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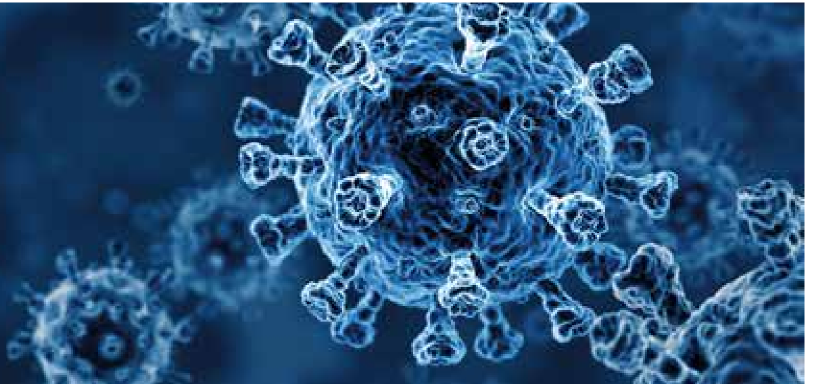

REGULATORY PRESCRIPTIONS FOR COVID-19: TRUMP CONTINUES EFFORTS FOR REGULATORY REFORM AND EXPEDITED INFRASTRUCTURE REVIEW

BY HENRY R. ("SPEAKER") POLLARD, V AND PIERCE M. WERNER

Two recent executive orders ("EOs") issued by President Trump require additional efforts by federal agencies to facilitate regulatory reform and to expedite infrastructure projects, relying greatly on emergency and special exception authorities within federal statutes and regulations. One EO, issued May 19 and entitled, "Executive Order on Regulatory Relief to Support Economic Recovery," focuses on general regulatory relief in the face of the COVID-19 pandemic ("Regulatory Relief EO"). The second EO, issued June 4 and entitled, "Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities," requires agencies with permitting, oversight and review roles under various environmental and other programs to expedite review and processing of these projects ("Infrastructure Review EO").

These EOs continue the President's overarching theme of reducing environmental regulatory burdens for business, utilities, and infrastructure network developers and managers, which began before COVID-19 began to take its full toll. (For other examples, see our *February 2020 newsletter*.) However, these EOs are targeted in their timing and overlapping in their purposes to spur recovery from the COVID pandemic's damage to the nation's economy. In this sense, they build on other, more agency-specific guidance for program administration in light of COVID-19. (See our alerts on EPA COVID-related guidance *here* and *here*).

The Regulatory Relief EO requires federal agencies to "address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility." Particular concern is expressed for small business relief. To implement this objective, federal agencies must determine and consider actions "consistent with applicable law" to alleviate regulatory burdens on the economy – including rulemakings, exemptions, waivers, and another means – and consider use of "appropriate temporary enforcement discretion or appropriate temporary extensions of time." In addition, agencies must consider whether any temporary or emergency actions taken in the face of the COVID-19 crisis to provide regulatory and enforcement relief are worthy of permanent implementation to help sustain any economic gains. Furthermore, agencies must provide compliance assistance and implement 10 principles of "fairness in [their] administrative enforcement and adjudications." These principles include enforcement

directives that may significantly curtail agency enforcement practices, such as the directive that administrative adjudicators may not be enforcement staff and that the agency must provide all relevant evidence in its possession to the subject of any enforcement action.

The Infrastructure Review EO charts a similar course using agency authorities and emergency procedures to reduce the time and degree of review needed for infrastructure projects. This will help ensure they can be kept on track for commencement and or funding to help reinvigorate the economy. The EO directs all federal agencies to "take all appropriate steps to use their lawful emergency authorities and other authorities to respond to the national emergency and to facilitate the Nation's economic recovery." More specifically, they "should take all reasonable measures to speed infrastructure investments and to speed other actions . . . while providing appropriate protection for public health and safety, natural resources, and the environment, as required by law." Certain agency project oversight roles receive special attention, namely: (i) the Secretary of Transportation for transportation projects; (ii) the U.S. Army Corps of Engineers for civil works (such as channel dredging, flood control and beach restoration projects) and wetland permitting of infrastructure projects; (iii) the Secretaries of Defense, Interior and Agriculture for projects on federal lands; (iv) all agencies for administration of project review pursuant to the National Environmental Protection Act ("NEPA") based on current regulations and guidance of the Council on Environmental Quality addressing emergency circumstances; and (v) all agencies for reviews required pursuant to the Endangered Species Act and coordination of such reviews with the Secretaries of the Interior and Commerce. Affected agencies must prepare within 30 days a list of projects eligible for the contemplated relief applicable to their respective review roles.

Despite the sense of urgency in these EOs, it is not clear what beneficial effects these EOs will produce and when. Each EO requires reporting by the agencies to demonstrate their level of effort, and each EO states clearly that the implementation of its terms shall be "consistent with applicable law and subject to the availability of appropriations." These provisions should allow parties to track how well the EOs are implemented and should provide some assurance that the underlying legal requirements of the environmental laws are met. It should be no surprise that environmental groups have reacted generally negatively to these EOs alleging that they reduce project scrutiny and protections and let noncompliance go unchecked. On the other hand, industry and certain infrastructure-based parties are hoping the EOs result in greater flexibility and speed for project review and approvals and for reasonable discretion regarding compliance and enforcement under difficult and unexpected operating conditions.

In addition, although much regulatory review and/or funding occurs at the federal level for major projects and infrastructure, regulatory relief at that level hardly removes all challenges or hurdles. Perhaps most significantly, states, tribes and even localities are in many, if not most, cases in charge of the environmental permitting, land use approvals and infrastructure project reviews. These lead roles arise by having received authority to administer the federal environmental program in question, by independent state law, or through local zoning and land use control powers. So, while regulatory relief may yet come at the federal level, most major projects require federal, state and local approvals to move forward. The approach or degree of action these other regulators take in tandem with the EOs will likely vary, leaving a fair degree of uncertainty still to be managed.

There is no question that COVID-19 and the associated public health concerns have caused great hardship for many companies and other economic stakeholders. National regulatory relief could play a helpful role in putting the economy back on track, but it remains to be seen whether these EOs will provide timely and material relief given the additional review often required at the state, tribal and local level.

Executive Order 13,924, "Regulatory Relief to Support Economic Recovery," 85 Fed. Reg. 31353 (May 22, 2020).
Executive Order 13,927, "Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities," 85 Fed. Reg. 35165 (June 9, 2020).

EPA ANNOUNCES TERMINATION DATE FOR COVID-19 ENFORCEMENT POLICY

BY: CHANNING J. MARTIN

Last March, EPA issued a memorandum entitled *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program*. The memorandum announced a temporary policy regarding EPA's enforcement of environmental obligations during the COVID-19 public health emergency. Pursuant to that memorandum, if the pandemic constrains a facility's ability to perform routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification, the facility can document that fact and potentially avoid enforcement. EPA said in the memo that it "does not expect to seek penalties for violations" where it agrees COVID-19 is the cause of the noncompliance. The memorandum also established certain notification obligations if the facility expected to miss certain obligations and milestones in EPA administrative settlement agreements.

All good things must come to an end. In a June 29, 2020 addendum to the memorandum, EPA announced that it will terminate the temporary policy on August 31, 2020. This means EPA will not base any exercise of enforcement discretion on COVID-19 after that date. EPA could have terminated the policy earlier, but said the August termination date is designed to give facilities time to adjust.

In announcing the termination, EPA reasoned that "new federal guidelines and directives have been issued to support both the public health response and economic recovery efforts, and many parts of the country have already taken steps to relax social distancing restrictions in parts or all of individual states, with the goal of returning to normal operations." EPA indicated that, with a lifting of these state and local restrictions, so, too, are restrictions lifted that potentially impede regulatory compliance. EPA reserved the right to terminate the policy earlier than August 31, but indicated it will provide at least seven days prior notice if it does so.

EPA's COVID-19 enforcement policy has been controversial. Environmental groups have criticized it and argued that it gives facilities discretion to determine whether to comply with their environmental obligations. Nine states, led by New York, sued EPA over the policy last May. Many state environmental agencies have issued their own COVID-19 enforcement discretion policies. Now that EPA is winding down its enforcement discretion, it will be interesting to see whether all states follow suit or whether decisions will be based on the spread of the virus within a given state.

Addendum on Termination: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (OECA June 29, 2020).

COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (OECA March 26, 2020).

D.C. CIRCUIT REQUIRES EPA TO CONSIDER ALL HAPs WHEN REVIEWING NESHAPS

BY: JAY HOLLOWAY

In 2001, EPA promulgated the National Emission Standards for Hazardous Air Pollutants (NESHAP) for pulp and paper combustion sources. The rule addressed some, but not all, of the hazardous air pollutants (HAPs) these sources are known to

emit. In 2017, EPA conducted its first review of the NESHAP, but decided to review only the emission limits on HAPs already controlled by the NESHAP. The Louisiana Environmental Action Network (LEAN) and other environmental groups took issue with the fact that EPA's review did not address every HAP the pulp and paper source category is known to emit. They petitioned the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to review EPA's action. In a recent decision, the Court agreed with the petitioners and found that section 112 of the Clean Air Act (CAA) requires EPA to consider and address all 190 listed HAPs when issuing or revising NESHAPs.

At the center of the appeal was the Risk and Technology Review (RTR) of the NESHAP. The RTR process involves reevaluating health risks associated with toxic air emissions, as well as any new control technologies or processes that should be incorporated into the emissions limits and requirements of the NESHAP. EPA is required to perform an RTR eight years after promulgating a HAP emissions standard. In this case, EPA began the RTR process in 2011 some ten years after issuance of the NESHAP. However, EPA did not begin the RTR rulemaking process until 2016, operating under a court ordered deadline of October 1, 2017 to issue a final rule. The 2016 proposal included some changes to the rule, but did not add emissions limits for HAPs that EPA recognized were not addressed in the rule. The 2017 final rule also did not address these HAP emissions.

EPA recognized that new emission limits may be developed as part of the RTR process, but found there was no obligation to do so. It argued Section 112 of the CAA did not require it to address pollutants that were not addressed by the original NESHAP when the NESHAP is periodically reviewed. The Court disagreed and remanded the 2017 rule to EPA with instructions to "set limits" on the remaining HAP emissions.

The question now for all industry is to what extent the LEAN decision will impact other RTRs. Of particular interest is the potential impact on the recently issued RTR for Combustion Turbines (CTs) and Coal and Oil-fired Utility Boilers (MATS rule). The CT NESHAP was promulgated in 2004. It regulates formaldehyde emissions from new and reconstructed CTs at major HAP sources, but does not contain any requirements for existing CTs. In the preamble to the NESHAP and in the RTR, EPA found that HAPs are contained in CT exhaust gases. These HAPs include formaldehyde, toluene, benzene and acetaldehyde. Metallic HAPs are also present in oil-fired CTs. The rule only sets a limit for formaldehyde (at 91 parts per billion) and requires that new or reconstructed CTs incorporate lean premix gas-fired and/or lean pre-mix oil-fired burners. As an aside, compliance with these requirements is stayed and has been stayed since issuance of the rule.

EPA finalized the CT RTR on March 9, 2020. The RTR contained no change to formaldehyde requirements for new or reconstructed CTs and again included no requirements for existing units. Does the LEAN decision require that EPA must have performed a complete assessment of the 190 air toxics and required limits for air toxics other than formaldehyde? Throughout EPA's CAA rules, emissions limits on certain pollutants are found to be surrogates for other pollutants, and that is EPA's argument as to why the formaldehyde limit is adequate. By controlling formaldehyde through clean combustion, EPA's position is that all other HAPs are adequately controlled. Thus, consistent with the

Court's holding, EPA believes the rule addresses all CT HAP emissions without the need to set individual emissions limits for each. EPA will now have the opportunity to defend that position in court because a challenge to the CT RTR was recently filed in the D.C. Circuit.

The second question concerns the MATS rule RTR issued in April 2020. The MATS rule was developed through a comprehensive evaluation of all 190 listed air toxics. In the final rule, EPA allowed coal and oil-fired utility boilers to comply with particulate matter (PM) and sulfur dioxide (SO2) emissions limits as surrogates for all HAPs except mercury, for which there are separate emissions limits. MATS units can also choose to comply with specific HAP limits.

There is no question that the MATS rule addressed all listed HAPs. Thus, the only potential impact of the LEAN decision would be if the D.C Circuit were to determine that the MATS RTR should have set specific limits for all toxics analyzed in the rulemaking. That result seems implausible. This MATS rule RTR is being challenged, but the appeal is focused on EPA's determination that it is not "appropriate and necessary" to regulate mercury emissions from utility boilers.

We see some risk from the LEAN decision for the CT RTR and CT NESHAP, but none for the MATS RTR and the MATS rule. The bigger issue is how the LEAN decision will impact other NESHAPs when they come up for review.

Louisiana Environmental Action Network v. Environmental Protection Agency, 18-1245 (D.C. Cir. Apr. 21, 2020).

CT RTR, 85 Fed. Reg. 13524 (March 9, 2020).
MATS RTR, 85 Fed. Reg. 31286 (May 22, 2020).

COURT HOLDS LOCAL NIMBY ORDINANCE PREEMPTED BY STATE LAW

BY: ETHAN R. WARE

The "not in my back yard" (NIMBY) doctrine taking hold across the United States was recently dealt a setback in South Carolina. The United States District Court for the District of South Carolina, Florence Division, recently determined that a State law regulating mine permitting expressly preempts a County ordinance requiring a separate mine permit from the local government. The case is instructive because it shows that local governments may not accord themselves "veto power" over state programs they do not like simply by enacting a local ordinance.

Background

In the case of *Red Bluff Trade Center, LLC v. Horry County*, a mining company sought to operate a limestone mine on property in Horry County, South Carolina after first obtaining all necessary permits from the State Department of Health and Environmental Control ("DHEC"). While its mine permit application with DHEC was pending, the company filed an application to obtain a mine permit from the Horry County Council, as required under Horry County Code of Ordinances, chap. 13, art. VI (the " Ordinance"). The Ordinance requires public notice and a hearing, after which the request for a mining permit is approved or denied by resolution. Id. at § 13-62. The decision to approve or deny the application is purportedly based on (1) the adequacy of the transportation network, and (2) compatibility with the surrounding community. *Id.* at § 13-63. Despite having satisfied all necessary requirements, the Horry County Council voted to deny the application.

Decision and Analysis

While the Court recognized that powers of local governments in South Carolina are to be "liberally construed" and local governments have "wide latitude" to adopt local ordinances to protect their citizens, the Court found the local permit program was preempted by State law. The Court found the County's attempt to duplicate State mine permit program requirements was in direct conflict with the State permit program and therefore must fail.

The history of State regulation of mining in South Carolina was reviewed by the Court and found to be relevant to its decision. In 1972, South Carolina joined the Interstate Mining Compact by enacting the South Carolina Mining Act, S.C. Code Ann. §§ 48-21-10, et. seq. (the "Mining Act"). The Compact recognizes "[t]he states are in a position and have the responsibility to assure that mining shall be conducted in accordance with sound conservation principles, and with due regard for local conditions." *Id.* at § 48-21-10(1)(a)(5).

The Mining Act states, in relevant part, that "no mining may be carried on in the State unless plans for the mining include reasonable provisions for the protection of the surrounding environment and for reclamation of the area of land affected by mining." S.C. Code Ann. § 48-20-20. The Court interpreted the Mining Act to give DHEC "ultimate authority over all mining, and the regulation and control of mining activity." The Court noted the Mining Act allows local governments to adopt regulations governing mining activities provided those regulations are consistent with the Act. It cited S.C. Code Ann. § 48-20-250, which says:

> No provision of this chapter supersedes, affects, or prevents the enforcement of a *zoning* regulation or ordinance within the jurisdiction of an incorporated municipality or county or by an agency or department of this State, except when a provision of the regulation or ordinance is in *direct conflict* with this chapter.
> (emphasis added).

Thus, the Court found the Ordinance could avoid preemption only if it was a "zoning" ordinance and not in "direct conflict" with the Mining Act. The Court determined that neither of these conditions had been satisfied. In support of its conclusion that the Ordinance was not zoning, the Court found (1) unlike traditional zoning ordinances, the Ordinance did not apply to particular districts but applied universally to all land; (2) the Ordinance did not permit or prohibit anything as of right, but merely created the potential for permitting or conditional permitting; (3) the Ordinance did not directly control the location of mines, but instead licensed mining based on the nature of the activity; (4) unlike traditional zoning ordinances that "endeavor to address and organize comprehensively all potential land uses" to separate "incompatible uses," the Ordinance applied only to mining; and (5) the Ordinance operated exclusively on a case-by-case basis.

The Court also found the Ordinance directly conflicted with State regulation. The decision notes the Mining Act states that "[n]o operating permit may be issued except in accordance with the procedures set forth in Section 48-20-70" and "[n]o operating permit may be modified except in accordance with the procedures set forth in Section 48-20-80 or 48-20-150." S.C. Code Ann. § 48-20-60. Relying on a South Carolina Supreme Court decision interpreting a similar statute regulating solid waste landfill permitting in the State, the Court concluded "[t]he…intent of the legislature [is] the Mining Act expressly preempts the Horry County Mine Permit Ordinance" from requiring local permits for the same activity regulated by the State.

The Court did not take the opportunity to identify those specific components of the local permitting requirement that duplicate State permit provisions. For example, a DHEC permit must include provisions regarding traffic patterns, water quality, endangered species, and noise buffer zones. The Ordinance included all of those items. It would have been helpful if the Court explained how each provision was preempted by the Mining Act.

Conclusion and Application

The mining industry is under attack on all sides from environmental groups and local governments. A trend in recent years is for those same advocacy groups to petition local governments to adopt sweeping permitting programs, which may be as stringent as, or more stringent than, State regulations. The *Red Bluff* opinion strikes a blow against those efforts by ensuring duplicative permitting programs cannot stand.

While this case is unique to South Carolina law and mines in that State, it provides guidance to operations in other jurisdictions. The Court deferred to State regulation when given the chance and was not fazed by attempts to masquerade a permitting ordinance as a "zoning ordinance." The holding in this case thus has application in other states across the country.

Red Bluff Trade Ctr., LLC v. Horry Cty., 2020 U.S. Dist. LEXIS 66146, No. 4:17-cv-03354-SAL (D.S.C. April 15, 2020).

FEDERAL COURT HOLDS CERCLA REPORTING EXEMPTION APPLIES TO RELEASES IN EXCESS OF AIR PERMIT LIMITS

BY JESSIE J. O. KING

A federal court in Pennsylvania recently ruled a U.S. Steel Corp. manufacturing facility was not required under CERCLA to notify federal authorities of releases to the air in excess of emission limits in its air permits. This ruling provides an expansive reading of CERCLA's "federally permitted release" exemption for release reporting of air emissions and is favorable for manufacturers.

U.S. Steel owns a plant in Pittsburgh, Pennsylvania that produces coke and coke byproducts, including coke oven gas that is used as fuel at the plant and two adjacent U.S. Steel plants. In late 2018 and the spring of 2019, fires occurred at the plant causing U.S. Steel to shut down certain emissions control equipment responsible for removing volatile organic compounds (VOCs) and sulfur from its coke oven gas. The air emissions control equipment remained shut down for months after each fire, causing releases of hydrogen sulfide, benzene and other VOCs into the ambient air at the plant and the two adjacent plants using the unprocessed coke oven gas during these time periods. U.S. Steel reported both fires to the county health department, the authority responsible for enforcing the Clean Air Act (CAA) in accordance with local laws and U.S. Steel's air permits. An environmental group sued, alleging the releases were required to be reported to the National Response Center (NRC) under CERCLA. U.S. Steel filed a motion to dismiss the suit, alleging the releases were exempt from CERCLA. The Court agreed with U.S. Steel and granted its motion to dismiss.

Section 103(a) of CERCLA requires immediate reporting to the NRC of releases of hazardous substances "in quantities equal to or greater than the statutorily defined limitations." However, this same section exempts reporting of a "federally permitted release." Congress defined that term in Section 101(10) of CERCLA to mean allowable releases under numerous environmental laws, including the CAA, the Clean Water Act (CWA), the Solid Waste Disposal Act, superseded by the Resource Conservation and Recovery Act (RCRA), the Safe Drinking Water Act (SDWA), the Marine Protection Research and Sanctuaries Act (MPRSA), and the Atomic Energy Act (AEA). The question posed to the court was whether the exemption for "federally permitted releases" applied to releases in excess of, or otherwise not in compliance with, levels allowed

under the facility's air permits. The Court held it did. To determine Congress' intent as to the scope of the exemption, the Court compared the CERCLA definition of "federally permitted release" for air permits to those for permits issued under CWA, RCRA, SDWA, MPRSA and the AEA. For releases to the air, CERCLA defines a "federally permitted release" as "any emission into the air *subject to* a permit or control regulation under" the CAA. Conversely, CERCLA requires releases relating to the other five statutes to be "in compliance with" or "authorized under" a permit, regulation or standard in order to qualify for the exemption. Therefore, the Court reasoned Congress unambiguously intended the federally permitted exemption for releases subject to CAA permits to be applied differently than those under the other environmental laws. To reach this finding, the Court interpreted "*subject to*" to mean that, as long as the pollutants emitted were addressed by the permit, the exemption applied even if the emissions exceeded their permit limits.

But why would Congress purposely treat CAA releases differently? The Court concluded that Congress intended to relax the exemption for these releases because the CAA already establishes substantial prevention, response, and reporting requirements for accidental air releases that duplicate CERCLA's reporting and response requirements.

For facilities subject to the extensive reporting requirements under air permits, this practical approach makes perfect sense. However, this ruling may be appealed and, in any event, may not be followed by the other federal courts in different circuits across the country.

Clean Air Act Council vs. United States Steel Corp., No. 2:19-cv-01072 (W.D. Pa. May 14, 2020).

VIRGINIA REGIONAL CARBON TRADING: READY, SET, JOIN RGGI!

BY: LIZ WILLIAMSON

The Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort among 10 northeastern states to cap and reduce CO2 emissions from fossil-fueled power plants. A bill passed in the 2020 Virginia General Assembly Session and signed into law has kick-started Virginia's preparation to participate in RGGI. With the General Assembly shifting to a Democratic majority in November 2019, this change was expected. The previous General Assembly stalled Governor Ralph Northam's efforts to participate in RGGI in 2020. However, the General Assembly's pivotal legislation sent state environmental regulators to work to expedite entry into RGGI on January 1, 2021.

The new legislation is entitled the Clean Energy and Community Flood Preparedness Act. It accelerates efforts to immediately join RGGI, in concert with the General Assembly and Governor's new budget that removes the prior budget restriction that prevented the Virginia Department of Environmental Quality (DEQ) from expending resources to join RGGI in 2019. The Act requires that DEQ "establish, implement, and manage an auction program to sell allowances into a market-based trading program consistent with the RGGI program." To accomplish this objective, the Act tasks DEQ with revising Virginia's Cap and Trade Rule to allow Virginia to join RGGI as a full member, rather than as a linked member with consignment auctions. The Act directs DEQ to revise the Rule without notice and comment through the Virginia Administrative Process Act by incorporating the statute into the

existing Rule. Now, Virginia will be sprinting toward RGGI membership by the end of this year.

Direct RGGI membership is a significant shift from the prior consignment membership that only required the collection of administrative fees from participants. As a full member, Virginia will participate directly in RGGI auctions, meaning sources affected by the rule will have to purchase a CO2 allowance for every ton of CO2 emitted. Funds for the purchase of CO2 allowances will now pass from Virginia RGGI participants that must purchase allowances (electric generators and large non-exempt industrial sources that emit carbon) to RGGI. RGGI largely returns the auction proceeds from Virginia allocations to the Commonwealth. The Clean Energy and Community Flood Preparedness Act directs that the monies will not be returned to the participants but will be funneled primarily to two new state funds: (1) an account for sea level rise/flooding from severe weather; and (2) an account to support low income energy efficiency programs. Electric generators in Virginia will obtain rate recovery for the costs involved in RGGI participation as an environmental investment. As result, it is likely that RGGI costs ultimately will be borne by Virginia's citizens and businesses in their electricity payments. In summary, the Act uses RGGI participation as a mechanism for collecting monies from citizens and businesses to pay for new state funds directed toward flood preparedness and low-income energy efficiency programs.

On July 1, DEQ issued the revised Virginia Cap and Trade Rule as directed by the Act. The revised Rule provides for Virginia to begin participation in 2021 and retain the current allowance allocation for Virginia for 2021 of 27.16 million tons of CO2 allowances to be contributed into the RGGI market. However, the RGGI model rules have a mechanism to adjust allocations downward for full members, so it is possible allocations may be adjusted in the future. The revised Rule bypassed notice and comment and action by the State Air Pollution Control Board. DEQ indicated that it coordinated with other RGGI states prior issuing the Rule.

Sources that must comply with RGGI are working on implementation. There are many details not present in the revised Rule that pertain to implementation and permitting. DEQ indicates that a permitting template will be developed as a separate document.

Virginia has made history as the first southern state to join RGGI. We will be tracking implementation efforts in the second half of 2020. Environmentalists have applauded this step with the hope that this trading program will reduce carbon emissions in the Commonwealth. Participants are preparing to comply with RGGI's additional layer of regulatory requirements. Manufacturing facilities, all of which consume more electricity than households, will need to prepare for cost increases.

Virginia General Assembly 2020 Session, Senate Bill 1027, entitled the Clean Energy and Community Flood Preparedness Act (amending §§ 10.1-603.24 and 10.1-603.25 of the Code of Virginia).

Regulation for Emissions Trading Programs, 9 VAC 5-140-6010 et seq.

Revised Regulation for Emissions Trading Programs, 9 VAC 5-140-6010 et seq., https://www.deq.virginia.gov/Portals/0/DEQ/Air/Regulations/c140p7.pdf. (prepublication version)

Virginia General Assembly 2019 Session, House Bill 1700, Item 4-5.11 #1c.

For more information about the Regional Greenhouse Gas Initiative, see https://www.rggi.org

For more information about environmental group positions on RGGI, see https://www.southernenvironment.org/cases-and-projects/carbon-cap-and-trade-a-simple-and-proven-climate-solution-for-virginia and https://bluevirginia.us/2020/02/virginia-general-assembly-passes-legislation-to-join-the-regional-greenhouse-gas-initiative

EPA AMENDS TSCA DEFINITION OF "SMALL MANUFACTURER"

BY: RYAN W. TRAIL

EPA recently issued a final rule amending Toxic Substances Control Act (TSCA) regulations concerning "small manufacturers" of chemical substances. Companies that meet the regulatory definition of a "small manufacturer" of chemical substances are exempt from certain reporting and recordkeeping obligations under TSCA. The amendment, which became effective on June 29, 2020, increased total annual sale thresholds in the definition, which in turn increased the number of companies eligible for the exemption.

Generally, TSCA requires companies manufacturing 25,000 pounds or more of a chemical substance at any site in a calendar year to report to EPA certain details regarding the company and the chemicals manufactured (known as "Chemical Data Reporting" or CDR). Reported information includes such details as chemical identities of all substances produced above the reporting threshold, total annual production (or import) volume, volumes used onsite and volumes exported, and information related to exposure risks to onsite workers. One significant exemption from CDR requirements is for "small manufacturers."

Prior to the amendment, a chemical manufacturer that did not manufacture in excess of 100,000 pounds of any one chemical at any one site in a calendar year qualified as a "small manufacturer" and was exempt from CDR if their total annual sales were less than $40 million. If the company exceeded the 100,000 pound production threshold for a particular chemical, it was not considered "small" for purposes of reporting on that chemical, unless the company had less than $4 million in total annual sales. Any company whose total annual sales were less than $4 million was "small" and exempt, regardless of production volume.

The recent amendment to the definition of "small manufacturer" adjusts this two-part standard for inflation. The new definition includes those companies with (i) total annual sales (combined with those of any parent company) of less than $120 million (increased from $40 million), unless the company manufactures more than 100,000 pounds of any one chemical at a site; or (ii) total annual sales of less than $12 million (increased from $4 million), regardless of production volume.

For companies considered "small" under the first part of the standard ($120 million total annual sales and less than 100,000 pounds), the company may be considered "small" and exempt for some chemical substances but not "small" for others, triggering limited CDR requirements. Such a company would continue to report only for those chemical substances produced in excess of 100,000 pounds annually. Companies qualifying as "small" based on the second part of the standard ($12 million total annual sales) and those qualifying as "small" for all chemical substances under the first part of the standard will be exempt entirely from reporting.

In the preamble to the amendment, EPA estimates the new definition of "small manufacturer" will result in the complete elimination of CDR reporting for 127 industry sites and will reduce CDR requirements for 173 industry sites, significantly reducing regulatory compliance costs for many companies. The small manufacturer exemption from CDR is self-implementing, meaning EPA does not make a determination as to whether a company is "small" prior to CDR reporting. Chemical manufacturers should carefully review annual sales and production volumes to determine if they may be exempt from some or all CDR reporting obligations under the new rule.

Small Manufacturer Definition Update for Reporting and Recordkeeping Requirements Under the Toxic Substances Control Act (TSCA) Section 8(a), 85 Fed. Reg. 31986 (May 28, 2020).

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