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ENVIRONMENTAL NOTES

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EPA ENDS "ONCE IN, ALWAYS IN" POLICY FOR SOURCES THAT EMIT HAZARDOUS AIR POLLUTANTS

BY: JOHN M. "JAY" HOLLOWAY III

Since 1995, EPA has followed a policy that any air emissions source that emits one or more hazardous air pollutants ("HAPs") above major source emissions thresholds is always considered a major source of HAPs. This is so even if the source subsequently decreases its HAP emissions below major source thresholds. This "once in, always in" policy is not derived from the Clean Air Act, but is only a policy position. EPA recently reversed this policy in a guidance memorandum from William L. Wehrum, the Assistant Administrator for Air and Radiation. In issuing the memo, Wehrum said that "[t]he guidance is based on a plain language reading of the [Clean Air Act] that is in line with EPA's guidance for other provisions of the Act."

EPA now takes the position that a major source of HAPs can accept permit limits on its emissions of HAPs and no long be a major source. By no longer being a major source, facilities will avoid extremely complex regulatory requirements. EPA's change in how it addresses these sources "will reduce regulatory burdens for industries and states, while continuing to ensure stringent and effective controls on hazardous air pollutants," Wehrum said.

EPA's new stance presents a tremendous opportunity for many industrial sources and electric generating units to streamline existing permits and ease regulatory burdens. In addition, many facilities are struggling with the burden of regulators adopting a "once in, always in" position for Title V major air pollution sources (not just for HAPs). There are increasing opportunities to work with states to convert such sources into minor sources and avoid ongoing Title V permitting requirements. Facilities that no longer exceed major source thresholds should consider pursuing these opportunities.

Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act (EPA January 25, 2018); 83 Fed. Reg. 5543 (February 8, 2018).

DOJ/EPA MEMOS CHANGE ENFORCEMENT POLICIES

BY: CHANNING J. MARTIN

Three memoranda, two issued by the United States Department of Justice ("DOJ") and one issued by EPA, mark a significant shift in how the federal government approaches civil and criminal enforcement for violations of environmental laws. The memoranda direct DOJ and EPA employees, respectively, to do the exact opposite of what was required of them under the Obama Administration.

Memo Limiting Use of Guidance Documents

Last November, the U.S. Attorney General issued a memorandum prohibiting DOJ from issuing guidance documents with a binding effect on the public unless they undergo notice-and-comment rulemaking. The memo also prohibited DOJ from using its guidance documents to coerce regulated parties into taking action, or to refrain from taking action, beyond that required by law or regulation. DOJ's recent memorandum takes the November 2017 memorandum one step further.

The memorandum issued on January 25, 2018 is directed to DOJ litigators who bring civil enforcement actions. It directs them not to use agency guidance documents to create binding requirements that do not already exist under statute or regulation. Similarly, DOJ litigators are instructed not to use noncompliance with guidance documents as a basis to contend that a regulated party violated environmental laws. The memo states that simply because "a party fails to comply with agency guidance expanding upon statutory or regulatory requirements does not mean [it] violated those underlying legal requirements; agency guidance documents cannot create any additional legal obligations."

Memo Limiting Use of Settlement Payments

The U.S. Attorney General issued a memorandum last June applicable to environmental enforcement cases brought by DOJ's Environment and Natural Resources Division ("ENRD"). The memorandum prohibited settlement payments under federal consent decrees to third-party organizations that were neither victims of the violations nor parties to the lawsuit. The new memorandum issued on January 9, 2018 expounds on the June memo. It keeps this prohibition in place unless (i) the payment meets one of three limited exceptions, and (ii) approval has been obtained as outlined in the January 9, 2018 memo. The effect of the prohibition is to stop a practice that many in industry have long complained about, being the federal government requiring payments by the settling party to environmental groups for projects wholly unrelated to violations at issue in the case. The January 2018 memorandum makes clear that third-party payments may be made under limited circumstances, but that doing so will continue to be the exception, not the rule.

There are three limited exceptions under which payments to third parties are permissible. First, the third-party payment prohibition does not apply to an otherwise lawful payment or loan that "directly remedies the harm that is sought to be redressed in a civil or criminal action, including harm to the environment." Thus, for example, funds may be used to perform a study by a non-governmental third-party of environmental impacts caused by violations at issue in the case.

Second, the third-party payment prohibition does not apply to payments to governmental entities, provided that the payments have a clear nexus to the environmental harm sought to be remedied. As an example, the memorandum points out that many previous ENRD settlements have provided for payments to Congressionally-chartered corporations, such as the National Fish and Wildlife Federation.

Third, the third-party payment prohibition does not apply to an otherwise lawful payment that provides restitution to a victim of the violation. A payment to a community service organization that serves the victims is an example of a permissible payment, provided the payment directly remedies the environmental harm.

The memorandum cautions that care must be taken in selecting appropriate third parties to receive payments. Factors to be considered include, among other things, experience with the kind of work necessary to remedy the environmental harm at issue, the ability of the third party to complete the remedy project in a timely and cost-effective manner, and a minimization of administrative overhead costs. "In no case should a third party be selected on the basis of political affiliation, personal relationship with or financial interests of any person or entity involved in the case, or any other improper basis." Significantly, the memorandum states that the defendant will, as a general rule, propose an appropriate third party for payments, subject to ENRD approval. Where the defendant does not do so prior to resolution of the case, the memorandum directs the settlement instrument to provide objective criteria to guide both the defendant's selection of an appropriate third party and the government's review and approval of the third party.

Memo Deferring EPA Enforcement to Authorized States

EPA's recent Interim Guidance memo states that the agency will generally defer inspections and enforcement to authorized states "as the primary day-to-day implementer of their authorized/delegated programs." This means most states around the country will take the lead on inspections and enforcement. There are exceptions, however, when EPA says it will become involved, such as (i) where an audit of a state's enforcement program shows the state's program is deficient, (ii) emergency situations resulting in a significant risk to public health or the environment, and (iii) serious violations that need to be investigated and addressed by EPA's criminal enforcement program. If EPA seeks to take back the lead from a state, the memorandum encourages discussion between upper management of both agencies. It says that "where senior leadership in the [EPA] region and State do not agree…, the matter should be elevated to the OECA Assistant Administrator for a decision. This elevation is important to ensure a consistent national program among states and the EPA and a level playing field for regulated entities." EPA indicates it will review and update the Interim Guidance as appropriate during FY2019 based on input from its regional offices.

These memoranda represent a sea-change in the policies of the Obama Administration and are welcome news for regulated parties. On the other hand, environmental groups will almost certainly see

them as cutting the legs out from under effective federal environmental enforcement. Regulated parties who welcome the relief should enjoy it while it lasts; the pendulum is almost certain to swing the other way at some future date.

Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (DOJ January 25, 2018).

Settlement Payments to Third Parties in ENRD Cases (DOJ January 19, 2018).

Prohibition on Settlement Payments to Third Parties (DOJ June 5, 2017).

Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States (EPA OECA January 22, 2018).

ROUND-UP OF CLEAN AIR DEVELOPMENTS FROM 2017

BY: LIZ WILLIAMSON

2017 was an unusual year for environmental regulation, particularly under the Clean Air Act. A new President and new EPA Administrator have brought about significant changes to the environmental policies of their predecessors. Here are some of the most important developments that occurred:

Carbon Regulation

When the Obama Administration left office in January 2017, the Clean Power Plan ("CPP") had been issued as a final rule and petitions for appeal by a host of industry groups had been filed in the United States Court of Appeals for the D.C. Circuit. Oral argument on the appeal was held in September 2016 before all judges, except recused judges. This is rare. Shortly after he took office, President Trump signed an Executive Order in March 2017 directing EPA to review the CPP. In early April, EPA announced that it was reviewing the CPP and, if appropriate, would issue a proposed rule suspending, revising or rescinding it. At the same time, EPA proposed a rule withdrawing the proposed CPP federal implementation plan, proposed model trading rules, and proposed amendments to the CPP framework regulations, all of which were still under review by the Office of Management and Budget. In light of EPA's actions, the D.C. Circuit Court stayed the pending litigation on November 9 for 60 days, which extended through the end of 2017. EPA released an Advanced Notice of Proposed Rulemaking on December 18 seeking public input on a proposal to replace the CPP. At the close of 2017, the Trump Administration's efforts to slow down, repeal and replace the CPP have been successful. We expect EPA to issue a proposed CPP replacement rule that is narrow and that gives substantial flexibility to the states in setting standards of performance. As the rulemaking process moves forward, it is unclear whether the D.C. Circuit Court will continue to delay issuing an opinion on the legality of the 2015 CPP. Most affected power producers are suspending their plans to comply with the CPP due to the uncertainty associated with the litigation and new rulemaking. Instead, the industry focus is on providing input to EPA with the goal of a fair and effective rule that is consistent with Clean Air Act section 111(d).

Clean Air Act Enforcement

EPA finalized twelve settlements of Clean Air Act civil enforcement cases during 2017, all of which presumably were filed or otherwise initiated under the Obama Administration. Companies subject to these consent decrees included those in the glass, oil and gas, carbon black, and chemical industry sectors. Three mobile source consent decrees were finalized, continuing the trend of enforcement on emissions from engines. Notably, consent decrees were not finalized in the cement, electric utility, and

acid gas industry sectors, which have been high on the enforcement initiative list in recent years. The Trump EPA has specifically noted its intent to continue the initiative to cut hazardous air pollutants from leaking equipment and poorly operated flares in chemical plants and petroleum refineries. In fact, EPA expanded the initiative to include large product storage tanks and hazardous waste generator and treatment, storage and disposal facilities.

EPA Political Appointees

The Trump Administration has been slow to fill vacancies at EPA. EPA Administrator Scott Pruitt tapped William L. Wehrum as Assistant Administrator for the Office of Air and Radiation. Wehrum previously worked at EPA as a political appointee in the George W. Bush Administration and as an attorney representing industry interests. He was narrowly approved as Assistant Administrator by the Senate in November. Wehrum is working alongside newly-approved appointees Susan Bodine, Assistant Administrator for Enforcement and Compliance Assurance, and Andrew Wheeler, Deputy Administrator. Bodine previously served in the George W. Bush Administration, and Wheeler was Chief Counsel to Republican Senator Inhofe. All of these appointments are widely considered to be pro-industry.

New Source Review ("NSR") Rollbacks

NSR regulations are under review by the Trump Administration, and EPA has formed a task force to overhaul them, according to several sources. Significantly, EPA has already chipped away at the longstanding application of NSR regulations by issuing a guidance memorandum. The guidance resets EPA's policy by stating that EPA will no longer second-guess industry actual-to-projected-actual emissions in the absence of "clear error." Rather, EPA's enforcement focus will be on the actual emissions during the five or ten-year recordkeeping or reporting period after the project is completed. This policy is a major shift from EPA's positions in past enforcement cases.

Other Actions

A few other notable actions include attainment and unclassifiable designations for the 2015 Ozone National Ambient Air Quality Standards. In December, EPA determined that most areas of the country met the 2015 standards and therefore designated them as either in attainment or unclassifiable. No non-attainment designations were released in 2017. The Cross-State Air Pollution Rule ("CSAPR") Update finalized by the Obama Administration in 2016 took effect in May 2017. The CSAPR Update reduced archived NOx seasonal allowances and moved allowance true-up deadlines.

Overall, industry was a big winner in 2017, particularly utilities that saved costs by delaying preparation for compliance with the CPP. Industry costs may pick up in 2018 when EPA's efforts to formulate a CPP repeal and replacement rule accelerate. Industry-friendly EPA political appointees are expected to give industry more input into rulemaking processes. Clean Air Act

enforcement cases have remained consistent among a number of key industries.

82 Fed. Reg. 48035 (Oct. 16, 2017) (Proposed rule repealing CPP).

82 Fed. Reg. 61507 (Dec. 28, 2017) (Advanced Notice of Proposed Rulemaking; Comments are due February 28, 2018).

National Enforcement Initiative: Cutting Hazardous Air Pollutants https://www.epa.gov/enforcement/national-enforcement-initiative-cutting-hazardous-air-pollutants

New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Test in Determining Major Modification Applicability, (EPA Dec. 7, 2017).

UPCOMING EPCRA TIER II REPORTS MUST USE NEW HAZARD CLASSIFICATIONS

BY: RYAN W. TRAIL

Manufacturers and large scale users of hazardous chemicals know the significance of March 1st. The Emergency Planning and Community Right-To-Know Act (EPCRA) requires facilities where hazardous chemicals were present above reporting thresholds at any time in the previous calendar year to complete a Tier II hazardous chemical inventory report. Tier II reports must be submitted by March 1 to the State Emergency Response Commission (SERC), Local Emergency Planning Committee (LEPC), and local fire department with jurisdiction over the facility. In 2018, Tier II submittals will present a new set of challenges to companies, but will also offer clarity to state and local response agencies who receive these reports and rely on them for emergency planning.

The Tier II form provides physical and/or health hazards of each chemical, their locations, and quantities present at the facility during the previous calendar year. In 2016, EPA amended its hazardous chemical reporting regulations to reflect a more standardized approach for classifying chemicals by their health, physical and environmental effects. Previously, physical and health hazards were divided into five hazard categories (three physical and two health hazard categories). Under the amended regulations, there are 24 hazard classifications (13 physical and 11 health hazard categories). Classes are then subdivided into categories depending on degree of severity of the hazard.

For example, under previous hazard classifications, a chemical was either a potential carcinogen or it was not. Under the new system, carcinogenicity has two hazard categories. Category 1 covers known or presumed human carcinogens, and Category 2 covers suspected carcinogens. The rationale for adding hazard classifications and severity categories was to provide more detailed criteria about each chemical, which will be valuable to emergency planners and responders.

The EPCRA amendments are consistent with recent amendments to OSHA regulations, which also require manufacturers of chemicals to use the new hazard classification system when drafting Safety Data Sheets (SDSs). During the rulemaking process,

stakeholders expressed general approval of the amendments. The regulated community reasoned that, if EPA adopted consistent hazard classes, it would be less burdensome on facilities, as they would only need to copy hazard information from each SDS.

EPA has updated its Tier II inventory forms and instructions and has modified its Tier2 Submit software to include the new physical and health hazards. With March 1 just around the corner, facilities submitting Tier II reports for reporting year 2017 need to remember that use of the new hazard classifications was required beginning January 1, 2018.

81 Fed. Reg. 38104 (June 13, 2016).

STRANGE BUT TRUE: RECENT EPA AND STATE ACTIONS SHOW BREADTH OF ENVIRONMENTAL ENFORCEMENT

BY: ETHAN R. WARE

A trilogy of recent federal and state enforcement actions show just how far agencies will go to enforce environmental regulations. Now may be a good time for a compliance audit.

Dumpster Diving

California is not exactly known for its friendly business climate. Now, it's a little clearer how far the State of California has progressed when it comes to citing companies for environmental violations.

DIRECTV is headquartered in Los Angeles. Recently, the company entered into a consent agreement with the state to pay roughly $9.5 million for violations of regulations governing transportation and disposal of hazardous waste. The November 2, 2017 settlement requires payment of $8.9 million in penalties and $580,000 for in-house corrective measures. The company must perform environmental compliance audits at its locations in the state three times over the next five years, and the agreement imposes penalties for any future violations discovered.

The violations concerned small batteries from TV remotes and aerosol cans from DIRECTV service operations centers that were being disposed in dumpsters sent to municipal landfills. These materials qualified as hazardous waste under California law because, unlike many other states, California does exempt small quantities of such materials from regulation as hazardous waste. DIRECTV employees had not been trained on the regulatory status of those materials, and so disposed of them in dumpsters.

Equally surprising as the size of the penalty is the investigative technique used by California regulators to discover the violations: "dumpster diving." From 2016 to 2017, state investigators climbed into trash dumpsters at 25 DIRECTV locations after hours, and they classified and catalogued all of the various wastes being shipped to municipal landfills. Ultimately the only problematic wastes were small batteries used for TV remotes and used aerosol cans.

After prosecuting DIRECTV, the California Attorney General warned other companies that the State of California will hold businesses "accountable" and said the state is making "strides [to keep the] environment free from toxic pollution."

This case points out that businesses in the service and retail sectors are not exempt from environmental regulations and need to be prepared for zealous environmental enforcement.

RMPs Can Change the Way You Operate

A Rhode Island company decided to change the way it does business rather than fight EPA. The case

concerned a small plant in Rhode Island that uses ferric chloride in a photochemical etching process to manufacture ornaments and collectibles. Until recently, chlorine was piped to the etching process from four 2,000 pound cylinders.

Chlorine is considered an Extremely Hazardous Substance (EHS) by EPA and listed as a regulated substance (threshold planning quantity of 2,500 lbs.) under § 112(r) of the Clean Air Act (CAA). Facilities storing an EHS on-site in excess of its threshold planning quantity (TPQ) must file annual reports, and § 112(r) of the CAA requires preparation of a risk management plan (RMP).

As a result of a January 2015 inspection, the company was cited for deficiencies in its RMP and failure to report that it was storing chlorine on-site. Under a settlement with EPA in November 2017, the company agreed to pay penalties and to change the way it does business to avoid future penalties and reporting obligations. The changes it made included replacing three of the 2,000 lbs. liquefied chlorine gas cylinders with three 150 lbs. tanks, and upgrading the facility alarm, manifold, and vacuum systems to reduce risks of a release of chlorine.

The news was not all bad. Changes to the company's piping and tank system reduced the amount of chlorine stored to below reporting and RMP compliance thresholds. That said, though, the company will have to receive many more shipments of chlorine gas to meet its existing production needs, meaning the prospect of accidents and releases of chlorine during transportation will increase.

Ignorance of the Law is No Defense

Few federal phrases are more confusing, and hold such great consequence, as "Waters of the United States" (WOTUS). The discharge of pollutants to wetlands and other WOTUS without a permit can result in criminal prosecution, yet the last time EPA attempted to define WOTUS, it resulted in national litigation which is still ongoing. Therefore, knowing what is and is not WOTUS is critical for any development or industrial project, such as mining.

The United States Court of Appeals for the Ninth Circuit recently upheld the criminal conviction of a small miner for discharging dredge and fill materials into WOTUS without a permit. The miner's defense was not complicated: he argued that, given all the litigation and rulemaking over WOTUS, he did not have "fair notice" of the government's interpretation of the term and therefore could not "knowingly" violate the statute.

The evidence showed that Mr. Robertson, the miner, excavated pits and placed spoils into wetlands. The wetlands bordered a non-navigable tributary to Cataract Creek, which flows to the Boulder River in Montana. While the Boulder River is quite shallow and also cannot be navigated, it drains to the Jefferson River which is navigable. The United States indicted Mr. Robertson for not obtaining a permit

to fill the wetlands, claiming the wetlands are non-navigable WOTUS that affect interstate commerce in the Jefferson River some 20 miles away. It alleged the wetlands had a "significant nexus" to the Jefferson River.

The Ninth Circuit rejected Mr. Robertson's defense and said he "was on notice… at the time of his excavation activities… that wetlands and non-navigable tributaries are subject to CWA jurisdiction" where there is a significant nexus to a navigable stream. The Court then took 14 pages to explain the meaning of WOTUS, tracing the term's legal history from the U.S. Supreme Court's 2006 decision in *Rapanos*. (The *Rapanos* case is a confusing "plurality decision" where less than a majority of Supreme Court Justices agreed upon an interpretation of WOTUS.) After admitting "[a]ll this paints a rather complex picture and one where without more it might not be fair to expect a layman of normal intelligence to discern.., [the scope of WOTUS]," the Ninth Circuit nonetheless upheld Mr. Robertson's conviction.

The *Robertson* case is important because it show that ignorance of even a "complex" law is no defense to violations. Accordingly, it is important that environmental compliance audits and site assessments include a legal analysis. A legal analysis of WOTUS may have helped this miner avoid jail; on the other hand, given the current confusion over WOTUS, maybe not.

California v. DIRECTV, Civ. Action No. R617880964 (Sup. Ct. CA, Nov. 2, 2017)

Administrative Order on Consent with ChemArt Company (EPA Aug. 2017)

United States vs. Joseph David Robertson, No. 16-30178 (9th Cir. Nov. 27, 2017)

RECENT COURT DECISION AND EPA/CORPS ACTIONS AFFECT FATE OF CLEAN WATER RULE

BY: HENRY R. "SPEAKER" POLLARD, V

A major skirmish in the long-running legal battle over the scope of protected waters under the federal Clean Water Act ("Act") has just ended with the U.S. Supreme Court decision in *National Association of Manufacturers v. Department of Defense*. The Supreme Court settled the dispute about which federal courts have jurisdiction under the Act to hear challenges to the Clean Water Rule ("CWR"). That rule, issued by EPA and the Army Corps of Engineers, redefined the term "waters of the United States" ("WOTUS") as used in the Act. On a different front, recent actions by EPA and the Corps serve to delay the effective date of the CWR to avoid conflicting implementation of the CWR during pending litigation. Although these recent developments are largely procedural, each may cause the litigation to last even longer, and so their implications are potentially far-reaching for all interested parties.

Understanding why the dispute over federal court jurisdiction arose helps to explain the Court's decision and its ripple effects for implementation of many aspects of the Act. The Act describes waters to be protected from unpermitted discharges as "navigable waters," a term that is then defined perfunctorily as "waters of the United States, including the territorial seas." Major elements of the Act that hinge at least in part on the WOTUS definition include the National Pollutant Discharge Elimination System ("NPDES") permitting program for wastewater and stormwater discharges, the federal wetland dredge and fill permitting program, and oil and hazardous substance spill response and liability. The meaning of WOTUS is therefore critical to proper implementation of the Act and has great consequences for regulated

parties. Over the years, EPA and the Corps had defined WOTUS by regulation, resulting in litigation that culminated in 2006 with the confusing plurality decision by the U.S. Supreme Court in *Rapanos v. United States* and subsequent lower court case decisions applying *Rapanos* in various ways.

EPA and the Corps eventually issued the CWR in 2015 to redefine WOTUS based on their approach to resolving and implementing *Rapanos*. Thirty-one states and various other parties, including the National Association of Manufacturers ("NAM"), promptly challenged the CWR in different federal *district* courts. The U.S. District Court for the District of North Dakota then stopped the CWR from taking effect in thirteen states. Some parties (but not NAM) also filed protective alternative challenges in different federal *circuit* courts. The circuit court cases were consolidated at the Sixth Circuit Court of Appeals; no such consolidation has occurred at the federal district court level. The Sixth Circuit stayed the effectiveness of the CWR nationwide until it had decided the matter. As a result, the pre-CWR definition of WOTUS and related Rapanos-based agency guidance have remained in play. EPA and the Corps have argued that the circuit courts, rather than the district courts, have original jurisdiction under the Act to hear the challenges, because the CWR (a) has the "practical effect" of an effluent limitation or other limitation issued pursuant to certain sections of the Act, and (b) is "functionally similar" to an action to issue or deny a permit pursuant to section 402 of the Act, which establishes the NPDES permitting program. The agencies also argued that starting in the circuit courts would serve the goal of judicial economy by being more efficient and resulting in greater national uniformity of judicial treatment of the issue. Many other parties, including NAM, disagreed. NAM later intervened in the Sixth Circuit and appealed its holding that it had original jurisdiction.

In *National Association of Manufacturers v. Department of Defense*, the Supreme Court unanimously overturned the Sixth Circuit and rejected the agencies' statutory arguments as contrary to the Act's plain language and clear intent. The Court also found that the Act does not contemplate the judicial economy sought by the agencies as to challenges to the CWR. Accordingly, the Court held that the district courts have original jurisdiction to hear the CWR challenges. However, the Supreme Court did not rule on the merits of the CWR, leaving that for the district courts to untangle first. Without original jurisdiction, the Sixth Circuit now likely needs to lift its nationwide stay of the CWR, but the earlier North Dakota district court injunction could come back to the fore. Given the number of CWR challenges in various district courts, different decisions may ensue from around the country. These may be appealed by losing parties to the circuit courts and, in turn, to the Supreme Court. That would put the substance of the CWR before the Supreme Court for the first time and likely cause it to revisit the scope of WOTUS once again. The whole process would likely take at least several years.

Now intersecting with the current litigated challenges to the CWR are recent regulatory actions by EPA and the Corps. These actions create a different track for the CWR that could alter the pending litigation's direction. Pursuant to an executive order issued by President Trump, these agencies proposed in July 2017 to repeal the CWR and revert the definition of WOTUS back to pre-CWR regulation. In light of the Supreme Court's decision and Sixth Circuit's anticipated repeal of its nationwide stay of the CWR, EPA and the Corps just finalized a rule delaying the CWR's effective date to February 6, 2020. This move is intended to ensure the pre-CWR definition of WOTUS is applied nationally while the proposed rescission (and expected proposed replacement) of the CWR unfolds. Of course, the final iterations of these regulatory actions may also be challenged by parties who favor the CWR.

The dynamic litigation and regulatory fronts indicate that the true fate of the CWR will remain unclear for

some time. Meanwhile, many wait for reasonable certainty about what WOTUS really means and, in turn, about how much of their property is regulated waters and whether their discharges or dredge or fill activities require permits under the Act. Even with such uncertainty at the federal level, regulated parties should remember that state laws often protect and regulate surface waters and discharges distinctly from the Act or may do so more stringently than the Act (as may local ordinances in some situations), so they need to keep an eye on how these issues are handled at all levels of government.

Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200-5209 (February 6, 2018) (extending CWR applicability date).

National Ass'n of Mfrs. v. Dep't of Defense, 583 U.S. ___, ___ S.Ct. ___, 2018 WL 491526, No. 16-299 slip op. (January 22, 2018).

Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899-34909 (July 27, 2017) (proposed rule to rescind CWR).

THE FATE OF THE CCR RULE "IS" STILL IN DISPUTE

BY: JESSICA J.O. KING

In May of last year, Environmental Notes reported on the many petitions that had been filed challenging EPA's 2015 promulgation of a final waste management rule addressing the management and disposal of coal combustion residuals ("CCR Rule"). As is often the case with challenges to environmental regulations, the litigation has been slow, and the outcome remains uncertain.

The CCR Rule requires companies with existing surface impoundments to perform inspections and integrity studies, monitor groundwater, take corrective action where hazardous constituents have leached to groundwater above groundwater protection standards, upgrade (to include a liner and location restrictions) or close, and perform recordkeeping. Environmental groups attacked the regulation as not being sufficiently protective. Industry groups challenged the regulation on the basis that EPA does not have authority under the federal Resource Recovery and Conservation Act (RCRA) to regulate coal ash disposed of long ago in surface impoundments that have been dormant for decades.

Since the petitions were filed in 2015, a new President has been elected and EPA has new leadership. Not surprisingly, in September of this year, EPA informed the public and the United States Court of Appeals for the D.C. Circuit that it was granting industry groups' request to review certain provisions of the CCR Rule, including those under appeal. EPA and the industry groups asked the Court to delay further action on the case during the agency's review. The D.C. Circuit declined, and thus, after two years in the court system, oral arguments were held last November on the CCR Rule.

The main issues addressed by the panel of judges that heard the appeal were:

(1) Does EPA have authority to regulate inactive surface impoundments?

(2) If so, and if some or all of the rule is found to be legally deficient, should the Court remand the rule to EPA without invalidating the offending provisions, referred to as "remand without vacatur," so that they remain intact until such time as EPA considers what to do with the rule in a new rulemaking?

On the issue of EPA's authority, the Court was not easy on EPA or industry group representatives. When industry group lawyers pointed to RCRA's directive to EPA to regulate where waste "is disposed of," and not where waste "was disposed of," the panel seemed unimpressed. In fact, one judge questioned attorneys for industry on why a waste that now sits in a surface impoundment isn't, in the present tense, currently or presently "disposed of."

Regarding remand, environmental groups argued remand was totally inappropriate as to any provisions. The Court implied in comments during arguments that both sides could benefit from remand since both sides enjoy the status quo on the provisions they support. However, the panel commented that it was not convinced remand without vacatur was necessary since EPA can revisit a rule anytime it wants, with or without permission from the Court. That would, of course, mean an entirely new rulemaking and the risk (if not certainty) of more legal challenges.

And so industry "was," and still "is," waiting for an answer as to what it needs to do with the millions of tons of coal ash sitting in dormant impoundments. Based on the tone of arguments in the courtroom, it does not seem likely the Court is convinced EPA does not have jurisdiction to regulate dormant coal ash surface impoundments. The real question, however, is will EPA change course given the changes in Washington since the CCR Rule was first promulgated.

Utility Solid Waste Activities Group, v. EPA, No. 15-1219 (D.C. Cir.); 80 Fed. Reg. 21302 (April 17, 2015)

CONTACT US

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

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

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

John M. "Jay" Holloway III
Partner, Washington, D.C.
202.293.8127
jholloway@williamsmullen.com

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

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

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

Liz Williamson
Partner, Washington, D.C.
202.293.8123
ewilliamson@williamsmullen.com

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

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