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# ENVIRONMENTAL NOTES

July 2017

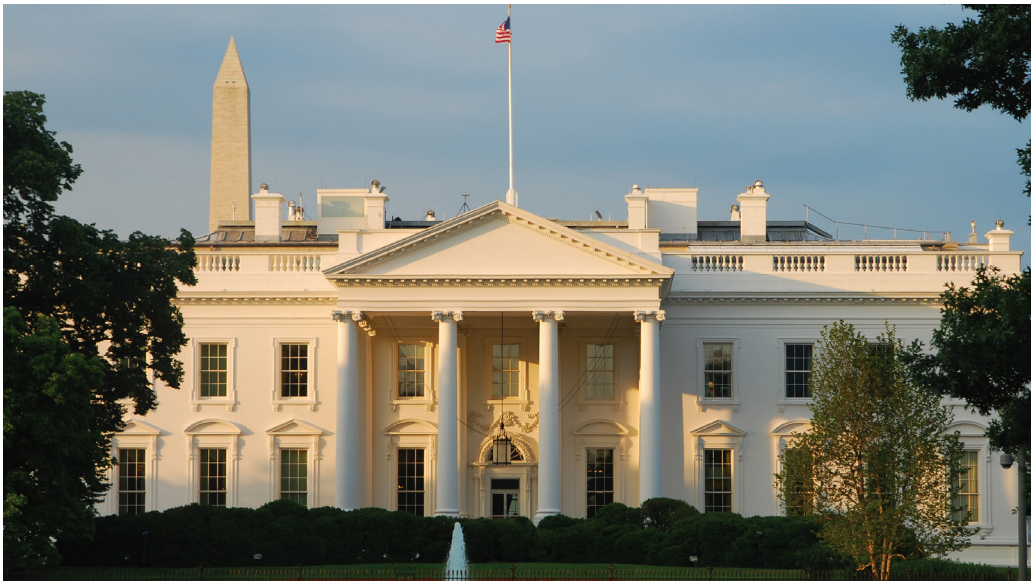
## UNITED STATES WITHDRAWS FROM PARIS CLIMATE AGREEMENT

BY: PHILLIP L. CONNER

On June 1, 2017, President Trump announced that the United States will withdraw from the Paris climate agreement ("Paris Agreement"). The Paris Agreement was signed by 195 countries in December of 2015. The goal of the agreement is to reduce greenhouse gas emissions to combat climate change. Withdrawing from the Paris Agreement essentially ends implementation of the carbon reduction targets set under the Obama Administration.

Under the Paris Agreement, each participating country set its own emission targets, though the reduction goals are not legally binding. The United States committed to reduce its carbon emissions by 26 to 28 percent below 2005 levels by the year 2025, a reduction of approximately 1.6 billion tons in annual emissions. The Paris Agreement also committed developed nations to offer financial aid to developing countries to assist in the implementation of cleaner energy resources. The Obama Administration pledged as much as $3 billion to developing countries by 2020.

President Trump's rationale for withdrawing from the Paris Agreement is his belief that it's a "bad deal" for the United States that will disadvantage American workers while providing an unfair advantage to foreign counties. The Paris Agreement would result in a host of additional federal regulations that the President says would damage the economy, kill jobs and drive up energy prices across the country. A study published in March of 2017 by the National Economic Research Associates estimates that participation in the Paris Agreement would cost 2.7 million jobs by 2025, including the loss of 440,000 manufacturing jobs. At the same time, China and India would be allowed to add coal-fired capacity. President Trump said, "This agreement is less about the climate and more about other countries gaining a financial advantage over the United States." Despite withdrawing from the Paris Agreement, President Trump said that he is open to renegotiating carbon reductions for the United States, but he has not offered any specific details or timeframes.



Opponents of withdrawal from the Paris Agreement claim that the United States will now be isolated in the global effort to curb climate change. Not surprisingly, the announcement drew significant criticism from various foreign heads of state as well as certain politicians and business leaders. Some mayors and Governor Brown of California have even committed to adopting the goals of the Paris Agreement, although it is not clear how successful those efforts will be without supporting federal regulation. What is clear, however, is that the climate and economic effects of withdrawal from the Paris Agreement are a topic that will be debated for some time to come.

## EPA ADMINISTRATOR MAKES STREAMLINING SUPERFUND A PRIORITY

BY: CHANNING J. MARTIN

EPA Administrator Scott Pruitt believes that "Superfund cleanups take too long to start and too long to complete." That's the impetus behind a May 22, 2017 internal memo he issued regarding EPA's Superfund program. In it, he said, "The process of evaluating the contamination at a site and developing the appropriate remedy can take years – if not decades – delaying remediation of the site and withholding the full beneficial use of the area from the local community. Under my administration, Superfund and the EPA's land and water cleanup efforts will be restored to their rightful place at the center of the agency's core admission."

The memo indicates that Administrator Pruitt is taking two immediate actions. First, "to promote increased oversight, accountability and consistency in remedy selections," Administrator Pruitt cancelled authority previously provided to the EPA Assistant Administrator for the Office of Land Emergency Management (which has jurisdiction over Superfund) and to all EPA Regional Administrators to issue remedies for certain Superfund sites. Now, the Administrator and his staff will select the remedy at sites whose cleanup is estimated to cost $50 million or more. This decision is widely seen as a way for the Administrator to expedite the cleanup of large sites that have been stalled for years. Second, notwithstanding the change, Administrator Pruitt directed Regional Administrators and their staff to more fully and frequently coordinate with his office throughout the process of developing and evaluating alternatives and selecting a remedy, particularly at sites with remedies estimated to cost $50 million or more.

Perhaps the most significant aspect of the memo is the Administrator's appointment of a task force "to provide recommendations on an expedited timeframe on how the agency can restructure the

cleanup process, realign incentives of all involved parties to promote expeditious remediation, reduce the burden on cooperating parties, incentivize parties to remediate sites, encourage private investment in cleanups and sites and promote the revitalization of properties across the country." The task force is chaired by Albert Kelly, Senior Advisor to the Administrator, and will include leaders from OLEM, the Office of Enforcement and Compliance Assurance, the Office of General Counsel, EPA Region III and other offices as appropriate. The Administrator required that a report be issued by the task force by June 21, 2017.

The Administrator wants recommendations to streamline and improve the efficiency and efficacy of the Superfund program. Among other things, he has directed the task force to focus on strategies that will reduce (i) the amount of time between identification of contamination at a site and a determination that a site is completed and ready for reuse, and (ii) studies that are "nice to know," but don't contribute to selection of a remedy. We think Administrator Pruitt is right to order a top-to-bottom review of the Superfund program. We'll let you know what the Task Force concludes once it issues its report.

*Prioritizing the Superfund Program* by Administrator Scott Pruitt (May 22, 2017).

## EPA STAYS LANDFILL METHANE RULES

BY: RYAN W. TRAIL

EPA recently announced a 90-day stay for reconsideration of rules governing performance standards and emissions from Municipal Solid Waste (MSW) Landfills. The final rules issued in July 2016 established new source performance standards (NSPS) to reduce emissions of landfill gas from new, modified, and reconstructed MSW landfills and revised guidelines for reducing emissions at existing MSW landfills. In October, 2016, industry petitioners requested reconsideration of the final rules.

Under the Clean Air Act, EPA may consider a request for reconsideration of a final rule or regulation only if it was "impracticable" to raise the objection during the public comment period or if grounds for the objection arose after the comment period. In either case, EPA must also determine the objection is centrally relevant to the outcome of the rule. If these criteria are met, EPA may stay the rule for reconsideration for a period not to exceed 90 days.

In this case, EPA found one issue raised by petitioners met the Clean Air Act criteria for reconsideration of a final rule. When the rules were published as "proposed," EPA included Tier 4 surface emissions monitoring (SEM) as an optional monitoring method. This optional method was based

on surface monitoring to demonstrate emissions were below specific thresholds. The Tier 4 SEM method would allow landfills exceeding certain modeled emission rates using other methodology (Tiers 1, 2, or 3) to demonstrate site-specific surface methane emissions are low. A landfill demonstrating surface emissions below 500 parts per million (ppm) for four consecutive quarters would not trigger the requirement to install a gas collection and control system, even if Tier 1, 2, or 3 calculations indicated the 34 million megagrams per year threshold for installation of controls was exceeded.

However, when the final rules were published, significant restrictions on the use of Tier 4 SEM were included, such as limits on wind speed, the use of wind barriers, and restricting the use of Tier 4 SEM to certain landfills. EPA determined that because these restrictions were not part of the proposed rules and were added without public review and comment, it was "impracticable" for petitioners to raise any objections during the comment period. EPA also found petitioners' objections to Tier 4 SEM restrictions were centrally relevant to the outcome of the rule. Because Tier 4 SEM can be used to determine when and if gas collection and control systems must be installed, the restrictions reduced the intended flexibility of the rules.

While EPA focused particularly on Tier 4 SEM restrictions within the rules, the Agency felt it necessary to stay the rules in their entirety because the provisions were integrally linked to how the rules function as a whole. The 90-day stay for reconsideration began on May 31, 2017. Landfills owners and operators should stay tuned; the fate of the Tier 4 SEM option is yet to be determined.

82 Fed. Reg. 24878 (May 31, 2017).

## REFRIGERATION SYSTEMS TARGETED: RISK MANAGEMENT PLANS AND RELEASE REPORTING

**BY: ETHAN R. WARE**

Companies operating ammonia refrigeration systems are easy targets for EPA under a number of environmental programs. Recent history suggests release reporting under Section 112(r) of the Clean Air Act (CAA) and under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Emergency Planning and Community Right-to-Know Act (EPCRA) result in the greatest risk of enforcement.

For example, from 2014 to 2016, a California food processor experienced releases of excessive ammonia from its refrigeration systems on two occasions. The first release in 2014 resulted in 2,700 pounds of anhydrous ammonia escaping

to the atmosphere. The second release in 2016 resulted in the release of 800 pounds. Fifteen employees were hospitalized as a result of the ammonia releases.

Section 112(r) of CAA requires a facility to prepare a risk management plan (RMP) if it has in process more than a threshold amount of a regulated substance. Anhydrous ammonia is a regulated substance with a reporting threshold of 10,000 pounds. Covered facilities must file an updated RMP every five years; updated RMPs must include (1) a hazard assessment, (2) a prevention program, and (3) an emergency response program.

Following the 2014 release, EPA alleged that the California food processor had committed violations of these CAA §112(r) prevention program requirements:

- Lack of employee training about risks associated with the release of ammonia and about use of personal protective equipment;
- Failure to perform annual inspections and tests on refrigeration system; and
- Absence of documentation showing the ammonia process equipment complied with industry standards (primarily for piping at the plant).

EPA also cited the processing plant for failing to timely file CERCLA and EPCRA reports. Under CERCLA §103(a), a facility must "immediately" report to the National Response Center (NRC) a release to the environment of a hazardous substance if the release exceeds the reportable quantity (100 pounds for ammonia) within a 24-hour period. EPA defines "immediately" as reporting to NRC with 15 minutes after "knowledge" of a reportable release. EPCRA requires a duplicate report to the Local Emergency Planning Committee (LEPC) if the release has the potential to cross the property boundary.

The California food processor cited by EPA released more than 100 pounds of ammonia in

both the 2014 and 2016 incidents. However, the company did not report either release until two hours after the release and did not report to the LEPC at all. Fines and costs assessed by the United States for these violations totaled $437,930. This evidences a marked increase in EPA penalties for similar events. Since none of these reporting requirements are delegated to state environmental agencies, these penalties indicate EPA is not shy about taking enforcement action.

## PESTICIDE BILL AIMED TO EASE DUPLICATIVE REGULATORY BURDEN

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

In another attempt to reign in burdensome regulations, the U.S. House of Representatives passed a bill in late May to eliminate duplicative permitting requirements for pesticide use. The Reducing Regulatory Burdens Act of 2017 has its genesis in a 2009 appellate court decision that overturned EPA's rule governing use of pesticides on or near waterways. Because of the court ruling, Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) approvals, as well Clean Water Act (CWA) permits, have been required for pesticide applications that may leave residue in Waters of the United States.

Under FIFRA, EPA regulates the registration, sale and labeling of pesticides. Registrations and labels are approved for distribution in commerce only after extensive review of data and information submitted to EPA. The CWA requires a NPDES permit for any discharge of pollutants to surface waters, unless an exception applies. In 2006, EPA issued a rule revision adding pesticides to the list of CWA exceptions, provided that the pesticides are managed in accordance with FIFRA. This avoided regulation under both statutes. EPA's action was then challenged by environmental and industry groups.

In 2009, the United States Court of Appeals for the Six Circuit reviewed EPA's final rule exempting pesticides from NPDES permitting requirements. It determined that, contrary to EPA's view, pesticides fit the definition of pollutant under the CWA and were applied from a point source. Therefore, the Court vacated the rule.

Following the November election, farmers, businesses, pesticide applicators and others lobbied Congress and argued they were enduring significant regulatory burdens to comply with duplicative approval requirements. The House bill codifies the EPA rule and is tailored to alleviate the regulatory burden. If the bill passes the Senate and is signed by the President, it will provide much needed relief for pesticide users.

71 Fed. Reg. 68,483 (Nov. 27, 2006); *The National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009).

Reducing Regulatory Burdens Act of 2017, H.R. 953, 115th Congress (2017-2018).

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## Six Williams Mullen Environmental Attorneys are Ranked in *Chambers USA*

Our Environment & Natural Resources team features six attorneys who are ranked in *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 Conner, Jessie King 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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