

ENVIRONMENTAL NOTES

October 2017

HURRICANES AND FLOODING: SURELY EPA REGULATIONS ARE SUSPENDED?!

BY: ETHAN R. WARE

It seems to happen every year. A natural disaster disrupts fall football season, and interstates are full of evacuees gobbling up hotel rooms and squatting in the nearest safety zones. In those times, no one ever thinks of the plant environmental manager trying to decide what to do and how to comply with arcane environmental cleanup and reporting requirements in the event of a spill or explosion. Well, EPA is coming to the rescue... sort of.

On May 31, 2017, EPA issued guidance entitled, "As Hurricane Season Begins: A Reminder to Minimize Process Shutdown Related Releases and to Report Releases in a Timely Manner" ("Hurricane Guidance"). The document provides direction to EHS professionals on compliance with environmental cleanup and release reporting requirements during a hurricane or flooding event. In sum, EPA will not excuse failure to report a release or spill due to an act of God, but a facility may be relieved of some or all of its cleanup responsibility if the release or spill itself was unpreventable.

A Warning

EPA's Hurricane Guidance first cautions industry not to avoid environmental requirements during a natural disaster. "[A] hurricane is predictable and as a result, lends itself to early preparations for minimizing its effect on a facility." EPA specifically points out that the Clean Air Act (CAA) requires a "general duty to prevent accidental releases of certain [flammable and toxic substances] and... extremely hazardous substances and to minimize the consequences of accidental releases which do occur" for any air emission source. See 40 CFR 68.130 (listing covered chemicals) and Hurricane Guidance, Release Minimization Requirements, Col. 2, p.1. Covered facilities are required under EPA's interpretation of the CAA to assess hazards caused by flooding and high winds before they happen, then take steps to prevent accidental releases and minimize their consequences. Id. In other words, if EPA deems the accidental release to have been reasonably preventable, CAA liability may follow if air pollution control technology is damaged by extreme weather. This is quite a burden.

Release Reporting Requirements

Facilities are not relieved of the obligation to report the spill or discharge of chemicals that occurs during a storm event. Section 103 of the Comprehensive Environmental Response

Compensation and Liability Act (CERCLA) and its implementing regulations at 40 CFR 302.4 require the person in charge of any facility to “immediately notify” the National Response Center (NRC) of any release of a hazardous substance if the release (i) is to the environment and (ii) exceeds the chemical’s reportable quantity (RQ) within a 24-hour period. EPA guidance interprets “immediately” to mean a report must be filed within 15 minutes of learning of the release.

The facility must also warn local authorities if the release leaves the property boundaries. Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA) provides for immediate notification to the State Emergency Response Commission and Local Emergency Planning Committee when the RQ of any CERCLA hazardous substance or Extremely Hazardous Substance is exceeded and the released substance may affect areas offsite.

The Clean Water Act (CWA) governs the spill or release of oil to Waters of the United States (meaning almost all surface waters). Thus, if a spill or release occurs during a natural disaster, immediate notification to the NRC is required under the CWA where an oil sheen appears on Waters of the United States or when a spill prevention, control, and countermeasures (SPCC) plan for the facility requires reporting. See 40 CFR 110 to 112.

All of these reporting requirements are entrenched in federal law. There is no “act of God” defense for any of them, so hurricanes and flooding do not relieve a facility from its obligation to report a release despite everything else it must deal with during very difficult times.

Cleanup Obligations: Measured Relief

On the other hand, the CWA and CERCLA recognize a defense to cleanup liability if a natural disaster causes contamination, although the defense is difficult to prove. Nonetheless, facilities should not shy away from claiming relief from cleanup liability if the defense applies.



Federal law generally requires a responsible party to clean up any spill or release to the environment. Liability for cleanup is regardless of fault. Section 311(f)(1) of the CWA states that a party may be required to clean up a release of oil or petroleum products to Waters of the United States, while Section 107(a) of CERCLA holds a potentially responsible party liable for a spill or release of hazardous substances to the environment.

Both statutes excuse a party from cleanup responsibility if the release is the result of an “act of God”. See Section 311 of the CWA and Section 107(b) of CERCLA. Proving an act of God defense under either statute is not easy to do even when natural disasters cause the liability. The facility seeking relief must show (1) the act of God was unanticipated; (2) the act of God qualifies as a grave natural disaster; (3) the sole cause of the release is the act of God; and (4) the release resulting for the act of God could not have been prevented by the exercise of due care or foresight. Flooding and hurricanes likely satisfy (2) and (3) because they are “grave natural disasters” and often the “sole cause” of the spill or release. The other elements are not so easily established.

First, some courts now hold that hurricanes and other extreme weather events are not “unanticipated.” Under this view, a facility affected by such an event would fail to satisfy criterion (1). The National

Weather Service (NWS) routinely warns and updates communities of impending extreme weather events providing time in most cases to prevent or mitigate a release. As a result, arguing that the disaster could not be anticipated may be an argument that is nearly impossible to win. For example, in *Liberian Poplar Transports, Inc. v. United States*, 26 Cl Ct. 223 (1992), a federal court found a weather warning from NWS sufficient to void the act of God defense for an unanticipated oil release during a hurricane where records showed that the company monitored progress of the storm prior to its impact, but did little to secure oil containers.

For a company to argue successfully that its release could not have been prevented under criterion (4), more must be shown than the facility was not negligent in its preparation for the storm:

To relieve a defendant of its responsibility [under the act of God defense], it is incumbent on him to prove that due diligence and proper skill were used to avoid the damage and that *it was unavoidable*.

“Invoking the Act of God Defense” Env’t and Energy Law and Policy J., Vol. 3, Issue 2, p. 19 (Fasoyiro, June 9, 2009) (emphasis added). It is now almost indisputable: If a company has warning and opportunity to prevent a release during weather events, there is no defense to the cleanup under the CWA and CERCLA.

Conclusion and Recommended Strategy

There is nothing a company can do to stop a hurricane or flooding, and there is often little that can be done to prevent damages to a manufacturing plant during such events. However, if the natural disaster is truly unanticipated and the release of oil or chemicals is truly unpreventable, then there may be a defense to liability for cleanup costs associated with the release.

To minimize your plant’s risk of liability, take the following steps:

Step No. 1: Develop a list of all systems at the plant vulnerable to a natural disaster;

Step No. 2: Review emergency response protocols applicable to manufacturing and pollution control equipment and take all reasonable measures available to prevent a release from this equipment during an extreme weather event; and

Step No. 3: In the event of a pending natural disaster, document all measures taken to prevent a release, then rely on the documentation to mitigate liability for any release that may occur.

SNAP! D.C. CIRCUIT GREENHOUSE GAS DECISION A WIN FOR INDUSTRY

BY: JESSICA J. O. KING

Industries that manufacture products containing hydrofluorocarbons (HFCs), such as aerosol cans, refrigerators, automobile air conditioners, building insulation and fire extinguisher foams, can breathe easier this month thanks to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). It recently struck down part of a 2015 regulation (the HFC Alternatives Rule) issued by the United States Environmental Protection Agency (EPA) banning the use of HFCs in certain products and requiring an EPA-approved alternative.

In 1987, the United States joined the Montreal Protocol which required signatory nations to regulate the production and use of ozone-depleting substances, including chlorofluorocarbons (CFCs). To comply with the Protocol, Congress added Title VI to the 1990 Amendments to the Clean Air Act (CAA) to address stratospheric ozone protection. Around this same time, HFCs were introduced in the United States as a substitute for ozone-depleting refrigerant

gases. Therefore, HFCs were viewed as a win for the environment.

Fast-forward almost thirty years. In 2015 and 2016, EPA determined that certain HFCs must be banned because of their disproportionately large contribution to climate change compared to other greenhouse gases (GHGs) due to their high global warming potential (GWP). In fact, a reduction in the use of HFCs was a primary focus under the Obama Administration's policy of curbing GHGs. This focus was both global and domestic. In 2016, the United States reached a global agreement with participating countries to cap and reduce the use of HFCs beginning in 2019. To do its part, the United States amended its Significant New Alternatives Policy (SNAP) under Section 612 of the CAA, including requiring federal agencies to avoid purchasing products containing high GWP HFCs beginning in 2016. Under SNAP, federal agencies are required to prefer products that use alternatives to HFCs in their purchasing decisions.

As part of the Obama Administration's domestic focus on GHG reductions, EPA also targeted manufacturers that used HFCs. Specifically, in 2015 EPA issued the HFC Alternatives Rule. Like SNAP, the HFC Alternatives Rule required certain manufacturers to use alternative substances in their products with EPA approval. Like SNAP, the authority cited by EPA for issuing the HFC Alternatives Rule is Title VI, and specifically Section 612 of the CAA. Section 612, entitled "Safe Alternatives Policy", requires certain listed substances "to the maximum extent practicable...be replaced by chemicals, product substitutes, or alternative manufacturing processes that reduce overall risks to human health and the environment."

Industry challenged EPA's authority to issue the HFC Alternatives Rule. The D.C. Circuit sided with industry and held that EPA had no authority to regulate HFCs under Section 612 of the CAA for the simple reason that HFCs are not ozone-depleting substances (a fact not disputed by EPA). Specifically, the Court focused on the fact that HFCs were previously approved by EPA as a replacement for ozone-depleting substances. The Court went on to point out that in 1994, EPA published comments on the SNAP

rule specifically stating that once a manufacturer has replaced its ozone-depleting substance with an EPA approved non-ozone depleting substitute, Section 612 does not give it authority to require the manufacturer to later replace that substitute with a different substitute. Noting EPA's previous position, the Court held that allowing EPA to require a reduction of HFCs previously approved to replace actual ozone-depleting substances is inconsistent with the plain language of the CAA. Therefore, the Court vacated the 2015 rule "to the extent it requires manufacturers to replace HFCs" and sent the rule back to EPA for further proceedings. The opinion is a message to EPA that it cannot issue regulations for which it does not have statutory authority in order to push a particular environmental agenda.

Mexichem Fluor, Inc. v. EPA et al. (CA No: 15-1328 (D.C. Cir. Aug. 8, 2017).

42 USC §§ 7671, 7671a & 7671k

80 Fed. Reg. 42,870 (July 20, 2015)

TOP TEN HAZARDOUS WASTE MISTAKES

BY: CHANNING J. MARTIN

We see it time and again: violations of hazardous waste regulations occur because employees are not aware of requirements, don't understand them or, worse, cut corners. Here are our top ten hazardous waste mistakes you don't want to make (in no particular order). Note that the requirements cited in this article reflect the RCRA hazardous waste regulations as amended by EPA's Hazardous Waste Generator Improvements Rule, which took effect at the federal level on May 30, 2017. Each state authorized to administer its own hazardous waste management program must now adopt regulations at least as stringent as the federal regulations. Note that there are exceptions to some of these requirements for Very Small Quantity Generators (VSQGs), meaning those who do not accumulate at any one time more than 1,000 kg (2,200 lbs) of hazardous waste, 1 kg (2.2 lbs) of acute hazardous waste, or 100 kg (220 lbs) of acute waste spill residue or soil.



1. Lack of a proper waste determination, 40 CFR 262.11.

While this is one of the most frequently cited violations, it is also a fundamental management issue. Failure to properly identify a waste stream leads to numerous additional violations. Examples include “orphan” drums containing an unknown substance, drums of products for which there is no apparent use, and contaminated wipes, rags and filters. Facilities should have procedures for identifying all materials and conducting waste determinations before (or at the time of) waste generation.

2. Satellite containers of hazardous waste not properly managed, 40 CFR 262.15.

The use of satellite containers to accumulate hazardous waste is common. However, it is a violation to store satellite containers in areas that are not “at or near” the process or under the operator’s control or with an amount greater than 55 gallons (or greater than 1 quart of liquid acute hazardous waste or 1 kg (2.2 lbs) of solid acute hazardous waste.) Other common satellite container violations include open containers

(they should be stored closed) and lack of proper markings. Note that the newly-revised regulations apply emergency preparedness, prevention and contingency planning rules to satellite accumulation areas. Previously, those rules applied only to central accumulation areas (90 or 180-day storage areas.)

3. Containers not marked with the words “Used Oil,” 40 CFR 279.22(c).

Tanks and containers storing used oil must be labeled or clearly marked with the words “Used Oil.” Fill pipes used to transfer used oil into underground storage tanks must also be marked with the words “Used Oil.”

4. Hazardous waste containers not marked with the date accumulation began, 40 CFR 262.16(a)(6)(i)(C) and 262.17(a)(5)(i)(C).

Hazardous waste containers must be marked with the date when waste first began to be accumulated in them. That’s generally the date that waste was first placed in the container or when the amount of hazardous waste in a satellite container reaches 55 gallons. Large quantity generators (LQGs) may not accumulate hazardous waste for more than 90 days, and small quantity generators (SQGs) may not accumulate hazardous waste for more than 180 days. Very small quantity generators are not subject to time limits unless and until they exceed their allowable accumulation thresholds.

5. Lack of training or training documents, 40 CFR 262.16(b)(9)(iii) and 262.17(a)(7).

All personnel involved in hazardous waste management at LQGs are required to receive training on a yearly basis and to document that training. SQGs must ensure that all employees involved in hazardous waste management are thoroughly familiar with proper waste handling and emergency procedures.

6. Containers not marked with the words “Hazardous Waste,” 40 CFR 262.14 (a)(5) (viii)(B), 262.15(a)(5)(i), 262.16(a)(6)(i)(A) and 262.17(a)(5)(i)(A).

Containers accumulating hazardous waste must be marked with the words “Hazardous Waste.”

7. Lack of a proper contingency plan and emergency procedures, 40 CFR 262.16(b)(9) and 262.17(a)(6).

SQGs must have a basic plan while LQGs must have a contingency plan containing all required information.

8. Failure to update the name and contact information of the facility’s emergency coordinator, 40 CFR 262.16(b)(9) and 262.17(a)(6).

The facility must have an emergency coordinator and post his or her name and telephone number in areas where hazardous waste is generated or accumulated. When the designated coordinator leaves the company, it’s common for facilities to forget to update this information.

9. Failure to make arrangements with emergency personnel, 40 CFR 262.16(b)(8)(vi) and 262.17(a)(6).

SQGs and LQGs are required to make arrangements with local emergency personnel concerning how to respond to releases of hazardous waste, fires involving hazardous waste, etc. They are also required to document the same in writing (or document that they tried to make such arrangements, but were not successful). Many facilities often have nothing in their files to make this demonstration.

10. Hazardous waste containers not closed, 40 CFR 262.15(a)(4), 262.16(b)(2)(iii)(A) and 262.17(a)(1)(iv).

A container holding hazardous waste must always be closed, except when it is necessary

to add or remove waste. It’s an easy violation to commit if your employees are not careful.

ROUND TWO FOR VIRGINIA’S PROPOSED NONPOINT SOURCE NUTRIENT CREDIT CERTIFICATION REGULATION

BY: HENRY R. “SPEAKER” POLLARD, V

The Virginia State Water Control Board (“Board”) recently approved a revised proposed regulation for the certification of non-point source nutrient credits (“NSN Credits”). The regulation now moves to the Governor’s office for final review before being issued for public comment (“Proposed Regulation”). The Proposed Regulation, to be issued pursuant to Va. Code § 62.1-44.19:20 of the State Water Control Law, establishes the framework for nutrient credit usage in Virginia. It reflects recent efforts to strengthen an earlier version of the Proposed Regulation on this topic, including a more detailed and substantial approach to eligibility and certification of NSN Credits to be traded in Virginia’s nutrient credit marketplace.

Nutrients are nitrogen and phosphorous, which, when discharged in wastewater and stormwater, can adversely affect water quality. While point-source discharges typically occur from discrete conveyances like pipes and ditches, non-point sources of nutrients involve sheet-flow stormwater runoff or other sources not regulated as point-sources, such as crop and pasture lands and residential lots. The ability to use NSN Credits offers an increasingly valuable and significant alternative for dischargers of wastewater and stormwater with nutrient loads. Municipalities, certain industries, and developers can utilize NSN Credits to offset nutrient loads in their respective wastewater and stormwater discharges and apply them to help meet nutrient limits in their wastewater and stormwater permits. The earlier version of the Proposed Regulation published over two years ago garnered many comments, but other factors have shaped NSN Credit issues since then as well. Such factors include evolution of State and federal water

protection planning and nutrient management and reduction practices, newer nutrient management strategies, innovation in technology and nutrient reduction tools, and experience with a burgeoning nutrient credit market. In particular, the Chesapeake Bay Total Maximum Daily Load's increasingly stringent requirements for point-source discharges and increasing pressure to address loadings from non-point sources have sharply accelerated the need – and related market-based opportunities – for NSN Credits to offset these loadings.

The Proposed Regulation addresses several key aspects of agency certification of NSN Credits and assurance of their eligibility and viability for use by others. These aspects include (a) NSN Credit certification and registration procedures; (b) calculation of the nutrient reduction factor associated with a particular NSN Credit, which depends on the nutrient reduction method used to generate the Credit; (c) the duration of NSN Credit certification (perpetual or for a set period of time) and the retirement of NSN Credits once used or expired; (d) reasonable assurance that the NSN Credits are

actually generated as certified; (e) reporting and recordkeeping obligations; (f) compliance audit and inspection processes and authority; (g) requirements to comply with local water quality standards even if NSN Credits are applied against nutrient loadings; (h) public notification of use of NSN Credits as part of a discharge permit condition; and (i) allowances for other requirements as the Board deems necessary and appropriate. The Virginia Department of Environmental Quality (“DEQ”) would serve as the implementing agency under the Proposed Regulation.

As the issues have evolved, the Proposed Regulation has in turn changed from the earlier proposed version and includes several new or different provisions, including: (i) clarification that the Proposed Regulation would only apply to NSN Credits that will be registered on Virginia's Nutrient Credit Exchange; (ii) inclusion of municipal separate storm sewer system (“MS4”) service areas within the definition of “management area” to clarify that the entire MS4 service area is required to meet applicable urban baseline determination





FINAL TSCA INVENTORY NOTIFICATION RULE ISSUED

BY: ETHAN R. WARE

requirements before an MS4 may generate nutrient credit; (iii) certification and use of NSN Credits generated in tandem with stream or wetland mitigation credits; (iv) addressing “innovative practices” that don’t squarely fall within nutrient management practices approved by the Chesapeake Bay Program or listed in Virginia’s best management practices clearinghouse; (v) specification of a five-year maximum period for term NSN Credits (those other than perpetual); (vi) more specific provisions for perpetual NSN Credits; (vii) certain exceptions from financial assurance obligations; (viii) aligning NSN Credit review for land-conversion projects with 2016 statutory amendments; and (ix) other changes based on DEQ’s experience to date in certifying NSN Credits under its statutory authority.

The Proposed Regulation indicates that the certification process and NSN Credit verification and assurances are evolving to keep pace with a growing market and increasing and critical need for NSN Credits to help regulated wastewater and stormwater dischargers meet ever tightening nutrient load and permit limits. All stakeholders should carefully monitor the public comment process as it unfolds.

Revised Proposed 9 VAC 25-900, Certification of Nonpoint Source Nutrient Credits; Tentative Agenda and Draft Minutes of meeting of the Virginia State Water Control Board (July 19, 2017), available at <http://townhall.virginia.gov/L/ViewMeeting.cfm?MeetingID=26286>.

EPA has begun promulgating regulations to implement the Frank R. Lautenberg Chemical Safety for the 21st Century Act of 2016 (Act), legislation that makes significant changes to the Toxic Substance Control Act (TSCA). EPA recently finalized regulations requiring covered manufacturers, importers, and processors to notify EPA over the next six to 14 months regarding whether registered chemicals are “active” (currently being manufactured or processed) or “inactive” (no longer being manufactured or processed).

TSCA Chemical Registration

Pursuant to Section 5 of TSCA, a company may not manufacture or import a chemical for commercial purposes unless the chemical is listed on the TSCA Chemical Substance Inventory. There are a number of exceptions to the registration requirement, such as chemicals that are mixtures, are polymers, or are manufactured in small quantities for R&D purposes. Some of the exceptions are subject to notification and risk assessment requirements.

Over the years, the TSCA Inventory has become clogged with chemicals registered, but never used. “This rule will enable EPA to... designate chemical substances on the [TSCA] Inventory as active or inactive in U.S. Commerce.” 82 Fed. Reg. at 37522. The designation of a substance as active or inactive is relevant to EPA’s prioritization of substances for risk evaluations under the Act. A substance posing an unacceptable risk may be banned from use after risk evaluations are complete.

Notification Requirements

Certain “manufacturers” and “processors” of chemical substances listed on the TSCA Inventory that are distributed in commerce in the United States are covered by the rule. The term “manufacturer” includes importers, so a company that imports chemicals for distribution or use may be subject to the rule. The phrase “process for commercial purposes” means to prepare any amount of chemical substance “for the purpose of obtaining immediate or eventual commercial advantage” and includes mixtures and impurities. Therefore, most manufacturers and distributors will be required to file a notification.

Manufacturing or processing a chemical listed on the TSCA Inventory solely for an exempt commercial purpose is not subject to the rule. The list of exempt activities includes manufacturing or processing of:

- Chemicals with impurities or by-products with no subsequent commercial purpose.
- “Small quantities” of chemicals solely for R&D.
- Substances existing “solely as part of articles.”
- Substances processed solely for export or test marketing.

Where an “equivalent notice” has been provided to EPA, notification under the rule is not required. Such prior notice may have been received as part of the interim list of active substances, chemical substances for which TSCA registration by Notice of Commencement occurred after June 21, 2006, but before June 21, 2016, and those for which notification is made by another manufacturer.

The notification requirements are straight-forward. A covered facility must notify EPA of the activity and use of each chemical substance manufactured, imported, or processed at the facility. Retrospective reporting applies to chemical substances listed on the TSCA Inventory and manufactured during the 10-year period ending on June 21, 2016. This 10-year period is referred to as the “look-back period” in the Act. If a chemical substance has not been manufactured, imported, or processed during

the look-back period, the facility need not file an applicable form, but further use of that chemical substance is prohibited without a forward-looking Form B submission.

EPA developed two versions of forms to be filed: Notice of Activity Form A and Notice of Activity Form B. Form A is to be used by those facilities reporting retrospective chemical activity, while Form B is to be used by those wishing to “reintroduce into... commerce” an inactive substance.

Information required under Form A must be reported electronically and include the following for each reportable chemical:

- Company Information Authorized Official, and Technical Contact.
- Chemical Specific Information -- chemical abstract number and index name.
- Certification of accuracy.

Co-manufacturers and co-processors should determine among themselves which entry complies with the rule, but both remain liable if a notification required under the regulation is not submitted.

Notification Deadlines

Deadlines for filing the electronic Form A and Form B differ for the type of manufacturer or processor involved. Each timeframe for reporting is discussed below based on the type of operation.

Form A notification of retrospective use of a chemical substance must be filed during the applicable submission period. Manufacturers and importers must file between August 11, 2017, and February 7, 2018. Processors are subject to a submission period commencing August 11, 2017, and ending October 5, 2018, which provides time for the processor to determine whether a Form A notification was filed by the manufacturer.

Notification triggered by Form B (re-activation of an inactive substance) must be submitted at least 90 days prior to manufacturing or processing the inactive substance.

Electronic Filing

EPA restricts Form A and Form B notifications to electronic filing through EPA's CDX system: <https://cdx.epa.gov> or 1-888-890-1995 (Help Desk). Confidentiality claims are made through the electronic filing process, but will require that certain substantiation questions be completed.

Conclusion and Recommended Action

Companies manufacturing, importing, or processing a TSCA chemical must file a Form A for that substance by February 7, 2018, or cease manufacturing, importing or processing that chemical and file a Form B 90 days prior to future use. The filing must be in EPA's CDX system.

To comply with the new notification program, it is recommended that each manufacturer, importer and processor of a TSCA chemical undertake the following steps to comply with the regulation:

- Step No. 1:** Prepare a chemical inventory of TSCA substances manufactured, imported, or processed companywide for use in the United States.
- Step No. 2:** Where the company has not manufactured, imported, or processed a chemical for more than 10 years, determine whether the company intends to resume the manufacture, import, or processing of that chemical and, if so, file Form B as necessary prior to use of the substance.
- Step No. 3:** File a Form A through the CDX system for each chemical substance manufactured, imported, or processed within the look back period.

82 Fed. Reg. 37520 (August 11, 2017).



OSHA ADDS ARSENIC AS A CONCERN FOR INDOOR SHOOTING RANGES

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

Over the last few years, the Occupational and Health Administration (OSHA) has targeted indoor shooting ranges for potential exposures of employees to lead. During inspections, OSHA compliance officers generally take surficial and airborne samples to determine whether facilities exceed permissible limits. If exposures exceed permissible limits, a multitude of requirements may be triggered under OSHA's lead and respiratory standards. However, based on a recent enforcement action, it appears OSHA may be adding arsenic to its focus on indoor shooting ranges as well.

Arsenic is often found as a component of lead ammunition. Like lead, OSHA's arsenic standard establishes permissible exposure limits for employees. If exposures exceed regulatory thresholds, standards for respiratory protection, medical surveillance and other work practices may be triggered. The standard also requires that surfaces be "as free as practicable" of an accumulation of arsenic. As with the lead standard, this housekeeping requirement is challenging

because it is subjective and does not establish a numerical limit.

Many indoor shooting ranges have focused their compliance-related efforts on the lead standard; however, recent events suggest that arsenic should be assessed when evaluating whether employees are exposed above permissible limits. Employers should also revise written programs, training, and housekeeping requirements where appropriate. As OSHA adapts, the shooting range industry must also reassess to ensure its employees are properly protected from recognized hazards.

EPA PUBLISHES GUIDANCE FOR STATE CCR PERMITTING PROGRAMS

BY: RYAN W. TRAIL

In April, 2015, EPA published in the Federal Register a final rule regulating the management and disposal of coal combustion residuals (CCR), commonly known as coal ash, from coal-fired power plants. Among other things, the rule established national performance standards for CCR landfills and surface impoundments. In its preamble to the rule, EPA explained that it had limited authority under Subtitle D of the Resource Conservation and Recovery Act (RCRA) and therefore could not give states the ability to seek authorization from EPA to implement the rule. Congress fixed that in 2016 when it passed the Water Infrastructure Improvements for the Nation Act (Act). Section 2301 of that Act amended RCRA to authorize State permit programs for the management and disposal of CCR.

EPA recently issued guidance for States that are developing permitting programs. The guidance sets forth a framework by which EPA will review and approve these programs. It is divided into four chapters. Chapter 1 contains an overview of that portion of the Act addressing CCR permit programs.

The overview is in a Question and Answer format and addresses questions about the statute, the review process to be used by EPA, and statutory criteria for EPA approval of State permit programs. Chapter 2 contains procedures EPA plans to use to review and make determinations on State CCR permit programs as well as a description of the documentation States will need to submit to EPA for approval of a program. Chapter 3 contains a checklist of requirements of the CCR rule at 40 CFR 257 subpart D. The checklist is intended to be used by States when developing and submitting their applications for CCR program approval. Finally, Chapter 4 provides a checklist of the materials a State must submit to constitute a “complete” CCR permit program application.

The guidance recognizes certain areas where EPA may be justified in approving State programs that differ from, but are “at least as protective as,” the 2014 CCR rule. These include allowing State officials to authorize certification forms for coal ash facilities, rather than a professional engineer; allowing suspension of groundwater monitoring when the potential for migration of hazardous constituents is low; allowing certain alternative groundwater protection standards; and allowing States to decide whether remediation of certain releases is necessary and how long remedial actions must be pursued.

Although EPA has only released a pre-publication version of the guidance, it will accept public comments on the interim guidance until 30 days after the guidance is published in the Federal Register. EPA “welcomes public input [on the interim guidance] at any time” and calls the guidance a “living document,” which may be revised periodically.

[CCR State Permit Program Guidance Document; Interim Final August 2017](#)

WILLIAMS MULLEN EXPANDS ENVIRONMENTAL PRACTICE



Elizabeth C. "Liz" Williamson

Elizabeth C. "Liz" Williamson and John M. "Jay" Holloway have joined the firm's nationally-recognized Environment and Natural Resources Group. Ms. Williamson and Mr. Holloway join Williams Mullen from Eversheds Sutherland in Washington D.C. They were previously with Hunton & Williams.

Ms. Williamson and Mr. Holloway counsel electric cooperatives, utilities and industrial clients across the country on federal and state environmental laws and regulations, with an emphasis on Clean Air Act issues. They have extensive experience with Clean Air Act permitting and compliance, as well as extensive environmental litigation experience with Clean Air Act enforcement, citizen suits, New Source Review, and rulemaking appeals. They regularly represent national trade associations in federal and state rulemakings and before federal and state courts.

"Liz and Jay are exceptional attorneys whose background and experience will bring value to our clients," said Channing J. Martin, Chair of the Environment and Natural Resources Group. "We're excited to add them to our team."

Ms. Williamson and Mr. Holloway join a practice that has five attorneys ranked by Chambers USA and seven attorneys listed in The Best Lawyers in America®. The practice is rated a "Tier 1" practice nationally in U.S. News – Best Lawyers' "Best Law Firms" report.



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