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ENVIRONMENTAL NOTES

May 2017

BYE-BYE CLEAN POWER PLAN

BY: CHANNING J. MARTIN

The Clean Power Plan ("CPP"), and its companion new source review rule, is the Obama Administration's signature regulation on reducing greenhouse gas emissions from power plants. Among other things, it requires states to put in place programs designed to reduce overall nationwide carbon emissions from existing power plants by 32% by 2030 compared to 2005 levels. Issued as a regulation by EPA in 2014, it has faced tough times from the get-go – and things are only getting worse.

Almost immediately after it was promulgated, 29 states and dozens of corporations and industry groups filed suit to invalidate it. After the U.S. Court of Appeals for the District of Columbia Circuit refused to stay the effectiveness of the rule during the pendency of the litigation, the United States Supreme Court in February 2016 stepped in and blocked the rule until it could hear the case. The Supreme Court's action was unprecedented: It was the first time the Court had blocked implementation of an environmental regulation before the D.C. Circuit could consider the regulation on its merits. Strike One.

President Trump pledged during the campaign to eliminate many of President Obama's actions to combat climate change, and on March 28, 2017 he signed an Executive Order directing EPA to review the CPP and, "if appropriate," to suspend, revise or rescind the rule. Strike Two.

The full D.C. Circuit held arguments on the CPP litigation in February, 2017, but on May 1, 2017 -- a little more than a month after the Executive Order was signed -- that court granted the Trump Administration's request to suspend the litigation. The court agreed to do so for 60 days, and asked the parties to brief the court by May 15 on whether to remand the CPP to EPA for further consideration or hold the litigation in abeyance while EPA undertakes its review. Considering the national attention focused on this case and how far along the litigation was at the time, the D.C. Circuit's action was also unusual. Strike Three.

EPA has a host of options in deciding what to do with the CPP and its companion new source review rule, but rest assured it will be a long and drawn-out process. The CPP received over four million public comments when it was proposed, and it's clear the public, trade associations, utilities and environmental groups have a significant interest in the outcome.

Three strikes and you're supposed to be out, but if by chance the CPP survives and makes it to the Supreme Court, President Trump believes there is a pinch hitter he can call on: Justice Neil Gorsuch. The Supreme Court granted its February, 2016 stay on a 5-4 vote, and it's a pretty sure bet that with Justice Gorsuch replacing Justice Scalia, the vote on the legality of the CPP (at least as it exists now) would be 5-4 against the rule.

What's the next shoe to drop? It's whether the United States will withdraw from the Paris Agreement on climate change, an agreement among 144 ratifying countries that addresses greenhouse gas emissions, mitigation and adaptation. Under that agreement, the Obama Administration pledged to cause the United States to reduce greenhouse gas emissions 26 to 28 percent below 2005 levels by 2025. During the campaign, President Trump pledged that the United States would withdraw from the agreement, but there are serious international implications associated with doing so. President Trump is now said to be reconsidering his position, due in large part to his daughter, Ivanka Trump, and her husband, Jared Kushner, Senior Advisor to the President, both of whom are in favor of the agreement. The President is expected to decide by the end of May.

We'll keep you apprised.

TRUMP ADMINISTRATION RESPONDS TO LAWSUIT CHALLENGING "TWO FOR ONE" EXECUTIVE ORDER

BY: RYAN W. TRAIL

Last month we discussed President Trump's recent executive order entitled "Reducing Regulation and Controlling Regulatory Costs," and the legal challenge that followed. The Order called for executive agencies to identify two existing regulations for every one new regulation issued, with the goal being a total incremental cost of "zero" for all new regulations. The Natural Resources Defense Council ("NRDC") and others quickly filed a complaint seeking a declaratory ruling that the Order is an infringement on legislative authority and exceeds the President's powers under the Constitution.

On April 10, the Trump administration filed a motion to dismiss. The motion alleges plaintiffs have no standing to bring the action, the action is not ripe for review, and alternatively plaintiffs have failed to state a claim that would permit them to challenge the Order. In its memorandum supporting the motion, the United States argues the NRDC and other groups have no standing to bring the action. To have standing, plaintiffs must show (1) an "actual or imminent," "concrete and particularized" injury-in-fact, (2) a "causal connection between the injury" and the challenged action, and (3) a likelihood that the "injury will be redressed by a favorable decision." The United States argues the plaintiffs have not identified any member who has been harmed by the Order and contends any allegation of harm is entirely speculative because no agency action has occurred in response to the Order. Similarly, because no agency action has

taken place, the United States argues plaintiffs' claims are not ripe for review by the court.

The complaint filed by plaintiffs is based on the premise that consideration of costs in the rulemaking process is an "impermissible and arbitrary" consideration and amounts to a violation of the separation of powers. The United States argues that because the language of the Order requires it be applied only "to the extent permitted by law," this means the Order necessarily can't violate the separation of powers. Plaintiffs also say considering costs would amount to an ultra vires (beyond the power) action by agencies. The United States disputes these arguments and says consideration of costs is squarely within the powers of executive agencies and is a relevant factor they should consider.

The district court has yet to consider the Trump administration's motion to dismiss. The outcome of this case will have a significant impact on the regulated community because if the Order is upheld, regulated parties could see a significant reduction in their regulatory burdens. As always, we will keep you updated on developments in the case.

Public Citizen Inc. et al. v. Donald Trump et al., No. 1:17-cv-00253, U.S. District Court for the District of Columbia

TRUMP ORDERS FEDERAL AGENCIES TO RECONSIDER ENERGY AND CLIMATE CHANGE INITIATIVES

BY: PHILLIP L. CONNER

President Trump signed an executive order on March 28, 2017 that will have a significant impact on existing energy and environmental policies and regulations. Entitled "Promoting Energy Independence and Economic Growth," the executive order requires federal agencies to review such policies and regulations and identify those that encumber energy production, constrain economic growth and prevent job creation. Agencies are directed to suspend, revise or rescind policies and regulations that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public and to comply with applicable laws.

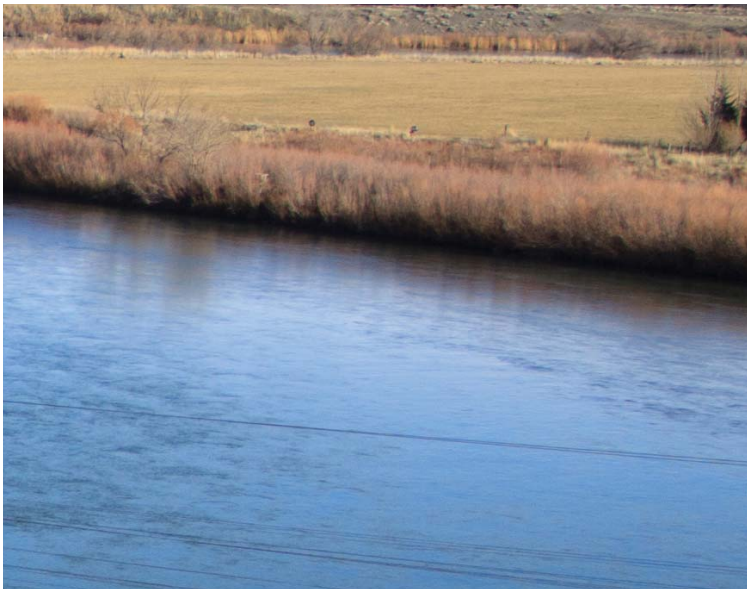
The reviews mandated by the executive order will apply to all existing regulations, orders, guidance documents, policies and other agency actions. In conducting the reviews, agencies are instructed to pay particular attention to initiatives that burden the use of oil, natural gas, coal and nuclear energy. Timeframes for performing the reviews are tight. The head of each agency must develop and submit a plan to carry out the reviews within 45 days of the date of the executive order. Within 120 days of the date of the executive order, the head of each agency must submit a draft final report detailing the agency's recommendations. The reports must then be finalized within 180 days of the date of the executive order.

The executive order specifically targets certain rules and guidance for review, including those associated with EPA's Clean Power Plan. In addition, the Interagency Working Group on Social Cost of Greenhouse Gases ("IWG") is disbanded, and documents issued by the IWG are withdrawn as no longer representative of governmental policy. Moratoria on coal leasing activities are also lifted.

In addition to requiring agencies to review initiatives that burden development or use of energy resources, the executive order revokes the following Presidential actions taken under the Obama administration:

i. Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);

ii. Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);



iii. Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment); and

iv. Presidential Memorandum of September 21, 2016 (Climate Change and National Security).

The executive order also rescinds two Executive Office reports dealing with climate action plans and a final guidance dealing with greenhouse gas emissions and the effects of climate change.

Complying with the executive order will present a challenge to those agencies that have policies and regulations requiring review. Besides determining whether relevant initiatives potentially burden the development or use of domestically produced energy resources, the executive order requires an analysis of whether the initiatives comply with underlying law and are of greater benefit than cost. Applying these criteria to the numerous initiatives that will be reviewed is certain to result in strong opposition and, in some instances, litigation by environmental groups and others. We expect that the impact of the executive order on energy production, greenhouse gas regulation and climate change regulation will be significant and hotly litigated for years to come.

CAN DISCHARGES TO GROUNDWATER TRIGGER CLEAN WATER ACT LIABILITY?

BY: HENRY R. "SPEAKER" POLLARD, V

It's a bad day when you find out that your facility has been leaking wastewater, wastes, petroleum product or chemicals. But if the leak went into the soil and the groundwater first, rather than a nearby creek, are you liable for an unpermitted discharge under the Clean Water Act ("CWA")? While the issue is not a new one, two very recent federal district court decisions from Virginia and South Carolina have explored this issue and continue the trend of mixed results in the federal Fourth Circuit, which includes Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

The CWA states in relevant part that, except as authorized by the CWA, no person may discharge a pollutant from a point source into navigable waters. "Navigable waters" are defined in the CWA merely as "waters of the United States," a term further defined by regulations issued by EPA to include a variety of types of surface waters and wetlands, but which do not mention groundwater. Under the CWA, a "point source" is a "discernable, confined, and discrete conveyance" and includes such features as pipes, ditches, channels, conduits, wells, discrete fissures, containers, and rolling stock. The primary means under the CWA to authorize such discharges from industrial operations, construction activities and municipal separate storm sewer systems is by issuance of a National Pollutant Discharge Elimination System ("NPDES") permit. For an enforcement action or citizen suit alleging a violation of this prohibition, each element of the prohibited activity must be proved. While EPA has most recently stated in its Clean Water Rule (now in litigation) that groundwater is itself not a "waters of the United States," EPA has in the past indicated that a person who discharges contaminants that

reach groundwater with a hydrological connection to surface waters can have liability even if the person discharges nothing directly into surface waters. Courts have issued a variety of opinions on this issue.

The January 2016 edition of *Environmental Notes* reported that a Virginia federal district court in *Sierra Club v. Virginia Electric & Power Co.* had recently denied Dominion Virginia Power's motion to dismiss a CWA citizen suit brought by the Sierra Club alleging that Dominion was discharging wastewater in violation of its VPDES permit and the CWA. (A VPDES permit is issued by the Virginia State Water Control Board pursuant to authority from EPA to administer the NPDES program in Virginia.) On March 23, 2017, the court issued its final decision and found that coal storage units at a Dominion power plant have been and are leaching arsenic into the groundwater, that the groundwater and surrounding surface waters are hydrologically connected, and that arsenic enters the surface waters via that connection. The court also concluded that, even with only minimal deference to EPA's interpretation of the CWA's NPDES prohibition against unpermitted discharges, "discharges to groundwater that is hydrologically connected to surface water are covered by the CWA." However, in a twist, the court found that the discharge was not actually in violation of Dominion's VPDES permit, because the Board does not consider groundwater to be within the scope of waters intended to be regulated under its VPDES program and permits. In addition, the court held that the evidence showed "the discharge poses no threat to health or the environment," and its lack of assessed civil penalties and monitoring-based injunctive order reflected this finding.

The other recent CWA citizen suit case is *Upstate Forever and Savannah Riverkeeper v. Kinder Morgan Energy Partners, L.P.*, a case decided by a federal district court in South Carolina on April 20. It reached a different result than the court in the *Sierra Club* case. In *Upstate Forever*, the court sided with a pipeline company and dismissed the case where an underground pipeline rupture caused a large release of gasoline directly into the soil and groundwater. The plaintiffs alleged that the released gasoline was migrating toward nearby creeks and wetlands via a presumed hydrological connection between the groundwater and those creek beds and wetlands. However, the court held that, even though the pipeline may be a point source, the plaintiffs failed to demonstrate that the discharge had reached navigable waters (defined as waters of the United States and, here, the creeks and wetlands). The court further required there to be a direct discharge to the surface waters, saying "migration of pollutants through soil and groundwater is nonpoint source pollution that is not within the purview of the CWA." The court likewise rejected plaintiff's related arguments that the point source did not need to be the pollutant's original source and that soil and groundwater themselves constitute "point sources" due to their ability to serve as conduits for movement of pollutants. Interestingly, the court contrasted the coal ash piles in the *Sierra Club* case as true point sources that collect, channel and convey pollutants, even if directly into the groundwater. In the end, failure to identify "a discrete conveyance [constituting a point source] of pollutants into navigable waters" proved fatal to the plaintiffs' case.

These cases build on a growing body of conflicting caselaw within the federal Fourth Circuit addressing whether groundwater hydrologically connected to surface waters is within the scope of "waters of the United States" and therefore "navigable waters," and whether discharges into groundwater hydrologically connected to regulated surface waters are regulated discharges within the scope of CWA's prohibition against unpermitted discharges. The Fourth Circuit has yet to render a decision on this issue, but appeals of these two cases are likely to cause that to change.

The Fourth Circuit is the battleground for these important CWA jurisdictional issues. How they play out will affect CWA legal liability for accidental spills and even routine discharges that enter groundwater first before ultimately reaching nearby surface waters.

33 U.S.C. §§ 1311(a) & 1362; Sierra Club v. Virginia Electric & Power Co., C.A. No. 2:15-CV-112, 2017 WL 1095039 (E.D. Va. March 23, 2017); *Upstate Forever and Savannah Riverkeeper v. Kinder Morgan Energy Partners, L.P.*, C.A. No. 8:16-4003-HMH (D. S.C. April 20, 2017).

REVISED MACT STANDARDS COMING FOR 13 HAP SOURCES

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

The United States District Court for the District of Columbia recently ordered EPA to update the maximum achievable control technology (MACT) emission standards for 13 sources of hazardous air pollutants (HAPs). The order was issued after the agency failed to meet deadlines required by the Clean Air Act (CAA).

Under the CAA, EPA must promulgate MACT standards for certain sources of HAPs. Because pollution control technology improves over time, EPA is required to review and, if appropriate, revise those standards every eight years. The CAA also requires EPA to consider residual risks to public health after technology-based emission standards are implemented and then, if necessary, create additional standards to protect the public. This review is typically referred to as a Risk and Technology Review (RTR).

The source categories targeted by the suit include rubber tire manufacturing; surface coating of metal furniture, large appliances and wood building products; iron and steel foundries; and printing, coating and dyeing of fabrics and other textiles. Plaintiffs alleged the MACT standards for these sources should have been updated between 2010 and 2012. Because EPA conceded it missed those deadlines, the court ruled in plaintiffs' favor and asked the parties for proposed schedules of implementation. Plaintiffs asked the court to order that the revised standards be finalized over two years. EPA claimed that would be impossible and proposed a plan for promulgation of revised rules over the next four and a half years. EPA explained RTRs consider many technical nuances that take longer to develop than the underlying emissions standard.

Agreeing in part with EPA, the court found a middle ground and ordered the agency to complete the

revisions for at least seven of the overdue source categories by the end of 2018, and to complete the remaining six by June, 2020. Bottom line: If your facility falls within the 13 source categories identified in the suit, revised MACT standards are on the way.

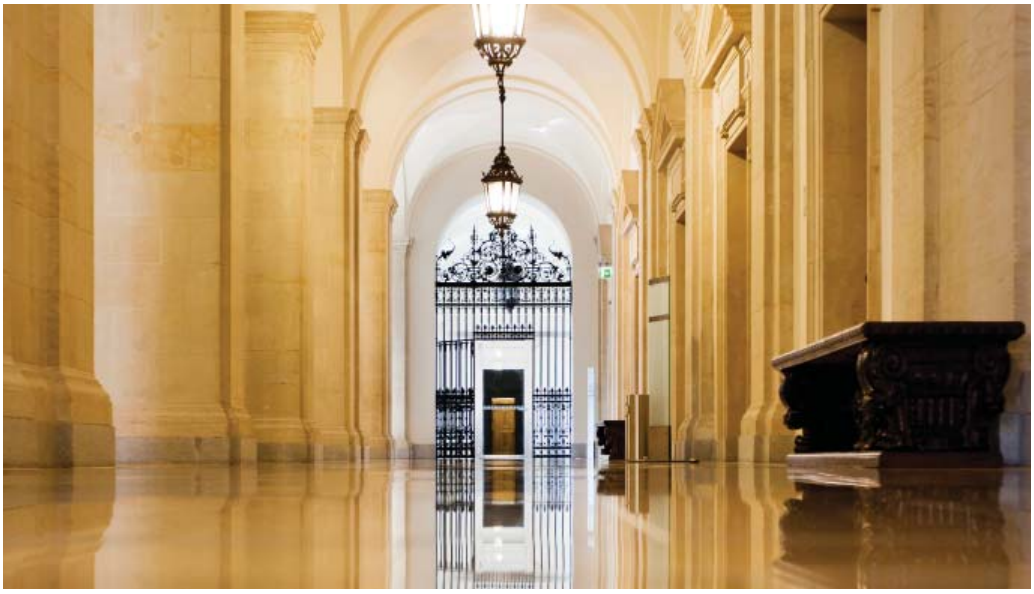
Blue Ridge Environmental Defense League et al. v. Pruitt, No. 1:16-cv-00364-CRC (D.D.C. 2016).

D.C. CIRCUIT STRIKES DOWN CERCLA REPORTING EXEMPTIONS FOR ANIMAL FEEDING OPERATIONS

BY: JESSICA J. O. KING

The United States Court of Appeals for the District of Columbia Circuit has invalidated EPA's 2008 rule exempting animal feeding operations (AFOs) from certain federal, state and local hazardous substance reporting requirements (Final Rule). The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know-Act (EPCRA) require persons to report the release of certain specified quantities of hazardous substances to the environment. Once reported, EPA has the authority to take remedial actions or order the assessment and remediation of releases under CERCLA.

AFOs can generate significant quantities of hazardous substances from the decomposition of animal waste. Specifically, when animal waste decomposes, it releases ammonia and hydrogen sulfide to the air. Ammonia and hydrogen sulfide are classified as "hazardous substances" under CERCLA and "extremely hazardous substances" under EPCRA. As a result, AFOs were previously required to report land, water and air releases of ammonia and hydrogen sulfide if those releases exceeded reportable quantities. The reportable quantity for each of those substances is 100 pounds per day.



With the issuance of the Final Rule, EPA made significant changes to AFO reporting requirements. Specifically:

- All AFOs are exempt from the hazardous substance air emissions reporting requirements in CERCLA; and
- All but very large concentrated AFOs, known as CAFOs, are exempt from state and local hazardous substances air emissions reporting requirements in EPCRA.

EPA's explanation for the changes is stated in its preamble to the Final Rule. There EPA concluded that a federal response to air emissions from animal waste is "impractical and unlikely." EPA said there is no real gain by reporting if no response will occur. The D.C. Circuit did not agree.

The ruling was the result of competing suits brought by environmental groups and two livestock trade associations. The environmental groups argued CERCLA and EPCRA do not allow EPA to exempt certain persons from complying with the reporting requirements. The livestock trade associations argued CAFOs should also be exempt since the only reason EPA kept them subject to the EPCRA reporting requirements was because of the public's desire for information, not to aid in an emergency response.

In its opinion, the D.C. Circuit recognized that AFOs and CAFOs have a difficult job in measuring releases of ammonia and hydrogen sulfide from animal waste. It noted that hazardous substances from animal waste "…after all do not come conveniently out of a smokestack". However, the court found this fact irrelevant, holding that EPA lacks authority to provide an exemption where it is not specifically allowed in CERCLA or EPCRA. The Court found that because CERCLA has specific reporting exemptions – i.e. engine exhaust, certain nuclear material, fertilizer application, solely workplace exposures, continuous releases - only those listed in the statute can be exempt. Finally, the court found EPA's action unreasonable in light of EPA's failure to prove there was no scenario where reporting would benefit the public.

The opinion includes numerous puns – such as "hold your horses, responds the EPA" and "the Final Rule ran afoul of the underlying statutes" – but it's no joke to those who operate AFOs. The impact of the opinion on them is extensive time and costs for reporting, estimated by EPA to be a million hours annually and more than $60 million annually in compliance costs. The court admits "it's possible that [the potential real benefits] are outweighed by the costs, which EPA estimates to be substantial," but it found any cost-benefit analysis could not overcome EPA's lack of authority and unreasonableness in issuing the Final Rule.

Waterkeeper Alliance v. EPA, No. 09-1017 (D.C. Cir. Apr. 11, 2017); 73 Fed. Reg. 76948 (Dec. 18, 2008)

EPA ISSUES NEW CONTAMINATED SEDIMENTS GUIDANCE

BY: ETHAN R. WARE

Earlier this year, EPA released revised guidance for remediation of contaminated sediments at sites being addressed by EPA under CERCLA (the "New Sediment Guidance"). The guidance identifies six key clarifications to EPA remedial action policies used to characterize, evaluate, and implement response actions for sediment cleanups. The New Sediment Guidance changes how industry will be required to investigate and remediate contaminated sediments in the following respects:

1. Early Action

The New Sediment Guidance requires sediment projects to incorporate "early or interim corrective measures" before the sediment contamination is fully characterized:

> Even before the sediment at a site is well characterized, if risk is obvious, it may be very important to begin to control significant ongoing land-based sources. It may also be appropriate to take other early or interim actions followed by a period of monitoring, before deciding on a final remedy.

New Sediment Guidance at p. 3. There is no direction given on how to determine what risks are "obvious" or guidance on how much characterization is required prior to beginning early or interim actions. Instead, EPA recommends its regional offices evaluate site data early "to determine if there are opportunities to reduce…unacceptable human…and environmental exposure and risk through use of early actions." This approach could prove costly for regulated entities when data are not fully developed; there is a risk cleanup actions will be unnecessary and duplicative.

2. Support Alternatives with Early Data

The New Sediment Guidance encourages collection of data early in the assessment process. For example, it states that "due to the long-time frame often needed to collect data to evaluate Monitored Natural Recovery ("MNR") as a remedial option," facilities should be directed to collect data "as soon as possible." Where bioaccumulative toxics are involved, evaluation of background levels and potential for "recontamination" must also be evaluated. This renewed effort to collect early data may also increase costs for sediment investigations.

3. Assess Risks from Submerged Sediments

EPA encourages states and EPA regions to require potentially responsible parties (PRP) to review risks associated with exposure to submerged sediments. Prior guidance required EPA regions to evaluate health risks resulting from "direct contact with sediment." The New Sediment Guidance expands the analysis to buried contaminants by re-defining dermal contact:

> Direct Contact (dermal exposure) with sediments may be particularly important in areas where swimming or wading may occur, including contact to submerged sediment, and therefore, is an important exposure particularly to evaluate at contaminated sediments sites.

New Sediment Guidance at p. 5. This means companies required to investigate sediments will be forced to broaden receptors affected by a site release, increasing scope and costs of cleanups.

4. Collect Ecological Data

The New Sediment Guidance requires companies to study impacted sediments for ecological toxicity as a whole, not just concentrations of contaminants known to be associated with the site. For the first time, EPA regions are required to design "site specific sediment toxicity tests" to evaluate holistic effects of known and unknown contaminants on the entire ecosystem present at the site. This new approach may result in companies being required to address contaminants in sediments not associated with the site.

5. Monitoring Endpoints

The NCP simply requires PRPs to "[e]stablish remedial action objectives specifying contaminants and media of concern, potential exposure pathways, and remediation goals." 40 CFR 300.430 (e)(2)(i). The New Sediment Guidance says remedial action objectives (RAOs) must also provide "timeframes for achieving the [RAO]" and conditions expected to exist when the RAO is met. To accomplish this, the New Sediment Guidance requires that RAOs include "quantitative… conditions" such as fish tissue and sediment concentrations expected to be achieved as part of the cleanups. The RAOs will be enforced through fish tissue monitoring, even if there are multiple unrelated sources for contaminants, which can result in duplicative and false data.

6. Collaborate with Clean Water Act Programs

The New Sediment Guidance encourages close coordination between the Superfund and Clean Water Act programs regarding contaminated sediments. "For example, permits and other actions taken under CWA authority could reduce the risks of sediment remedy recontamination." The New Sediment Guidance goes on to state that information gathered during Superfund cleanups "can [also] help support CWA program[s] in defining and addressing areas of ongoing recontamination" through limits in NPDES permits, impaired water designations, TMDL development, or long-term monitoring.
Moreover, Section 10 of the Rivers and Harbors Act prohibits "the creation of any obstruction" to navigation in Waters of the United States. The New

Sediment Guidance notes that remedies for sediment remediation, such as caps, may violate Section 10 by obstructing navigation. To address this, "[i]n developing and evaluating remedial alternatives…for a waterway with an authorized navigation channel, [EPA will] determine whether a Superfund response action within the boundaries of a federal navigation channel may create an obstruction…" That means caps may have to be modified or perhaps not used.

These six key items are now final guidance at EPA. Regional offices are to consider them in the preparation of Remedial Investigation/Feasibility Studies and Records of Decision.

Remediating Contaminated Sediments Sites – Clarification of Several Key Remedial Investigation/Feasibility Study and Risk Management Recommendations, and Updated Contaminated Sediment Technical Advisory Group Operating Procedures, Office of Land and Emergency Management, Directive No. 9200.1-130 (Jan. 9, 2017).

EPA PROPOSES FURTHER DELAY OF REVISED RMP RULE

BY: ETHAN R. WARE

As we reported in the April issue of *Environmental Notes*, the Trump administration issued a final rule on March 16, 2017 that delayed the effective date of regulations making significant changes to requirements applicable to Risk Management Plans (RMP) under §112(r) of the Clean Air Act (CAA). These changes were made in the waning days of the Obama administration, and were strongly opposed by many in industry. The effective date of the rule was delayed to June 19, 2017.

The Administration's action was spurred in part by a February 28, 2017 petition to reconsider the rulemaking filed by an industry group identified as the "RMP Coalition." EPA may grant the petition "if in [EPA's] judgment the petitioner raises an objection… impractical to raise during the comment period…" On April 3, 2017, EPA issued a proposed rule to delay implementation of the rule even further – to February 19, 2019 – "to allow the Agency time to consider petitions for reconsideration…and take further regulatory action, which could include proposing and finalizing a rule to revise the Risk Management Plan amendments." In addition, EPA held a public hearing on April 19, 2017 to accept comment on how it should proceed.

EPA's actions send a clear message that the revised RMP regulations are unlikely ever to become effective in their current form. We'll keep you apprised of developments.

82 Fed. Reg. 16146 (April 3, 2017); 82 Fed. Reg.13968. (March 16, 2017).

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CONTACT US

William A. Anderson, II
Partner, Washington, D.C.
202.327.5060
wanderson@williamsmullen.com

Phillip L. Conner
Partner, Columbia, SC
803.567.4611
pconner@williamsmullen.com

Amos C. Dawson, III
Partner, Raleigh, NC
919.981.4010
adawson@williamsmullen.com

Jessica J.O. King
Partner, Columbia, SC
803.567.4602
jking@williamsmullen.com

Channing J. Martin
Partner & Chair, Richmond, VA
804.420.6422
cmartin@williamsmullen.com

A. Keith "Kip" McAlister, Jr.
Associate, Columbia, SC
803.567.4604
kmcalister@williamsmullen.com

Henry R. "Speaker" Pollard, V
Partner, Richmond, VA
804.420.6537
hpollard@williamsmullen.com

Ryan W. Trail
Associate, Columbia, SC
803.567.4605
rtrail@williamsmullen.com

Ethan R. Ware
Partner, Columbia, SC
803.567.4610
eware@williamsmullen.com