ENVIRONMENTAL NOTES

December 2015

NORTH CAROLINA DENR IS NOW DEQ; NEW AUDIT PRIVILEGE AND LIMITED IMMUNITY ENACTED

BY: ETHAN R. WARE

The Regulatory Reform Act of 2015 (the "Act"), passed by the North Carolina General Assembly in September and signed by Governor McCrory on October 22, made a number of significant changes to the state's environmental laws. Among other things, it changed the name of the North Carolina Department of Environment and Natural Resources to the North Carolina Department of Environmental Quality. It also transferred certain functions of the department (but not its major environmental programs) to another state agency.

The Act also added a new Part 7D, entitled "Environmental Audit Privilege and Limited Immunity," to the state's evidence statutes. This newly-added section does two things: First, it protects from disclosure an "environmental audit report" prepared in the course of a voluntarily-conducted environmental audit. Second, it provides immunity from civil penalties (but not from criminal enforcement) for certain environmental violations discovered in the course of an environmental audit.

If only things were that simple. There are a number of exemptions and conditions to both the protected status of audits and immunity for certain environmental violations. For example, to protect an environmental audit report from disclosure, an owner or operator of a facility that is inspected by NCDEQ must notify the agency within 10 days of completion of the inspection that the report exists and must provide the beginning and ending dates of the audit. This article does not attempt to detail all the exemptions and provisions for one simple reason: Part 7D is not yet effective and may never be. The reason is that the Act required NCDEQ to submit Part 7D to EPA within 30 days after the Act became law and to request EPA's approval to implement it in connection with the state's "delegated, authorized or approved federal environmental programs," i.e., almost all of the state's air, water and waste laws and regulations. Without that approval, the Act states that Part 7D does not become law.

We are not holding our breath. Other states have passed sweeping audit privileges and immunities only to have EPA say no or require significant modifications. For example, Virginia passed similar legislation in 1995, and EPA threatened to revoke delegation of its federal environmental programs because of it. To prevent that from happening, the Virginia Attorney General was forced to provide written assurances to EPA in January 1998. Those assurances said the state would interpret the law so that the privileges and immunities did not apply to violations of delegated federal environmental laws and regulations. Result: Virginia's privileges and immunities don't apply in the context of most of its environmental laws.

We'll wait and see what EPA does before going into the details of North Carolina's new audit privilege and enforcement immunities. But, again, we are not holding our breath.

EPA FINALIZES AMENDMENTS TO THE BOILER MACT; DEFINITIONS OF "STARTUP" AND "SHUTDOWN" ARE REVISED

BY: RYAN W. TRAIL

EPA recently issued a final rule that amends the Boiler MACT, the regulation that addresses emissions of HAPs from industrial, commercial, and institutional boilers and process heaters located at major sources of HAPs. The

amendments were made in response to 13 petitions for reconsideration of amendments to the rule made in 2013. Major sources of HAPs that have affected units must comply with the rule by January 31, 2016, so owners and operators of these sources should review the changes now.

While the amendments make a number of changes and clarifications, this article focuses on revisions made to the definitions of "startup" and "shutdown" and the work practices that apply during these periods. The definition of "startup" now includes an alternative definition that extends startup for four hours after the boiler either supplies "useful thermal energy" for heating, cooling, or process purposes, or produces electricity, whichever is sooner. Those using the alternative startup definition must meet enhanced recordkeeping requirements. The definition of "shutdown" is amended to begin either when the boiler no longer supplies useful thermal energy or when "no fuel is being fed to the boiler," whichever is sooner. This change was made to addresses the circumstance where fuel remaining in a boiler on a grate or elsewhere continues to combust, even though fuel is no longer being fed to the boiler and useful thermal energy is no longer being generated. Revisions to work practice standards during these periods include use of clean fuel and engagement of all applicable control devices so that emissions standards are met no later than four hours after useful thermal energy is first supplied.

The changes to the definitions should make it easier for owners and operators of these emission units to implement the rule. With the compliance date less than two months away, it's important that they know how the nuances of the final rule will affect their operations.

80 Fed. Reg. 72789 (November 20, 2015)

CAN AIR EMISSIONS RESULT IN CERCLA LIABILITY?

BY: ETHAN R. WARE

Liability under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) results from "releases" of hazardous substances. The term "release" is usually used in the context of something spilled or dumped on land or discharged to water, but do air emissions from a manufacturing process expose a facility to CERCLA liability? Maybe so, if the federal government and other plaintiffs prevail in a case now pending in the United States Court of Appeals for the Ninth Circuit.

In 2014, Teck Cominco Metals, Ltd. ("Teck") was found liable under CERCLA for contaminating nearby waterways with heavy metals from its lead smelting operations. The metals had been dumped into the streams and creeks directly. Plaintiffs then made new allegations that Teck should also be liable under Superfund for airborne releases that ultimately settled in the waterways. The district court agreed, but allowed Teck to file an immediate appeal of its ruling to the Ninth Circuit.

On appeal, Teck argued to the Ninth Circuit that hazardous substances emitted into the air before falling back to the ground are not being "disposed" of, and, therefore, it cannot have liability for them under CERCLA. CERCLA adopts its definition of disposal directly from the Resource Conservation and Recovery Act (RCRA), and a tenet of hazardous waste regulations dating back to 1980 is that uncontainerized air emissions are not solid waste. Therefore, air emissions cannot be "disposed of" for purposes of the applicable regulations.

Teck is not without support for its position. In a 2014 decision, the Ninth Circuit held that the emission of particulates in diesel exhaust is not a "disposal" under RCRA. The Court pointed out that the definition of "disposal" under RCRA does not include "emitting," and therefore exhaust emissions could not lead to RCRA liability.

The federal government argued to the Ninth Circuit that air dispersion of pollutants is a "disposal" under both RCRA and Superfund. In its brief, it said, "Teck's crabbed interpretation…would negate disposal in countless cases [and] put polluters beyond [Superfund's] reach…"

Depending on the outcome, this case could expand the scope of CERCLA significantly. Also, if the federal government's position is upheld, it may mean that companies will need to file Part A RCRA Notices for any air emissions exhibiting characteristics of hazardous waste.

Pakootus v. Teck Cominco Metals, Ltd., No. 15-800005 (9th Cir.)

WATER BOARD PROPOSES AMENDMENTS TO VIRGINIA'S WATER WITHDRAWAL AND WETLAND REGULATIONS

BY: HENRY R. "SPEAKER" POLLARD, V

The State Water Control Board ("Board") has proposed amendments to Virginia's Water Protection Permit ("VWP") regulations for the permitting and control of wetland impacts and surface water withdrawals. Many of the changes are intended to improve ease of use, but others are more fundamental.

The proposed revisions affect the main VWP regulation (9 VAC 25-210), as well as the VWP General Permits for: Impacts to Less than One-half Acre (9 VAC 25-660), Facilities and Activities of Utility and Public Service Companies (9 VAC 25-670), Linear Transportation Projects (9 VAC 25-680), and Impacts from Development and Certain Mining Activities (9 VAC 25-690). Major changes being proposed would:

> Impact surface water withdrawal permitting requirements and consolidate them in a new Part V of the main VWP regulation for ease of use. (Surface water withdrawals that are presently "grandfathered" would not change under the proposed amendments, as these are established by statute.)

> Include in Part V new definitions of "public water supply" and "public water supply safe yield" that will affect public water suppliers relying on surface water sources. Including a "safe yield" definition would effectively bring all aspects of water withdrawal permitting under Board and DEQ administration, even though the actual waterworks permit is still issued by the Virginia Department of Health.

> Add flexibility in the permit review process to account for updates made to delineation manuals used to make jurisdictional determinations about what does and does not qualify as a wetland.

> Incorporate more directly (i) the main elements of the U.S. Army Corps of Engineers' 2008 Mitigation Compensation Rule (33 C.F.R. Part 332) regarding the priority and sequencing of wetland mitigation options and (ii) recent additional "in lieu fee" mitigation programs authorized by the Virginia General Assembly.

> Revise or clarify (i) the demonstration of wetland functionality, (ii) compensatory mitigation requirements, (iii) the administrative continuance of a permit pending agency review of the renewal application, (iv) thresholds for triggering modifications of existing permits based on additional impacts to wetlands or streams, and (v) new requirements in connection with claiming a permit exemption or exclusion.

> Allow restrictive covenants to protect wetland mitigation projects to be recorded at any time prior to commencement of the work authorized by the permit.

> Revise VWP general permits to reflect many of the changes proposed in the main VWP regulation for consistency across the VWP program regulations.

The last major overhaul of the VWP regulations was about eight years ago, and it has taken time for stakeholders to adjust to that set of changes. Given the breadth of the proposed amendments, regulated parties and stakeholders now have much to consider yet again. The respective public comment periods for the proposed amendments end January 29, 2016.

32 Va. Reg. 773 (November 16, 2015).

FOSSIL FUEL EGUs CONTINUE TO FEEL THE HEAT

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

In 2013, President Obama issued a memorandum directing EPA to develop limits on carbon emissions from new power plants. EPA did as the President asked when it promulgated a final rule this past October establishing new source performance standards for greenhouse gas (GHG) emissions at new, modified, and reconstructed electric utility generating units (EGUs). The final rulemaking under Section 111(b) of the Clean Air Act establishes CO2 emission limits for fossil fuel-fired (i.e., coal, petroleum liquids, and natural gas) EGUs, which are defined to mean steam generating units, integrated gasification combined cycle (IGCC) units, and stationary combustion units. Although less stringent than EPA's proposed regulations in 2014, the rulemaking will be costly for new fossil fuel-fired EGUs.

Applicability of the rule is based upon two factors: (i) when the EGU commenced construction, reconstruction or modification, and (i) its capacity to generate energy and sell it to the grid. Affected EGUs are those units for which "construction or modification" is commenced after January 8, 2014 or (for steam generating units and IGCC units) "reconstruction" is commenced after June 18, 2014. But that's not the sole criterion. To be subject to the rule, the EGU must also meet two other criteria:

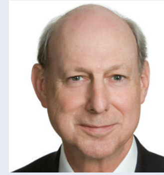
> Its base load rating must be greater than 250 million British thermal units per hour (MMBtu/h) (e.g., heat input of fossil fuel, either alone or in combination with other fuels, is equivalent to 73 megawatts or 260 gigajoules per hour); and

> It serves a generator capable of supplying more than 25 megawatts of electricity for sale to the grid.

For affected EGUs, the rule establishes emission limits based on implementation of the best system of emission reduction technology (BSER). As an example, a new steam generating unit may not emit more than 1,400 lbs. of CO2/MWh-gross. To measure gross energy output, EPA sums the total CO2 emissions (e.g., pounds of CO2) over 12 operational months and divides by the total gross output (in megawatt-hours) over the same 12 operational months. Similar criteria are provided for reconstructed steam generating units and new or reconstructed stationary combustion turbines. In contrast, and subject to certain conditions, modified steam generating units and IGCC units will have unit-specific limits determined by the unit's best historical annual CO2 emission rate from 2002 to the date of the modification. The rule also addresses (i) startup, shutdown, and malfunction, (ii) compliance and emissions performance testing, and (iii) reporting and recordkeeping.

Although EPA touts its new GHG rule as less stringent than its 2014 proposals, the rule effectively ends the construction of new coal-fired power plants by requiring them to be equipped with carbon capture and sequestration systems. That technology is not in use on a commercial scale anywhere in the country. Thus, fossil fuel-fired EGUs continue to feel the heat. All requirements are codified in a new Subpart TTTT of 40 C.F.R. Part 60.

40 C.F.R. §§ 60.5508 and 60.5509(a)(1)-(2).
80 Fed. Reg. 64510 (Oct. 23, 2015)



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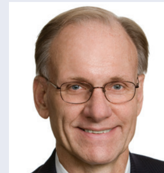

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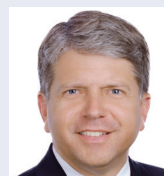

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