hazardous wastes warrants attention because changes and policies may affect how your facility manages certain waste streams. The alcohol exclusion now requires 50% water in the waste stream to be considered "aqueous," mercury thermometers may be avoided in air emission tests, and guidance cautions generators about multiphase waste re-affirming use of the Paint Filter Liquid Test for each phase in a multi-phase solid waste to meet the solid phase designation.

[85 Fed. Reg. 40594 \(July 7, 2020\)](#) (final rule)
[84 Fed. Reg. 12539 \(April 2, 2019\)](#) (proposed rule)

CLIMATE INITIATIVES WILL IMPACT INDUSTRY

BY: JAY HOLLOWAY

Current and future climate initiatives at the federal and state levels are having and will have very significant impacts on industry. Most view climate initiatives as only a utility issue, but that is not the case. Across the country, industrial sources and the transportation sector emit 22% and 28%, respectively, of CO₂ emissions versus 27% from utility sources. There is no question that carbon constraints are currently focused on limiting utility CO₂ emissions and requiring the replacement of utility generation with renewable generation. The costs of these efforts are enormous. Former Vice President Biden, for example, intends to commit two trillion dollars to these efforts if he is elected President. State level climate programs, such as Clean Energy Virginia, will impose billions of dollars of requirements on utilities, the cost of which will be paid by ratepayers. In Virginia, residential customers pay fifty percent of the cost of electricity on a kilowatt per hour basis. The other half is paid by the commercial and manufacturing sectors.

While manufacturing and other industry sources are typically exempt from CO₂ reduction efforts, they are not exempt from paying the lion's share of the cost. For example, Dominion Energy is seeking between 60 and 80 billion dollars from ratepayers to fund Clean Energy Virginia compliance efforts, some 50% of which is to be paid by Virginia industry. Industry will either pass these costs to customers in the form of price increases or absorb them, leading to lower earnings. These costs will increase as future federal and state climate-based laws and regulations become more stringent.

Soon, we will likely see the current exemptions for manufacturers from existing CO₂ laws and regulations go away, subjecting industry to direct CO₂ laws and regulations. Again, these costs cannot be passed onto industrial customers without price

increases on goods and services. Industry must actively engage in federal and state regulatory efforts to ensure continuing operations in the U.S. For example, to offset rising compliance costs, manufacturers need the opportunity to participate in open electricity and energy markets, generate renewable energy credits from energy efficiency efforts, and actively participate in distributive energy programs and renewable projects.

The real challenge to manufacturers from climate initiatives will be ensuring that natural gas remains inexpensive and readily available. The question of whether to shut down fracking is an issue that is being seriously debated. Fracked natural gas is a large part of the current robust natural gas supply driving low prices. Ending fracking will immediately shorten supply, raise prices and challenge supply going forward.

Renewables now compete with natural gas, oil, coal and nuclear. As the country moves to 2050, renewables and natural gas will compete on an almost 50/50 basis. Both sources of energy are required for the U.S. to limit CO₂ and grow our economy. If climate initiatives upset this balance by raising natural gas prices and/or limiting supply, manufacturers will bear the brunt of the risks and costs.

Going forward, the supply of natural gas also will be impacted by the regulation of methane emissions. Methane has approximately eight times the global warming potential of CO₂. The immediate effort to regulate methane emissions focuses on emissions from natural gas production and distribution. The Natural Resources Defense Counsel and other environmental groups are focused on forcing controls on methane emissions from all stages in the production, transport, delivery and combustion of natural gas.



EPA's New Source Performance Standard (NSPS) for the Oil and Gas Industry takes aim at all methane emissions from production and pipelines. These regulatory requirements will force upgrades of production and transportation of natural gas, including pipelines, thereby increasing costs and creating new regulatory and permitting issues. This focus on methane is driving the development of technologies that reduce methane emissions from the combustion of natural gas. These technologies include carbon capture and sequestration. The development of alternative fuels, such as hydrogen fuel, ethanol and syngas, is also gaining traction.

Even given these many challenges, climate programs provide significant opportunities for industry. For example, the dramatic increase in renewable generation, including solar, onshore and offshore wind, will require billions of dollars for the manufacture of parts and the provision of construction and maintenance. In addition to direct supplier opportunities, industry can participate in

renewable generation projects to offset energy cost increases. Removing legal and policy prohibitions on industry selling and buying energy in the open market is key to successful industry climate strategies.

Finally, CO₂ disclosure and sustainability programs are integrated into almost all company cultures. These programs require the

public disclosure of CO₂ and other greenhouse gas (GHG) emissions. Companies also require vendors to disclose, develop and report progress on sustainability efforts. The goal of these sustainability programs is achieving a net-zero carbon impact for both the company and its vendors. Here is an update of some CO₂ disclosure efforts.

- > Walmart, CVS, Target, Bank of America, Dell, Imperial Brands, Jupiter Networks, Microsoft,

LEGO, L'Oréal, Novartis, NRG Energy, Phillips Lighting, Philip Morris International, Royal Phillips, US GSA, Tesco, and Virginia Money Holdings, among others, are disclosing GHGs and other emissions.

- > A total of 115 companies and organizations, representing \$3.3 trillion in value, are now disclosing GHG emissions.
- > Corporations are requesting climate data from 11,500 suppliers, a five percent increase from last year.

If your company does not currently disclose CO₂ and other GHG emissions, it almost certainly will in the future. An assessment of your complete carbon footprint, how you will disclose, and whether you should have an associated sustainability plan should be on your radar.

[Annual Energy Outlook 2020, U.S. Energy Information Agency \(Jan. 29, 2020\); New Source Performance Standard for Oil and Gas industry, 40 CFR Part 60, Subpart OOOOa.](#)

BEAT THE CLOCK: TIMELY REPORTING OF RELEASES OF HAZARDOUS SUBSTANCES

BY: RYAN W. TRAIL

The obligation of manufacturing facilities to report releases of hazardous substances to local, state, or federal authorities is a complex regulatory subject. Multiple variables may impact whether a facility with a release to the environment can expect an enforcement action if the release isn't reported as required by law.

Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), reporting to the National Response Center (NRC) may be required following the release of a "hazardous substance" to the "environment." "Hazardous substance" and "environment" are defined terms, which we've discussed in detail in prior articles. The report must be made by a "person in charge," upon gaining "knowledge" that the release met or exceeded a "reportable quantity" of the substance. Each of these terms is also defined by regulation or



EPA guidance. Finally, CERCLA requires a qualifying release to be reported to the NRC "immediately."

Unfortunately for the regulated community, the term "immediately" is not defined by CERCLA or its implementing regulations. This leaves companies, regulators, and ultimately courts to determine what amount of time the legislature intended when it said qualifying releases must be reported "immediately." In the years since the Superfund amendments of 1986, EPA and the courts have cited a single sentence from a 1985 Senate committee report on that issue. The Senate Committee on Environment and Public Works noted that "delays in making the required notification should not exceed 15 minutes after the person in charge has knowledge of the release." Citation to this legislative history appears in EPA's 1999 CERCLA Enforcement Response Policy as authority for the 15-minute reporting requirement.

Administrative enforcement cases brought by EPA for not timely reporting regularly result in the imposition of civil penalties, even where the required report was made within a few hours of gaining knowledge of the release. Typically, cases considering the issue of timeliness of a report hinge on the question of when the person in charge gained "knowledge" that a reportable quantity was released. "Knowledge" is interpreted by EPA to include actual knowledge or constructive knowledge, with constructive knowledge being a level of awareness that would lead a reasonable person to investigate further. In determining at what point in time the person in charge gained "knowledge," EPA may consider facts such

as time needed to perform engineering calculations to determine if a reportable quantity was released. Some situations may involve a substance with a low reportable quantity or clearly substantial releases from large vessels, such that no calculation time is necessary or justified.

When deciding whether to pursue enforcement, these are the circumstances EPA will review and analyze. However, the baseline standard for timely reporting is within 15 minutes of knowledge of a qualifying release. Facilities storing or utilizing hazardous substances onsite should carefully review contingency planning for release reporting to ensure required reports are made in a timely manner.

[Senate Comm. on Environment and Public Works, Superfund Amendments and Reauthorization Act of 1986, S. Rep. No. 99-11, 99th Cong. \(1985\).](#)

EPA TRIES TO SINK ENVIRONMENTAL GROUPS CHALLENGE TO ITS NAVIGABLE WATERS RULE

BY: JESSIE KING

In late August, a South Carolina federal court was asked to rule in favor of EPA and the Army Corps of Engineers (Corps) and dismiss a Clean Water Act (CWA) lawsuit brought by environmental groups challenging EPA's recent Navigable Waters Protection Rule (Rule). The Southern Environmental Law Center and other groups (together, "Environmental Groups") complain the Rule vastly reduces areas formerly protected by the CWA in violation of the Administrative Procedures Act, the CWA, and United States Supreme Court precedent. The United States District Court for the District of South Carolina must now decide whether the case should go to trial or be dismissed.

The CWA prohibits discharging any pollutant to "navigable waters," which means the "waters of the United States" (WOTUS) and non-jurisdictional waters that are conveyed downstream to jurisdictional waters. The scope of the definition of WOTUS is an issue courts and EPA have been

wrestling with for years. In 2006, the Supreme Court ruled in *Rapanos v. United States* that the test for what is a WOTUS is whether the water has a "significant nexus" to a navigable water. The significant nexus test, however, proved confusing and open to conflicting interpretation. In 2015, the Obama-era EPA and the Corps adopted a rule to codify the "significant nexus" test and to clarify its reach. The 2015 rule broadened the scope of the CWA, using distance limitations to quantify a nexus. The 2015 rule was challenged in numerous courts across the country, and some courts determined it was arbitrary, without scientific foundation and, therefore, unlawful. EPA and the Corps under President Trump repealed the 2015 rule in 2017, reviving the 1986 regulations' definition of WOTUS. This action was appealed, but it became effective in late 2019.

After years of conflicting court interpretations and internal shifts at EPA and the Corps, EPA and the Corps issued the Rule this past April, giving categorical listings of waters and wetlands that are now considered WOTUS, as well as those that are specifically excluded, including ephemeral streams and certain isolated wetlands. In their South Carolina lawsuit, the Environmental Groups contend the Rule contradicts *Rapanos* as to what can and cannot be considered WOTUS. The United States strongly disagrees, arguing in its pending motion to dismiss:

1. EPA is entitled to deference in its interpretation of what constitutes WOTUS because the CWA is ambiguous;
2. EPA correctly fixed the complicated and unclear "significant nexus" test used over the last 12 years to determine what is and what is not WOTUS;
3. The *Rapanos* decision did not reject the interpretation adopted in the Rule;
4. Contrary to the 2015 rule, the administrative record establishes extensive analysis supporting the new Rule, including sound science and responses to all comments;
5. In limiting jurisdiction of the CWA to a defined group of waters and by excluding ephemeral streams and certain wetlands, the Rule provides certainty, reduces negative effects,



- and allows States and Tribes to regulate these excluded bodies as they see fit;
6. The 2015 rule supported by the Environmental Groups was not based on sound science; and
 7. The exclusion of certain waste treatment systems from the definition of WOTUS, including some cooling ponds, is not new to the Rule and has been applied on a case-specific basis by EPA and the Corps to natural and manmade systems since 1980.

The main issue addressed in the United States' motion to dismiss the case is whether the CWA's general objective to preserve water quality overrides any discretion EPA or the Corps may have when determining what waters are subject to jurisdiction under the CWA. The motion claims the CWA does not require preservation "at any cost," and, therefore, deference should be given to the Rule. While the motion provides numerous scientific analyses cited in the Rule to support the exclusion of ephemeral streams and certain isolated wetlands, it refutes the Environmental Groups' argument "the CWA's jurisdictional reach must be solely 'driven by science.'" Expanding on this, the United States explains that an analysis of CWA jurisdiction requires a balancing of both legal and scientific considerations including: (1) the statutory limits on EPA's and the Corps' legal authority, and (2) CWA deference to state authority over certain waters including ephemeral streams and certain isolated wetlands.

Finally, the United States requests that, if the Court were to find that some provisions in the Rule are unlawful, it not vacate the entire Rule but, instead, address only those provisions. The United States says this is important because the overall purpose of the Rule is to provide certainty to the regulated

community and the public. A complete vacatur would bring stakeholders back to 2006, with no clear picture as to what is and is not WOTUS. In this day of political unrest and a widening expanse between conservative and liberal groups, it is hard to imagine any certainty in newly-issued federal regulations or revisions to regulations. However, to its credit, the United States asks the U.S. District Court to do just that and allow some certainty to remain in the CWA arena.

[South Carolina Coastal Conservation League, et al. v. Andrew R. Wheeler, Case No. 2:20-cv-01687-DCN \(D.S.C., Charleston Division, 2020\).](#)

[85 Fed. Reg. 22250 \(April 21, 2020\) \(Navigable Waters Protection Rule\).](#)

PROPOSED DEFINITION OF "HABITAT": NEW GROUND FOR ENDANGERED SPECIES ACT REGULATIONS

BY: HENRY R. ("SPEAKER") POLLARD, V

The U.S. Fish & Wildlife Service and the National Marine Fisheries Service (together, the "Services") recently issued a proposed rule adding a definition of "habitat" to the regulations implementing Section 4 of the Endangered Species Act (ESA). Many infrastructure and development projects hang in part on review by the Services (as well as by state natural resource agencies) of their potential impacts on listed endangered and threatened species. These determinations take into account any adverse impacts on protected species' habitat. Thus, what qualifies as "habitat" under the new definition can dictate whether a project will succeed or fail.

The ESA itself already defines the term “critical habitat” for purposes of conserving protected species. However, the U.S. Supreme Court made clear in its 2018 decision in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service* that any “critical habitat” must first qualify as habitat. As a result, the Services must make a threshold determination of the habitat for the species before designating it as “critical habitat.” To implement that two-step process, the Services propose to establish for the first time a definition of “habitat.” As the Services note, the regulatory definition of “habitat” needs to be distinct from, but broader than, the definition of “critical habitat.” Thus, if an area meets the definition of “critical habitat,” then it must necessarily be part of, but not necessarily be all of, the species’ overall “habitat.”

The proposed rule offers for public comment a primary proposed definition and an alternative proposed definition. The definitions are:

1. “The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.” [“Primary Definition”] OR
2. “The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.” [“Alternate Definition”]

As is reflected by these alternatives, one of the key issues raised is whether “habitat” should be based on a species’ *dependence upon* or on its *use of* the territory in question, or perhaps some other factors. That is, which concept better reflects the relationship between the species and the area in question for purposes of protection under

and consistency with the goals and limits of the ESA? The circumstances of dependence upon or use of any physical place vary greatly among species and include such variables as time of year, length of stay, and the benefits offered (food and water supply, cover, mating and nursery grounds, etc.). As a result, the Services are seeking comment on which alternative, or some other factors, provides the appropriate degree of flexibility in assessing that relationship while still staying within the statutory mandates and limits.

The debate over which conceptual approach should control has significant consequences, yet ambiguities associated with each approach create lingering uncertainties. Either of the concepts could be interpreted narrowly or broadly without clearer direction as to how direct and consistent such dependence or use needs to be for the species “to carry out one or more life processes.” In addition, the Primary Definition’s reliance on the concept of dependence still begs potential conflation of meanings of “habitat” with “critical habitat,” even if intended to be distinct. More specifically, because “critical habitat” as currently defined in the ESA focuses on the “physical and biological features” of the territory in question that are essential for the conservation of the species, if a species is directly and consistently dependent on a physical place, does that also mean the place is necessarily “critical habitat?”

In addition, the second sentences of the Primary Definition and the Alternative Definition address to different degrees whether an area unoccupied by the species at the time of the listing must have the elements needed to sustain the species. The Services note that, as compared to the Primary

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Definition, the second sentence of the Alternative Definition “expressly limits unoccupied habitat for a species to areas ‘where the necessary attributes to support the species presently exist,’ and explicitly excludes areas that have no present capacity to support individuals of the species.” Environmental groups already have complained that either of these second sentences could hinder long-term planning for species conservation by preventing protection of areas that could be occupied by protected species in the future, even if the necessary habitat attributes do not exist at the time of the agency action. On the other hand, say others, forecasting whether such attributes would materialize in the future in a manner capable of sustaining the species can prove to be a rather speculative exercise. Regardless, when making short-term and long-term investment and infrastructure planning decisions, there needs to be reasonable certainty as to whether an area is or could be expected to become subject to ESA protection.

The definition of “habitat” may satisfy the mandate of the *Weyerhaeuser* decision to fill a definitional hole in the ESA regulatory program, but the term’s new home within the ESA regulatory landscape will have important implications for planning and permitting of development and infrastructure projects. Comments on the proposed definition were due by September 4, 2020, and the Services will be sorting out the comments for some time to come before finalizing the definition. Of course, any change in Administrations based on the upcoming election would likely alter the course of this regulatory action. In any event, interested parties will be hoping that the final version of the definition of “habitat” will not leave them out in the cold.

[*Endangered and Threatened Wildlife and Plants: Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 47333 \(August 5, 2020\).*](#)

[*Weyerhaeuser Co. v. United States Fish and Wildlife Serv., 586 U.S. _____, 139 S. Ct. 361, 202 L.Ed.2d 269 \(2018\).*](#)

EPA TAKES BROAD ACTION ON PESTICIDE DEVICES

BY: PIERCE M. WERNER

The United States Environmental Protection Agency (EPA) is in the process of a regulatory crackdown, spurred by the current pandemic, which may have broader effects than meet the eye and which raises questions that do not have clear answers. The subject of this regulatory action is the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), with the targets being large e-commerce marketplaces; however, the action taken by EPA may have more far-reaching effects than just on these on-line websites.

On June 10, 2020, EPA issued Stop Sale, Use, or Removal Orders (Orders) to Amazon.com Services LLC (Amazon) and eBay Inc. to cease and desist from selling or distributing a number of pesticide products and devices in violation of FIFRA. EPA alleged the products and devices were unregistered, misbranded, or restricted-use pesticides, and said the claims made about them were false or misleading. The Orders are largely a response to the spur of products listed for sale on the web that make unsubstantiated claims about products or include regulated ingredients that are claimed to combat the spread of or eliminate COVID-19.

While many of the products listed in the Orders are plainly in violation of FIFRA, the Orders also include “pesticide devices” less obviously regulated by the Act, which evidences a broader reach by EPA than is clearly warranted under relevant guidance. For example, devices listed in the Orders include dehumidifiers that claim to do no more than “remove excess moisture from the air which can result in mold and mildew.” These are said to be in violation of FIFRA for lack of an EPA establishment number on the product—the key requirement for pesticide devices under FIFRA, as compared to a more comprehensive review and registration process for pesticide products.

EPA maintains guidance on its website related to pesticide devices; however, the source of these documents can be traced to a single Federal Register notice on Pest Control Devices and Device Producers. This document provides little clarification beyond the definitions in FIFRA and applicable federal regulations. That’s why EPA’s inclusion of certain devices that do not claim to “trap, destroy, repel, or mitigate any pest or any other form of plant or animal life,” but which merely claim to create a similar effect as an indirect result, appears to indicate an enhanced scope of regulation by EPA.

While discussion of this action and the direct effects seem limited in scope to on-line sellers, the consequences may be more expansive. First, as a result of this action, on-line sellers have begun to review and remove similar products and devices beyond those listed in the Orders. This may come as a surprise to manufacturers who are entirely unaware of the potential applicability of FIFRA to their products. Second, the action shows the increased scrutiny that EPA is willing to undertake in

response to products that profess to address public health emergencies. Accordingly, manufacturers that produce products or make claims even tangentially related to environmental or human health effects should reevaluate the potential applicability of FIFRA to the products they produce. The alternative is to risk potential enforcement by EPA.

[In the Matter of Amazon.com Services LLC. Stop Sale, Use, or Removal Order. EPA Docket No. FIFRA-10-2020-0102 \(June 10, 2020\).](#)
[Attachment A to June 10, 2020 Order.](#)

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