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ENVIRONMENTAL NOTES

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EPA ENFORCEMENT INITIATIVES RENEW AND EXPAND INDUSTRIAL TARGET PRIORITIES

BY: RYAN W. TRAIL

EPA's Office of Enforcement and Compliance Assurance recently proposed changes to its National Program Manager (NMP) Guidance that, in part, would revise EPA's National Enforcement Initiatives ("NEIs") for federal fiscal years 2017-2019, effective October 1, 2016. NEI's reflect where EPA will focus its enforcement resources for the upcoming years. Though EPA keeps its previous targets by renewing and carrying forward the existing 2014-2016 NEIs, it is expanding one and creating two others, setting its sights on additional industrial operations.

EPA's prior NEIs (FY 2014-2016) have focused on (1) air quality by reducing air pollution from the largest sources and cutting hazardous air pollutants; (2) energy extraction by ensuring that energy extraction activities comply with environmental laws; (3) hazardous chemicals by reducing pollution from mineral processing operations; and (4) water quality by keeping raw sewage and contaminated stormwater out of U.S. waters and preventing animal waste from contaminating surface water and groundwater. EPA states that its expanded and new initiatives "will address sources of pollution that pose direct public health and environmental threats to communities."

The expanded NEI broadens EPA's goal of reducing "toxic air pollution" from large product storage tanks with increased attention on hazardous air pollutant emissions at hazardous waste generator and treatment, storage and disposal facilities. Specifically, EPA would identify and address violations of leak detection and repair requirements for product storage tanks and hazardous waste tanks, surface impoundments, containers, and related treatment equipment.

The first new NEI, named "Reducing Risks of Accidental Releases and Industrial and Chemical Facilities," targets facilities posing the greatest risk of "catastrophic accidents" through accident prevention measures and enhanced response capabilities. EPA notes that many of these facilities are in disadvantaged communities, hinting at EPA environmental justice concerns. EPA's other new NEI, entitled "Keeping Industrial Pollutants out of the Nation's Waters," focuses on industrial sectors such as mining, chemical manufacturing, food processing, and primary metals manufacturing to build "compliance with Clean Water Act discharge permits" and cut "illegal pollution discharges." EPA's existing water quality NEI has been focused on municipalities and land developers ("raw sewage and contaminated stormwater").

EPA's proposed NEIs signal even greater emphasis on industrial operations and warrant close attention. Facility owners and operators may also want to reconsider their internal compliance assurance protocols to keep pace with EPA's evolving enforcement priorities.

United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *Draft National Program Manager Guidance Addendum FY2017* (February 19, 2016), available at https://www.epa.gov/sites/production/files/2016-02/documents/draft-fy17-oeca-npm-guidance-addendum.pdf.

FEDS SPAWN NEW RULES AND POLICIES FOR PROTECTED SPECIES HABITAT AND MITIGATION

BY: HENRY R. "SPEAKER" POLLARD, V

Federal agencies charged under the Endangered Species Act ("ESA") with species protection have recently hatched revisions to regulations and policies that change substantially the determination and protection of habitat for protected species and mitigation of adverse impacts on protected species.

On February 11, 2016, the U.S. Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") (collectively, the "Services") jointly amended current rules for critical habitat designation at 50 C.F.R. Part 424. The Services explicitly define for the first time "geographical area occupied by the species" and require an accounting for climate change, both operating to

expand the scope of land areas eligible for designation as critical habitat. This includes areas only temporarily or periodically occupied, even if such areas are not occupied at the time of the listing of the species for protection as the ESA states. However, not "every square inch, yard, acre or even mile independently meets the definition of critical habitat." In the end, the Services have retained great discretion to review each critical habitat designation on a case-specific basis, though any determination must be based on the best available scientific data. The revisions took effect March 14 but only apply to specific critical habitat designations proposed after that date.

Also on February 11, the Services modified the definition of "destruction or adverse modification" of critical habitat at 40 C.F.R. § 402.02 to comply with a court ruling holding that the previous definition was inconsistent with the ESA. In so doing, the Services arguably expand the scope of "adverse modification" to critical habitat, which now means a "direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." It includes, but is not limited to, actions that "alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features." Nature of the impact, not its size, controls, and the agencies reserve much discretion to make the call. Almost any land disturbing activity arguably could now be an adverse modification. Also, the forward-looking perspective in the definition suggests potential speculation as to whether relevant features may be impacted in the future. Regardless, this aspect dovetails greatly with the new regulation for critical habitat designation and USFWS's proposed draft mitigation policy. The new definition took effect on March 14.

The Services also have finalized their "non-binding" policy for exclusion of certain areas from designation as critical habitat, effective March 14. Accounting for economic and national security issues is mandatory under the ESA, whereas consideration of species conservation areas is discretionary. In their discretionary review, an area would be excluded from critical habitat designation only if the benefits of exclusion outweigh the benefits of inclusion. In any event, no area will be excluded if doing so would facilitate the extinction of the species in question.

On March 8, 2016, the USFWS issued a new draft policy concerning mitigation of adverse impacts to protected species, making major changes to the existing agency Mitigation Policy developed in 1981. The draft policy adjusts the mitigation perspective to a "landscape-scale" to achieve a "broader ecological context" in pursuing a net gain, where possible, but at worst a "no net loss," conservation of species. Driving the revisions in the draft policy are factors such as climate change, improvements in fish and wildlife science, and legal authority revisions. It integrates all legal authorities for mitigation during development activities and is intended to be the "umbrella" policy for species protection mitigation. ESA mitigation authority is incorporated for the first time, though the draft policy "encourages [use of] a broader definition of mitigation where allowed by law." Public comments are due by May 9, 2016.

The final rules and final and draft agency policies collectively raise major concerns and questions for both private and public sector entities with projects that may impinge on protected species habitat. Some argue the Services have exceeded their authority under the ESA with these actions. Others believe the Services have not gone far enough to set standards for species habitat protection and for mitigation. It would seem that litigation is likely, so these issues will, in turn, almost certainly continue to evolve as well.

81 Fed. Reg. 7414 (February 11, 2016); 81 Fed. Reg. 7214 (February 11, 2016); 81 Fed. Reg. 7226 (February 11, 2016); 81 Fed. Reg. 12380 (March 8, 2016).

EPA CAN WITHOLD CERTAIN WASTEWATER DATA FROM THE PUBLIC

BY: JESSICA J.O. KING

On March 29, 2016, a federal judge ruled that the Freedom of Information Act ("FOIA") exemption for "confidential business information" ("CBI") can cover wastewater discharge information collected by the United States Environmental Protection Agency ("EPA") in connection with a rulemaking under the Clean Water Act ("CWA").

In a lawsuit brought in the federal district court for the District of Columbia, environmental groups sought to enforce certain aspects of their earlier filed request to EPA to produce data relating to 733 power plants. Some of the requested data included amounts of wastewater pollutants discharged by each power plant, as well as the cost and effectiveness of the power plants' wastewater treatment technologies. EPA had collected this information in 2010 as part of a survey used by the agency to draft its 2015 rule establishing the first effluent limitation guidelines under the CWA for certain metals in wastewater discharged from steam-driven power plants. The power plants had originally

asserted that the wastewater volume and treatment plant technology cost and effectiveness information was CBI under FOIA. They subsequently justified that position to EPA when environmental groups challenged EPA's initial determination of CBI status. In turn, EPA withheld that information when it ultimately responded to the environmental groups' request.

The environmental groups conceded in court that FOIA on its face exempts CBI from disclosure, including the very information the groups requested. However, the environmental groups argued that the specific effluent data disclosure requirement in CWA § 1318 and its narrower exemption from disclosure for "trade secrets" were enacted after FOIA's more general exemption for CBI, and so the CWA disclosure requirement and its narrower exemption from disclosure effectively supersede and trump FOIA's CBI exemption in this case. The judge disagreed. He held that FOIA is part of the Administrative Procedures Act ("APA") and that APA § 559 explicitly prohibits subsequently enacted laws from superseding its requirements: a "[s]ubsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly." The judge then found that CWA § 1318 does not expressly supersede or modify the requirements of the APA, so FOIA's full CBI exclusion still applies in this case. Accordingly, he held that EPA properly considered the discharge information as protected CBI under FOIA and lawfully withheld it from the environmental groups.

This case offers some comfort to those responding to EPA information requests addressing CWA issues. That said, wastewater dischargers should not start cheering too loudly yet: to date, the environmental groups have not indicated whether they will appeal the ruling, and this issue can be expected to trigger debate for all interested parties for some time to come.

Environmental Integrity Project et al. v. U.S. Environmental Protection Agency, C.A. No. 14-1282 (D.D.C. March 29, 2016).

HAZARDOUS WASTE: NEW CORROSIVITY TEST DENIED, BUT THE FIGHT IS NOT OVER

BY: ETHAN R. WARE

EPA has tentatively denied a petition to expand the test for the hazardous waste characteristic of corrosivity to cover more wastes. In so doing, however, EPA left the door open to reconsider the decision based on public comment and, by separate regulatory action, to evaluate further whether "irritant wastes" may deserve closer scrutiny for potential regulation.

In 2011, Public Employees for Environmental Responsibility (PEER) petitioned EPA to expand the definition of corrosive hazardous waste by: (i) lowering the caustic pH regulatory value from pH 12.5 to pH 11.5; and (ii) including non-aqueous wastes within the coverage of the corrosivity characteristic. PEER's petition asserts that "inhalation exposures primarily due to concrete or cement dust… may occur in the course of manufacturing or handling cement and building demolitions," citing in part exposure to dust from the 2001 World Trade Center ("WTC") disaster. PEER also claims that other standard-setting bodies have adopted a pH value of 11.5 to determine corrosivity, warranting similar action by EPA. If the petition had been granted, it would have triggered a substantial broadening of the scope of wastes regulated as hazardous due to corrosivity, especially for cement and building demolition-related industries.

Although EPA tentatively rejected PEER's petition, EPA's rejection offers some insights into its analysis of petitions for changes to characteristic hazardous waste definitions. First, EPA determines that a pH value of 11.5 actually is not widely used or uniformly established as a corrosivity standard and that adoption of a particular corrosivity standard for a different agency program (or even a different EPA program) does not mean that it is appropriate for hazardous waste characterization in any event. EPA also finds PEER's reliance on the WTC scenario and exposure to purer forms of cement dust to be misplaced due to the variety of constituents in the WTC dust and a lack of evidence of corrosive-related injuries in the WTC and other cement dust exposure situations. Third, EPA determines that application of a pH-based corrosivity standard to non-aqueous materials is unwarranted due to a lack of both supporting scientific research and a reliable record of injuries caused by non-aqueous corrosives. Indeed, EPA remarks that many of the petition's claims are "factually incorrect or inaccurate or are otherwise misstatements," concluding that the petition fails to justify revisions to the corrosivity characteristic.

Nonetheless, EPA "is soliciting public comment and data and other information on the issues raised," allowing support for the petition to be improved. Just as significant, however, is EPA's single-sentence musing about whether it "should consider a new hazardous waste characteristic that would identify and regulate irritant wastes," an issue that EPA says is begged by the petition but that is beyond the scope of EPA's response to it.

Companies generating alkaline solid wastes (like cement

and demolition-related firms) may wish to file comments on the denied petition to ensure that the administrative record reflects their perspective. They may also want to address EPA's hint at potential consideration of "irritant wastes" as a new hazardous waste characteristic. Comments are due by June 10, 2016.

69 Fed. Reg. 21295 (April 11, 2016).

OSHA ENFORCEMENT IN THE FINAL YEAR OF THE OBAMA ADMINISTRATION

BY: A. KEITH "KIP" MCALISTER, JR.

Although the Obama Administration is well into its last year, it is signaling no let-up in its aggressive environmental and occupational safety and health enforcement agendas. Indeed, continuation of or even more stringent enforcement seems likely. In this light, employers should keep watch on two key OSHA enforcement issues that dovetail with environmental enforcement to understand and limit liability arising on both regulatory fronts:

1) Enhanced Use of the General Duty Clause: The General Duty Clause is often used as a gap-filler or fallback standard when OSHA lacks a specific standard to address a workplace hazard or needs to bolster its case. OSHA has relied heavily on policy and guidance documents rather than formal rulemaking for specific standards to justify citing employers under the General Duty Clause for alleged violations involving combustible dust and hazardous materials.

   This practice may be strengthened based on an OSHA October 2014 request for information. OSHA is planning to update many or revoke some obsolete permissible exposure limits (PELs). PEL's are established acceptable concentration limits for certain chemicals in the workplace. OSHA said that it is looking for ways to justify new PEL's or use alternative methods to set exposure standards, but it seems to want to do this without having to do the traditional hard work of determining feasibility of implementation and underlying risk assessment. Given the claimed obsolescence of certain PEL's and the time and difficulty of pursuing formal regulatory action, OSHA can be expected to rely even more on the General Duty Clause in lieu of outdated standards.

2) Increased Penalties: Recent Congressional action requires OSHA to raise penalties for the first time in 25 years. The initial "catch-up" adjustment must be in place by August 2016 and is based on changes in the consumer price index between 1990 and 2015. Maximum penalties could jump substantially, almost doubling (i.e., Serious = $12,471 or Willful = $126,000). OSHA will be tempted to use these stiffer penalties to gain greater leverage in enforcement actions to achieve its policy and enforcement objectives. Where the same set of facts may indicate both safety and environmental violations, such as with hazardous waste management problems, OSHA's penalties could now regularly rival what EPA or state environmental agencies may seek.

Flexing the General Duty Clause and increased penalty levels may offer enforcement flexibility and leverage for OSHA, but they create uncertainty and higher risk for industry. In light of these evolving issues and the likely push to the finish line by the Obama Administration, companies should revisit their internal policies and update training on potential exposures to prevent or mitigate liability arising from OSHA standard violations.

Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114–74, title VII, §701(b), 129 Stat. 599 (11/02/2015); 79 Fed. Reg. 61383 (October 10, 2014).

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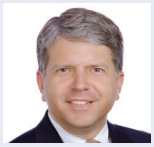

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