

ENVIRONMENTAL NOTES

July 2015

CLEAN WATER RULE OPENS LITIGATION FLOODGATES

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

With much fanfare, EPA and the Army Corps of Engineers ("Corps") recently issued a final rule clarifying which bodies of water are "waters of the United States" protected under the Clean Water Act ("CWA"). Coming in the wake of the Supreme Court's confusing decision in *Rapanos*, the so-called "Clean Water Rule" was issued to, among other things, make it easier to determine when waters are subject to federal jurisdiction. The litigation floodgates were opened the day the rule was issued. Sixteen States immediately filed suit to challenge the rule in U.S. district court in Texas, and a coalition of 13 States filed suit just days later in U.S. district court in North Dakota. Plaintiffs argue the CWA provides States with primary regulatory authority over such waters, and that the final rule significantly expands federal jurisdiction in an unconstitutional manner.

Among other things, plaintiffs allege the agencies failed to consider frequency, duration and flow in defining "tributaries." The rule identifies tributaries as waters that are characterized by the presence of physical indicators of flow – such as a bed, bank, or a high water mark. Plaintiffs contend that failing to account for frequency, duration and flow means federal jurisdiction can be asserted over dry ponds, ephemeral streams, and ditches that conveyed water only at some point in the past.

In its defense, EPA in the rule's preamble states that the rule actually decreases the number of waters that will be regulated. It says this is so because of important qualifiers and exclusions in the rule for certain categories of waters that will avoid case-by-case determinations.

The changes made by the rule are important because obtaining a permit to discharge fill material into waters of the United States can be a long and expensive process. Failure to obtain a permit prior to any such discharge may result in significant civil penalties of up to \$37,500 per day, along with criminal liability. We expect other States and industry groups will file or join similar lawsuits in the near future. Consequently, resolution of this issue will be years in the making.

"Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37054 (June 29, 2015).

SUPREME COURT RULING ON EPA MERCURY RULE: UTILITIES WINS THE BATTLE, BUT LOSE THE WAR

BY: JESSICA J.O. KING

The Clean Air Act requires EPA to regulate emissions of hazardous air pollutants from coal-fired power plants if the agency determines that such "regulation is appropriate and necessary" after studying the hazards the emissions pose to human health. EPA conducted the study and concluded that regulation was necessary. The agency refused to consider costs in reaching its decision. The final Mercury and Air Toxics Standards Rule ("Mercury Rule") issued in 2012 requires power plants to install controls to limit emissions of mercury and other air toxics. Industry groups sought review of the rule in the U.S. Court of Appeals for the District of Columbia Circuit.

In April of 2014, the D.C. Circuit upheld the rule, finding EPA did not have to consider the estimated \$9.6 billion

in annual compliance costs. The decision was appealed. Late last month, the U.S. Supreme Court ruled EPA should have considered costs during its rulemaking. The decision may appear to be a big win for electric utilities with coal-fired power plants, but the reality is that it will benefit few if any of them. There are two reasons for this outcome.

First, the Mercury Rule's initial compliance date was in April of this year, and most power plants met the deadline. In fact, only 200 plants (about 20% of the U.S.'s power capacity) were given up to an extra year to comply, and most of this additional time was provided so they could complete their ongoing installation of mercury controls. Twenty-two (22) of these 200 plants, less than 1% of U.S. power capacity in 2013, remained in operation without controls after the April deadline. SNL Financial, <https://www.snl.com/InteractiveX/Article.aspx?cid=A-32620730-13109> (May 16, 2015).

Second, the Court did not strike down the rule, but merely remanded the case back to the D.C. Circuit. The D.C. Circuit has the option of vacating the rule or remanding it to EPA and allowing it to stand while the agency weighs costs in determining if the rule is "appropriate and necessary."

The wheels of justice turn slowly, perhaps too slowly in this instance to provide meaningful relief.

Michigan vs. EPA, No. 14-45 (June 29, 2015); 77 Fed. Reg. 9304, 9363 (Feb. 16, 2012)

COURT UPHOLDS CHESAPEAKE BAY TMDL

BY: CHANNING J. MARTIN

The U.S. Court of Appeals for the Third Circuit has upheld federal pollution restrictions for the Chesapeake Bay Watershed over objections by agricultural and construction trade associations and 21 states (including South Carolina). EPA's Total Maximum Daily Load ("TMDL") issued in December 2010 calls for a reduction

of nutrients and sediment discharged to the Bay through a combination of federal and state requirements, including requirements applicable to nonpoint discharges, e.g., sheet flow and run-off. The challengers argued that while EPA had authority to regulate *point* source discharges of pollutants, the Clean Water Act does not authorize EPA to regulate *nonpoint* source discharges of pollutants or make decisions about land use and zoning as a way to regulate those nonpoint discharges. The challengers said EPA was encroaching on state land-use decisions and on each state's traditional right to decide how best to achieve federal water quality requirements. They also argued that EPA did not have authority to require multiple states to coordinate restrictions on discharges to the Bay watershed.

In upholding the lower court's decision, the Third Circuit acknowledged that addressing the Bay is a complex problem with both winners and losers. It said, "The winners are environmental groups, the states that border the Bay, tourists, fishermen, municipal waste water treatment works, and urban centers. The losers are rural counties with farming operations, nonpoint source polluters, the agricultural industry and those states that would prefer a lighter touch from the EPA."

Although no decision has been made by petitioners on whether to appeal, one thing seems clear: EPA will be emboldened by the ruling to establish similar TMDLs to address nonpoint source pollution in other parts of the country. States adjacent to the Gulf of Mexico may be next.

American Farm Bureau Federation v. EPA, No. 13-4079 (July 6, 2015).

LESSON LEARNED FROM EPA ENFORCEMENT OF EPCRA FORM R REQUIREMENTS

BY: RYAN W. TRAIL

EPCRA § 313 requires certain facilities manufacturing or "processing" more than 25,000 lbs. or otherwise using

10,000 lbs or more of a listed toxic chemical to file a Form R annually on or before July 1. In the last two issues of this newsletter, we discussed frequently asked questions and answers designed to assist you in the preparation of Form R reports for your facility. With the July 1 reporting deadline now behind us, we turn to an overview of three recent Form R enforcement cases and the trends they show for companies that fail to comply with applicable Form R requirements.

In March of 2015, EPA and the Department of Justice entered into a settlement with a large Idaho phosphate mining and processing company that failed to report uncontrolled releases of hydrogen cyanide, sulfur dioxide, nitrogen oxides and mercury. The facility also failed to report use and releases of carbonyl sulfide, phosphine, sulfuric acid, and hydrogen cyanide as part of its annual Form R report for a period of at least 3 years. As part of the settlement, the Company agreed to pay a \$600,000 combined penalty.

In September of 2014, EPA settled an action against a large Nevada gold mining company for its alleged late and incorrect filing of Form R reports for arsenic, cobalt, copper, cyanide, lead, mercury, nickel, propylene and zinc. The company agreed to pay a civil penalty of \$182,000 for the alleged violations. EPA stated the action was part of its National Mineral Processing Enforcement Initiative which aims to minimize risks to drinking water and other resources posed by hazardous waste operations at mineral processing facilities.

In December of 2014, EPA entered into a settlement agreement with a manufacturer of highly engineered advanced carbon composite materials, whose Maine facility allegedly failed to file Form R reports for several polycyclic aromatic compounds. The facility allegedly processed and failed to report more than 4,000 pounds of these compounds in 2012, far more than the 100-pound threshold established by EPA for reporting. In addition to a \$6,935 civil penalty, the settlement agreement included a Supplemental Environmental Project ("SEP"). Under the SEP, the company will provide local emergency responders with \$13,240 worth of equipment, including specialized confined space entry

equipment, a gas detection unit, and air cylinders, which will increase the time crews may spend responding to emergencies in dangerous atmospheres.

These recent cases are a reminder of two important points in EPCRA enforcement. First, EPCRA violations are often discovered as the result of agency compliance initiatives focused on other areas, so facilities in the crosshairs of any EPA compliance initiative should be mindful of EPCRA compliance. Second, SEPs are still a viable settlement tool, and are often used in the context of EPCRA enforcement actions to reduce the size of civil penalties and directly benefit the communities EPCRA seeks to protect.

EPA ISSUES VAPOR INTRUSION GUIDANCE

BY: CHANNING J. MARTIN

Vapor Intrusion ("VI") is the migration of vapors from contamination in the ground into overlying buildings and structures. It's no secret that regulatory agencies have increased their focus on VI over the last decade. Moreover, under ASTM E1527-13, a Phase I Environmental Site Assessment must consider whether VI at the property being assessed could be a concern.

EPA recently released two technical guidance documents concerning assessment at sites where VI is a potential concern. The guidance documents are intended to promote national consistency, and it's expected that many states will either adopt or revise their own VI guidance documents to reflect EPA's approach.

The *Technical Guide for Addressing and Mitigating the Vapor Intrusion Pathway From Subsurface Vapor Sources to Indoor Air* is applicable to all sites being addressed under federal cleanup statutes. The document addresses assessments, sampling, exposure scenarios, risk assessments, mitigation and remediation. The *Technical Guide for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites* addresses VI related to petroleum contamination from USTs. These

documents replace EPA's 2002 draft Vapor Intrusion Guidance. Note that EPA has included a Vapor Intrusion Screening Level calculator on its website which allows users to input certain parameters to determine whether a site "screens out" and is unlikely to pose a health concern from VI.

A notable change from EPA's 2002 Guidance is that EPA has abandoned its deference to OSHA indoor air levels in non-residential buildings. Now EPA claims broad authority to protect workers from indoor air contamination and indicates that its risk-based standards, as opposed to OSHA's permissible exposure limits, should be used in evaluating health risks to workers from VI in non-residential buildings. The guidance states that "EPA does not recommend using OSHA's PELs...for purposes of assessing human health risks to workers" through VI. Whether EPA can change OSHA's promulgated indoor air levels on its own may be subject to legal challenge.

What's the bottom line? Vapor Intrusion will continue to be a big issue at sites with volatile organic compound contamination in the subsurface, such as solvents and petroleum. The guidance documents will likely increase the cost of due diligence, as more and more buyers of commercial property require VI assessments. Lawsuits are also more likely as VI risks come to light that were previously unknown.

Guidance documents: epa.gov/oswer/vaporintrusion.

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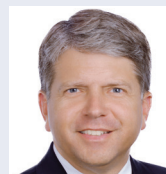
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