

ENVIRONMENTAL NOTES

June 2015

EPA ISSUES SIP CALL TO ELIMINATE SSM DEFENSE

BY: CHANNING J. MARTIN

EPA has issued a final rule that requires 36 states to revise their State Implementation Plans to eliminate a well-known and often-used Clean Air Act defense for excess emissions. While specific elements of the defense differ from state-to-state, the defense generally offers protection from enforcement when manufacturers and other sources exceed emission limits during periods of startup, shutdown, or malfunction (“SSM”). The idea behind the defense is that excess emissions during these periods are often unavoidable, and it would be unfair to impose penalties under such circumstances. Virginia, South Carolina and North Carolina have long had such a defense in their air regulations and their approved SIPs.

Enter the Sierra Club. It filed a petition for rulemaking with EPA in 2011 alleging that SSM provisions were inconsistent with the Clean Air Act and asking that all SSM provisions be removed from all state SIPs that had them. In response, EPA issued a proposed rule in 2013 that would require states to remove all SSM provisions, *except for* provisions providing an affirmative defense for excess emissions during periods of malfunction. EPA reasoned that even properly designed, maintained and operated sources would sometimes have difficulty meeting emission limits during malfunctions due to circumstances beyond their control. As long as the source was required to prove the malfunction was beyond its control and that it acted expeditiously and reasonably to minimize emissions and correct it, then EPA was ok with the defense.

Enter the United States Court of Appeals for the D.C. Circuit. In 2014, that Court struck down an affirmative SSM defense contained in EPA’s National Emission Standard for Hazardous Air Pollutants (“NESHAP”) for

Portland Cement Plants. See *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). Although that case dealt with a NESHAP, not the National Ambient Air Quality Standards encompassed by SIPs, EPA seized on it in the final rule as the basis for changing its mind and determining that all SSM provisions must go.

Among other states, EPA’s SIP call requires Virginia, South Carolina and North Carolina (including the local air jurisdiction in Forsyth County) to remove their SSM provisions and to submit a revised SIP without them. The deadline for all 36 states to comply is November 22, 2016. But wait – you guessed it. Litigation over the proposed rule is inevitable, and simply because EPA says SSM provisions must be shelved does not mean the courts will agree. We will keep you advised. The final rule was issued May 22, 2015 but has not yet been published in the Federal Register.

EPA AND CORPS DEFINE “WATERS OF THE UNITED STATES”

BY: CHANNING J. MARTIN

EPA and the Army Corps of Engineers have promulgated a final rule defining the scope of federal jurisdiction over wetlands and other “waters of the United States” under the Clean Water Act. Dubbed the “Clean Water Rule” by EPA, the 297-page document was issued to clear up the regulatory uncertainty over the scope of federal jurisdiction resulting from the U.S. Supreme Court’s “significant nexus” 2006 decision in *Rapanos v. United States*. Instead, many are claiming it’s a massive power grab by the federal government that muddies the waters further. The House of Representatives has already voted to block the rule, and the Senate has a bill before it to do the same. The U.S. Chamber of Commerce, American Farm Bureau Foundation, and other industry groups have vowed to challenge the rule in court.

So what does the rule do? In a nutshell, it seeks to reduce the number of instances where a case-by-case “significant nexus” analysis is required by better defining what waters are regulated. Among other things, it defines for the first time tributaries that have a significant connection to downstream waters, and it includes new distance-based metrics for determining the extent to which jurisdiction reaches nearby waters. But critics contend the rule is written so that the greater specificity it provides expands jurisdiction even more. They say that rather than limiting jurisdiction, the use of distance-based metrics makes it possible to extend federal jurisdiction to just about any water anywhere.

The final rule was issued on May 26, 2015, but has not yet been published in the Federal Register. It will be effective 60 days after it has been published. This issue is far from resolved, and a trip back to the U.S. Supreme Court seems inevitable.

FREQUENT QUESTIONS: EPCRA 313

BY: ETHAN R. WARE

This is the third and final installment of Frequent Questions related to Form R Reports due July 1. The Frequent Questions are published by EPA or researched to aid compliance with this complicated regulatory program.

QUESTION: In the previous year’s Form R, a facility mistakenly reports a Toxic Chemical is “otherwise used” at its plant, rather than “processed.” As a result, the facility mistakenly files a Form R for the chemical, of which it only used 15,000 pounds the previous year. Must the facility retract the erroneous Form R since it will not be filing a Form R for this reporting year?

ANSWER: A facility may request to retract an erroneous Form R if submitted unnecessarily. However, EPA will not accept requests for retraction later than one year after the due date for that Form R.

QUESTION: Do Form R reporting requirements allow for the possibility a Toxic Chemical can lose its identity as a side product in a reaction, and, therefore, the difference between “input and output” volumes may not always be due to a release?

ANSWER: Yes. When calculating the amount of Toxic Chemical released under Form R, the facility has to account for the amount of the Toxic Chemical the facility either manufactures or processes regardless whether the chemical is converted to another chemical in process. “Releases” required to be reported on the Form R are to be calculated for any part of the process involving the listed Toxic Chemical.

QUESTION: A facility covered by EPCRA 313 requirements ships a 55 gallon drum containing less than one-inch of Toxic Chemical offsite for discard. Must the facility report the Toxic Chemical contained in the drum as “off-site transfer” for purposes of disposal under Form R?

ANSWER: Yes. While the drum is considered “empty” under hazardous waste regulations, those definitions do not apply to EPCRA. The content of the drum is still considered a Toxic Chemical for Form R reporting, and the term “release” for reporting on Form R includes “abandonment or discarding of barrels [or] containers.” Disposal of any amount of Toxic Chemical is reportable.

QUESTION: A wastestream containing hydrochloric acid and sulfuric acid goes up a stack. Before exiting the stack, the wastestream passes through a scrubber where the acids are neutralized. The mist exiting the stack has a pH of about 8.0, but contains chloride and sulfate ions. Does the facility report the release of hydrochloric and sulfuric acid?

ANSWER: No. Since the pH of the resulting wastestream is between 6.0 and 9.0, the facility should report a release of zero for both acids. This interpretation is consistent with EPA’s preamble discussion regarding reporting zero releases for neutralized wastewater streams at 53 Fed. Reg. 4517.

GENERATORS NEED TO BE VIGILANT ABOUT TCLP SAMPLING PROTOCOL

BY: A. KEITH “KIP” MCALISTER, JR.

The Toxicity Characteristic Leaching Procedure (TCLP), SW-846 Method 1311, was promulgated by EPA pursuant to the Resource Conservation and Recovery Act to test and determine the potential leaching rate of disposed hazardous wastes in landfills. 55 Fed. Reg. 11797, 11827

(Mar. 29, 1990); 40 CFR 261.24(a). The TCLP is commonly used to determine if wastes are hazardous wastes. If analytical results of the leachate generated by the test contain certain constituents above regulatory thresholds, then the waste is hazardous waste and must be managed as such.

EPA acknowledges that field samples acquired for TCLP analysis often exceed the allowable size prescribed by the method, so laboratory subsampling or particle size reduction is required. This can cause the physical characteristics of wastes to be altered, causing inaccurate TCLP results. That outcome could be costly to anyone seeking to dispose of waste because waste that would otherwise be non-hazardous solid waste would now have to be managed and disposed of as hazardous waste. Moreover, exceedances of thresholds may trigger additional requirements, such as treatment prior to land disposal.

EPA guidance suggests alternative sampling techniques may be implemented to minimize or eliminate the particle size reduction step and limit a constituent's exposure to TCLP's leachate. EPA OSWER, *RCRA Waste Sampling Draft Technical Guidance, Planning, Implementation, and Assessment*, EPA 530-D-02-002 (Aug. 2002). Because TCLP does not explicitly describe how to perform particle size reduction, an analyst must use his or her best professional judgment to ensure that the sample is representative. G. Hansen, EPA Regulatory Guidance Letter ("RGL"), *Exemption from Particle Size Reduction Step in TCLP*, PPC 9442.1991(13) (Oct. 9, 1991). Practices that cause test results to be unrepresentative are prohibited. For example, cleaning, scrubbing, or freezing are likely not authorized. *Id.*; G. Hansen, EPA RGL, *Particle Size Reduction Procedure for TCLP Samples of Dry Cell Batteries*, PPC 9442.1991(07) (May 29, 1991).

The bottom line is that companies need to understand that particle size reduction can have an effect on TCLP analytical results. If results exceed TCLP thresholds, companies may wish to examine whether particle size reduction of the waste was performed by the lab prior to performing the test and, if so, whether it was necessary and/or was performed properly. This small amount of due diligence might avoid an otherwise expensive regulatory mistake.

EPA PROPOSES TO REDESIGNATE CHARLOTTE AREA TO ATTAINMENT FOR OZONE STANDARD

BY: RYAN W. TRAIL

On May 21, 2015, EPA proposed to approve the State of North Carolina's request to redesignate its portion of the bi-state, Charlotte-Rock Hill 8-hour ozone nonattainment area (the "Area"), to attainment for the 2008 8-hour ozone National Ambient Air Quality Standards ("NAAQS") (the "Proposed Rule"). A similar request was made in April by South Carolina for its portion of the Area and is currently pending at EPA.

The Proposed Rule outlines EPA's decision to recommend redesignation because (1) upon evaluation of monitoring station data from 2012-2014, the Area has attained the 2008 8-hour ozone NAAQS; (2) North Carolina has a fully approved state implementation plan (SIP) (for all requirements applicable for redesignation); (3) North Carolina has met all applicable SIP requirements for its portion of the Area; (4) the air quality improvement in the Area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, applicable federal air pollution control regulations, and other permanent and enforceable reductions; and (5) the North Carolina portion of the Area has a fully approved maintenance plan. EPA will accept comments on the Proposed Rule until June 11, 2015.

The good news for manufacturers and other sources is that the redesignation would translate to less stringent permitting requirements for new and existing sources, most notably in the area of New Source Review (NSR), with industries in the Area being regulated under the Prevention of Significant Deterioration (PSD) regulations rather than the non-attainment new source review standards. The bad news is that the Proposed Rule comes on the heels of another proposed rule from EPA, which may soon lower the 8-hour ozone standard from 75 parts per billion (ppb) to between 65 and 70 ppb, potentially causing the Area to fall back into non-attainment (the 3-year design value for 2012-2014 for the Area was 73 ppb). Where the standard may fall in the range remains to be seen, but EPA must finalize the proposed ozone standard by October 1, 2015.

80 Fed. Reg. 29250 (May 21, 2015)

SOUTH CAROLINA COURT LIMITS CERCLA REMEDIES

BY: JESSIE J.O. KING

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) allows the federal government to collect funds from or to order a “potentially responsible party” (“PRP”) to clean up contaminated sites. 42 U.S.C.A. §9601 to 9675 (1988), as amended. A PRP that has incurred necessary costs to remediate a contaminated site can file a claim for cost recovery under CERCLA Section 107(a) to recover all of its costs from other PRPs or can file a contribution claim to require them to pay their equitable share of the costs under Section 113(f). Federal courts across the country have been split as to whether a PRP could bring both a direct claim under Section 107 and a contribution claim under Section 113.

In *PCS Nitrogen v. Ross Development Corporation*, 2015 BL 134503, D.S.C. No. 14-cv-4252 (May 5, 2018), a South Carolina federal judge recently held that, where a PRP can satisfy the pleading requirements of both a cost recovery claim and a contribution claim, it is limited to only a contribution claim. In the Ross case, PCS Nitrogen (PCS) performed remedial activities under a CERCLA Section 106(a) Unilateral Administrative Order (UAO) issued by EPA. The UAO ordered PCS to clean up the site. PCS sought to recover its cleanup costs pursuant to both Section 107(a) and Section 113(f). The Court held: (1) PCS was permitted to bring a 107(a) cost recovery claim because it incurred “necessary” response costs; and (2) PCS was permitted under CERCLA to bring a 113(f) contribution claim because the UAO was the functional equivalent of a civil action under Section 106. Finally, the Court ruled that PCS could not do both, holding that whenever a party may properly bring a contribution action, it is precluded from bringing a cost recovery action as well. It is uncertain whether other federal courts will follow South Carolina’s lead. In the meantime, PRPs are likely to continue to include both cost recovery and contribution causes of action in their lawsuits to heighten the chance of fully recovering their response costs.



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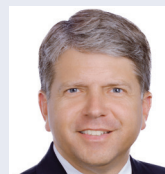
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