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ENVIRONMENTAL NOTES

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CONGRESS FINDS THE FORMULA TO REFORM CHEMICAL REGULATION

BY: RYAN W. TRAIL

The Toxic Substance Control Act (TSCA) is the primary federal law by which the manufacture, import and use of chemical substances are regulated in the United States. Since its inception in 1976, TSCA has not been updated significantly. Politics played a large part in what essentially became a reform stalemate. But negotiators on both sides of the aisle reached a deal in May, and Congress in early June passed the Frank R. Lautenberg Chemical Safety for the 21st Century Act (also known as the TSCA Modernization Act of 2015). President Obama has now signed it. The Act will change considerably the landscape of chemical regulation and is perhaps the most important amendment to a federal environmental statute since the Clean Air Act Amendments of 1990.

The Act significantly improves the process by which EPA evaluates and regulates chemicals. Among other things, EPA is required to identify substances that are high priorities for risk evaluation; determine the health and environmental risks of those substances; determine, without regard to cost, whether a substance presents an unreasonable risk; and, if so, regulate it under its specified conditions of use. The Act sets forth tight timeframes in which EPA must accomplish these steps, something that industry desired.

For new chemicals, TSCA previously deemed a "pre-manufacture notice" (PMN) approved unless EPA concluded within 90 days of submission that the chemical presented an unreasonable risk. Under the Act, EPA must respond to a PMN by concluding 1) the new chemical presents an unreasonable risk; 2) there is insufficient information to determine if an unreasonable risk exists, and in the absence of sufficient information, the chemical may present an unreasonable risk; or 3) the chemical does not present an unreasonable risk. For existing chemicals, the Act creates a two-step process for considering chemical risks, with the first step involving evaluation and prioritization of risks, and the second step involving management of those risks.

The Act also preempts state restriction of chemicals that EPA determines pose no unreasonable risk. It also preempts state restriction while EPA is considering whether to regulate a high priority chemical. However, preemption does not apply to state requirements that are identical to or adopted pursuant to a federal requirement, or that are adopted pursuant to state water quality, air quality, or waste treatment or disposal regulations. Finally, state action taken prior to April 22, 2016 – such as Prop 65 in California – is grandfathered and not subject to preemption.

These are only a few of the many changes the Act will bring to manufacturers, processors and importers of chemicals, as well as large industrial users. Rulemakings from EPA will follow enactment, so those affected by the Act will need to remain vigilant.

https://www.congress.gov/bill/114th-congress/house-bill/2576/text

REGULATED PARTIES – 2, REGULATORS – 0

BY: CHANNING J. MARTIN

The United States Supreme Court has handed regulated parties their second win in four years concerning when they can take EPA and the U.S. Army Corps of Engineers to court over wetlands permitting issues. In 2012, the Supreme Court in *Sackett v. EPA* held unanimously that a compliance order issued under the Clean Water Act – meaning an order determining that a party is violating the Act and requiring compliance – was "final agency action" subject to judicial review under the Administrative Procedures Act (APA). EPA had taken the position that no judicial review could occur until the person receiving the order refused to comply and EPA filed suit to enforce it. This presented regulated parties with a Hobson's Choice: comply with the order even if they thought it was unlawful, or violate the order and face the prospect of significant fines if a court enforcing the order agreed with EPA. The Supreme Court found that EPA's view had no basis under the Clean Water Act and held that regulated parties were entitled to pre-enforcement review. The decision in the case was not even close – EPA lost 9-0. That's why when U.S. *Army Corps of Engineers v. Hawkes Co., Inc.* went to the Supreme Court with a similar issue, we suspected the regulators would lose again. They did, 8-0. Again, not even close.

The issue before the court in *Hawkes* concerned wetland "jurisdictional determinations" (JD). Property owners who are not certain whether their property contains wetlands may proceed with development without a permit, but few do so since the risk of being wrong can be significant. Instead, most have a wetlands delineation performed and then ask the Corps for a preliminary or approved JD. An approved JD is issued by the Corps to document whether wetlands are present or absent on property. It's valid for five years and forms the basis on which wetland permits are issued.

But what happens if a regulated party disagrees with the JD? The Corps' position was that the regulated party could not go to court to contest it until *after* the Corps issued or denied a permit. This left regulated parties with two options: proceed without a wetlands permit from the Corps and face the prospect of civil and criminal liability if they are wrong, or (ii) spend significant time and money to apply for a wetlands permit *and then* finally have access to a court to contest the JD once a permit is issued or formally denied. (Sounds similar to the choices in *Sackett*, doesn't it?)

In *Hawkes*, the applicant submitted an application to mine peat on property in Minnesota. The Corps issued an approved JD that found the property contained wetlands with a "significant nexus" to other "waters of the United States." Hawkes did not agree; its position was that the wetlands on the property were not subject to federal jurisdiction. Hawkes appealed the JD to a federal district court, but the court found issuance of a JD did not constitute "final agency action" within the meaning of the APA. Hawkes lost, but appealed to the U.S. Court of Appeals for the Eighth Circuit where it won. Undaunted, the Corps appealed to the Supreme Court.

Once again, the Supreme Court unanimously rejected the regulator's position. Chief Justice Roberts' opinion said that regulated parties shouldn't have to wait for the Corps to "'drop the hammer' in order to have their day in court." Justice Kennedy wrote a concurring opinion, joined by Justices Thomas and Alito, in which he said the Act is "notoriously unclear" and "the consequences to landowners even for inadvertent violations can be crushing." He went on to say that the Act "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."

Many think these cases are a harbinger of things to come when EPA's Clean Water Rule finally reaches the Supreme Court. Ultimately, it was a matter of fairness

that carried the day in both *Sackett* and *Hawkes*, but whether "fairness" will come into play when the Court considers the Clean Water Rule is anyone's guess.

U.S. Army Corps of Engineers v. Hawkes Co., Inc., No. 15-290 (May 31, 2016).

OSHA PROMULGATES NEW RULE ON RESPIRABLE SILICA PARTICLES

BY: KEITH "KIP" MCALISTER, JR.

Workers who inhale very small crystalline silica particles are at increased risk of developing serious — and often deadly — silica-related diseases. These tiny particles (known as "respirable" particles) can penetrate deep into workers' lungs and cause silicosis, an incurable and sometimes fatal lung disease. Crystalline silica exposure also puts workers at risk for developing lung cancer, other potentially debilitating respiratory diseases such as chronic obstructive pulmonary disease, and kidney disease. According to OSHA, approximately 2.3 million people in the United States are exposed to silica at work.

Industry has long controlled worker exposure to these particles by using vacuum systems and other widely-available equipment. However, in an effort to better reduce exposure, OSHA recently issued its long-awaited final rule amending the standard for occupational exposure to respirable silica (the "Rule"). Companies with workers exposed to respirable silica particles must abide by the Rule and make necessary adjustments to engineering and work practice controls. As described below, of particular importance is OSHA's reduction of the permissible exposure limit (PEL).

The Rule is comprised of two standards – one for Construction and one for General Industry and Maritime. In the construction industry, workers commonly exposed include those who drill, cut, crush, or grind silica-containing material such as concrete and stone. In general industry and maritime, the most severe exposures typically occur from sandblasting operations (e.g., paint and oil removal, glass etching); however, exposures also occur during such things as cement and asphalt paving, brick manufacturing, and hydraulic fracturing.

Most notably, the Rule establishes a new PEL for all industries of 50 micrograms per cubic meter ($\mu g/m^3$) averaged over an 8-hour shift. This is a significant reduction from the prior standards, which were approximately 100 $\mu g/m^3$ for General Industry and 250 $\mu g/m^3$ for Construction and Maritime. In addition to the PEL, the Rule includes revised provisions for exposure assessment, methods for controlling exposure, respiratory protection, medical surveillance, hazard communication, and recordkeeping. Both standards take effect on June 23, 2016, although compliance with most requirements is not required for another year or two depending upon the industry. Nevertheless, to prevent unnecessary liability, companies should familiarize themselves now with the regulatory requirements and begin planning for any modifications that will need to be made to their workplace.

81 Fed. Reg. 16286 (Mar. 25, 2016).

CORPS OF ENGINEERS ISSUES PROPOSAL ON NATIONWIDE PERMITS

BY: HENRY R. "SPEAKER" POLLARD, V

In early June, the U.S. Army Corps of Engineers ("Corps") proposed to reissue its nationwide permits ("NWPs") for certain wetland impacts. The proposed changes present some interesting issues and new opportunities for wetland permitting at the federal level.

Nationwide permits issued by the Corps are general permits authorizing certain categories of activities impacting navigable waters under the Rivers and Harbors Act or "waters of the United States" under the Clean Water Act. NWPs are designed to reduce the administrative review associated with these activities because their impacts are well-understood

and minimal. Fifty NWPs currently are available, and the activities authorized range from installing aids to navigation to hazardous and toxic waste cleanup to linear transportation and utility projects. These existing NWPs expire in March 2017.

The Corps plans to reissue all 50 NWPs, although with important revisions to key conditions and definitions of some of them. The NWPs proposed for revision or for which comments are being solicited include NWPs 3 – Maintenance, 12 – Utility Line Activities, 13 – Bank Stabilization, 14 – Linear Transportation Projects, 19 – Minor Dredging, 21 – Surface Coal Mining Activities, 32 – Completed Enforcement Action, 33 – Temporary Construction, Access, and Dewatering, 35 – Maintenance Dredging of Existing Basins, 39 – Commercial and Institutional Developments, 40 – Agricultural Activities, 41 – Reshaping Existing Draining Ditches, 43 – Stormwater Management Facilities, 44 – Mining Activities, 45 – Repair of Uplands Damaged by Discrete Events, 48 – Commercial Shellfish Aquacultural Activities, 51 – Land-based Renewable Energy Generation Facilities, and 52 – Water-based Renewable Energy Generation Pilot Projects. New NWPs being proposed address removal of low-head dams (Proposed NWP A) and installation of living shorelines (Proposed NWP B).

The proposed changes to the NWPs raise several key concerns. Of particular note is whether and how to incorporate the new definition of "waters of the United States" under the Clean Water Rule. Because that rule is being litigated in courts around the country, with the Sixth Circuit having stayed the rule's effectiveness until its fate is decided, the Corps is asking for comments on how to bring the existing NWP definition of "waters of the United States" in line with its Clean Water Rule. The Corps is also seeking comment on potential increases in allowable impacted acreage and Pre-Construction Notification thresholds. The thought is that increasing allowable impacts and thresholds may facilitate greater use of NWPs while still ensuring protection of regulated waters. Further, the Corps is asking for input on whether to change the conditions (particularly involving linear feet of stream impacts) under which a district engineer may grant waivers for NWPs to be used. Additionally, the Corps is seeking comment on whether to require compensatory mitigation for all losses of intermittent and ephemeral stream bed. At present, some NWPs require no or minimal compensatory mitigation for these losses.

The proposed NWPs also present important procedural implications. First, if a permittee under a NWP has begun authorized activities or has entered into a contract for such activities, that work must be completed within one year of the March 18, 2017 expiration of the current NWP, or else the remaining work is subject to the new NWP, assuming it still qualifies. Second, if authorized activities have not commenced or are not under contract by the March 18, 2017 NWP expiration, then the activity will have to qualify for and be re-permitted under the new applicable NWP or, if no longer qualified, be authorized under a regional general permit, if one is available.

Also, public notices are being separately issued by each district engineer as to potential deviations from the proposed revisions to the NWPs. This is because the Corps' divisional and district engineers can revoke, revise or suspend an NWP within their respective jurisdictions (i) based on concerns about regional or localized individual or cumulative effects, (ii) to take into account state water quality standards and coastal zone management considerations, or (iii) to avoid conflicts with state programmatic general permits ("SPGPs").

The public comment period for the Corps' proposed action ends August 1, 2016.

81 Fed. Reg. 35186 (June 1, 2016).

MERCURY RULE MOVES FORWARD

BY: JESSICA J.O. KING

The federal lawsuit filed by twenty-three states challenging EPA's Mercury and Air Toxics Standards (MATS) is in the 8th inning, and things are not looking good for the challengers. Some background is appropriate.

Section 112 of the CAA requires EPA to regulate emissions of hazardous air pollutants, including mercury, from coal-fired power plants if it finds such regulation is "appropriate and necessary." In 2012, EPA made that finding and issued MATS as a final rule. In doing so, it reviewed the risks to human health from these emissions, but refused to consider any costs in its rulemaking. Its position was that nothing in the Clean Air Act required it to consider costs in deciding whether to issue the rule. The states sought review in the U.S. Court of Appeals for the D.C. Circuit, arguing that EPA had to consider costs at the very beginning of its rulemaking. The D.C. Circuit agreed with EPA, and the states appealed. In 2014, the Supreme Court held that costs had to be considered by EPA in determining whether regulation of these emissions is "appropriate and necessary" under Section 112. It sent the case back to the D.C. Circuit, which in December 2015 sent the rule back to EPA with directions to consider cost.

The problem is that the Supreme Court did not stay the rule, i.e., put it on hold, when it issued its decision. That meant the clock was still ticking towards the date by which power plants had to comply. The states also asked the D.C. Circuit to stay the rule while EPA considered costs. This presented owners of these plants with a choice: (i) Don't comply now, in which case there won't be enough time to order and install equipment to comply if the lawsuit fails, or (ii) comply now even though it's possible the rule ultimately could be nullified. Obviously, there is an enforcement risk with waiting to see how things turn out.

In March, the states petitioned Chief Justice Roberts to stay the rule while EPA considered costs. He denied the petition, and the states appealed to the full Court for a hearing on the issue. On June 13, 2016, that request was denied without comment.

Many believe the states won the battle, but lost the war. The estimated 600 or so power plants affected by the rule were originally required to comply with the rule by April 2015. Most have already done so or have simply shut their doors rather than hope-against-hope that the rule will be invalidated. Thus, even if the rule is ultimately overturned -- admittedly, something that now seems a long shot -- EPA will have gotten what it wanted all along.

State of Michigan et al. vs. EPA, No. 15-1152 (June 13, 2016) 77 Fed. Reg. 9304 (Feb. 16, 2012).

EPCRA SECTION 313 REPORTING: FREQUENT QUESTIONS

BY: ETHAN R. WARE

This is the second installment of frequently asked questions regarding Toxic Release Inventory (TRI) reporting under Section 313 of the Emergency Planning with Community Right-to-Know Act (EPCRA).

As noted in our first installment, EPCRA Section 313 sets standards for TRI reporting and recordkeeping associated with the use, management and storage of a variety of individual chemicals and chemical categories deemed "toxic chemicals" under EPCRA Section 313

and its implementing regulations. TRI reporting is applicable to, among others, manufacturing, mining, and electric power generation operations that have ten or more full time employees and that manufacture or process at least 25,000 pounds or otherwise use

at least 10,000 pounds of a listed toxic chemical during the most recent reporting year. The following questions and answers, derived from EPCRA regulations and various EPA resources, offer useful insights into EPA's interpretation of the TRI requirements.

Question No. 1: In 2006, EPCRA regulations were revised to require facilities to use North American Industry Classification System (NAICS) codes in lieu of the previously required four-digit SIC codes. Must a facility use the more specific six-digit NAICS code when completing the Form R for Reporting Year 2015?

> **Answer:** Yes. A facility may not rely on three digit NAICS codes when completing Form R. However, a facility should first consult the NAICS three-digit subsector code or four-digit industry group code in order to determine the proper reporting subcategory.

Question No. 2: EPA publishes "toxic equivalency" values (TEQs) for dioxin and dioxin-like compounds ("Dioxins") released during a Reporting Year and disclosed on a Form R. What are TEQs?

> **Answer:** Every Form R provides space to report the release of Dioxins at a facility. For EPA (and many in industry), what is most important for the public to understand is the relative degree of toxicity of Dioxins released, not the actual amount. To this end, a facility must report both (i) the total quantity (in grams/year) of each Dioxin category released (Form R) and (ii) the quantity (in grams/year) of each individual Dioxin compound released, according to its category (Form R Schedule 1). EPA then calculates the TEQ for each individual Dioxin released by multiplying the reported quantity released for that individual Dioxin by a "toxicity equivalent factor," providing a sense of relative degree of toxicity for the Dioxin releases.

Question No. 3: If a facility discovers it failed to file a required Form R for RY 2014 for a toxic chemical, is the facility required to file the late Form R?

> **Answer:** No. EPCRA does not require the submission of late reports. However, once the deadline passes, and until a Form R is submitted for the toxic chemical, a facility remains liable for failing to file a required Form R until the five-year statute of limitations period expires. Similarly, a facility may revise or withdraw an inaccurate Form R, but the revision does not remove liability for filing the original erroneous Form R. Accordingly, often it is best to file a late or corrected Form R to try to decrease any ongoing liability arising from a tardy or inaccurate filing.

Question No. 4: What updates to the electronic Form R were added for Reporting Year 2015?

> **Answer:** There were certain substantive changes incorporated into Reporting Year 2015 Form R (published in January 2016):
>
> a. New Facility Information: geo-mapping capability and revised facility information are now required;
> b. Nonylphenol (CAS. No. 25154-52-3): this chemical has been added to the list of reportable toxic chemicals; and
> c. P2 Enhancement: a "comment box" is now included for accidental releases of toxic chemicals, allowing explanation of how an accidental release was managed (Section 9.1).

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We are pleased to announce that Phil Conner has joined the firm's Environment & Natural Resources practice in our Columbia office.

Phil Conner has represented industrial, manufacturing and corporate clients in environmental, health and safety law matters for almost 30 years. He regularly represents companies in state, federal and administrative tribunals in matters involving toxic tort litigation, appeals on environmental permits and responses to enforcement actions brought by regulatory agencies.

Phil frequently advises clients on matters related to the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

While experienced in handling litigation in court, Phil provides counsel to clients and works with federal and state agencies, including EPA and the South Carolina Department of Health & Environmental Control (SC DHEC), to help limit litigation or prevent litigation from occurring.

Before attending law school, Phil worked as a chemical laboratory technician and a technical sales representative. Both jobs required technical understanding that, along with his Bachelor of Science degree, serves him well as an environmental defense attorney.

Phil is listed as a leading Environmental attorney in *Chambers USA* for environmental law (2015-2016) and in *The Best Lawyers in America*© (2007-2016). He has been named the *Best Lawyers*® Greenville "Lawyer of the Year" for Environmental Litigation four times (2012, 2013, 2015, 2016), and he was named among Upstate South Carolina's "Legal Elite" by *Greenville Business Magazine* in 2013.

Phil serves on the Greater Greenville Chamber of Commerce Environmental Issues Committee, and he is a member of the Carolinas Air Pollution Control Association (CAPCA). He earned a Bachelor of Science degree, a Master of Business Administration degree and his Juris Doctor degree from the University of Georgia.

CHAMBERS AND PARTNERS

Five Williams Mullen Environmental Attorneys Ranked in *Chambers USA*

With the recent addition of Phil Conner, our Environment & Natural Resources team now features five attorneys ranked in the most recent edition of *Chambers USA*. These attorneys are located throughout our footprint and give our team a wealth of knowledge and experience in a number of key environmental topics. Congratulations to Phil and Ethan Ware in Columbia, Amos Dawson in Raleigh and Channing Martin and Speaker Pollard in Richmond for receiving the recognition.

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