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ENVIRONMENTAL NOTES

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TRUMP ISSUES EXECUTIVE ORDERS; ENVIRONMENTAL GROUPS PREPARE TO OPPOSE HIS AGENDA

BY: CHANNING J. MARTIN

President Trump has wasted no time in acting on his environmental agenda. On January 24, his second working day in office, the President signed two Executive Orders giving the green light to construction of the Keystone and Dakota Access pipelines. When he signed the orders, he said the pipelines "will create great construction jobs," and that the contracts with the pipeline companies are "subject to re-negotiation of terms by us" as to the use of American steel and American workers. Both of these projects have been the subject of a significant litigation and were opposed and delayed by the Obama Administration, tribes and numerous environmental groups. President Trump also signed an Executive Order requiring federal agencies to streamline the environmental permitting process for American manufacturers and reduce regulatory burdens within the confines of the law. Finally, he signed an Executive Order requiring federal agencies to expedite environmental reviews of infrastructure projects.

Environmentalists may be down at the moment, but they're not out. They're planning a four-step approach to oppose what they see as President Trump's roll-back of environmental policies and regulations. Step one is to enlist the public. Environmental groups will use social media and ads to convince the public that actions proposed by the Administration will be detrimental to human health and the environment. Step two is to use that public support and sentiment to peel-off moderate Republicans to block any legislation that rolls-back environmental laws or regulations. Step three is to push for stronger regulation and enforcement at the state level (particularly in states controlled by Democrats) as a way to counter weaker regulation by the federal government. Step four is to sue the federal government, and to convince states to sue the federal government, alleging that it failed to comply with the law, it acted arbitrarily and capriciously, etc. (This last step should sound familiar to Republicans since Republican Attorneys General used it regularly to challenge environmental regulations issued by the Obama Administration.)

Environmental groups have seen increased donations and membership since President Trump was elected. Thus, they've got the resources to mount a strong defense to the Trump agenda. Executive Orders are easy; they require just the stroke of the President's pen. The hard part is getting legislation through Congress. Stay tuned – the fireworks have just begun.

FOURTH CIRCUIT UPENDS NPDES PERMIT SHIELD

BY: KEITH "KIP" MCALISTER, JR.

The United States Court of Appeals for the Fourth Circuit recently upheld a lower court's determination that a West Virginia mining company was not shielded from liability by its NPDES permit. The mining company's permit incorporated a state

regulation which stated that "discharges . . . are to be of such quality so as not to cause violation of applicable water quality standards." Environmental groups contended the company violated this permit provision because its discharge of ions and sulfate in mine drainage caused electrical conductivity in the stream to increase. In turn, this caused exceedances of narrative water quality standards and resulted in impacts to aquatic ecosystems.

In its defense, the mining company argued it disclosed the discharges of ions and sulfate when negotiating its permit renewal, and the State affirmatively chose not to impose any specific limit on conductivity. The company further contended it followed the provisions of its permit, even if conductivity resulted in violations of water quality standards, because it complied with the effluent limits in its permit. The district court disagreed and sided with the plaintiffs.

On appeal, the Fourth Circuit held that a permit shields its holder from liability as long as the permittee complies with the express terms of the permit. Here, the court noted that, although the permit said the company must "not cause violation of applicable water quality standards," the evidence showed that these standards were, in fact, exceeded. Therefore, the company's argument that it complied with its permit was flawed.

Those familiar with previous Fourth Circuit Clean Water Act cases may recall the *Piney Run* case. There, the Court held that permit holders who disclose their pollutants to the permitting agency and thereafter comply with the effluent limits the agency chooses to insert in the permit are shielded from liability for discharges of pollutants not listed in the permit. Why didn't the same reasoning apply here to shield the mining company? The Court said there was a critical difference. That difference was the mining company's permit expressly stated that the permittee must not cause a violation of water quality standards while the permit in *Piney Run* contained effluent limitations only. There was no general prohibition in the *Piney Run* permit against violating water quality standards. The Court said:

> Nothing in *Piney Run* forbids a state from incorporating water quality standards into the terms of its NPDES permit. Rather, *Piney Run* held…that a permit holder must comply with *all* the terms of its permit to be shielded from liability. The terms of [the mining company's] permit required it to comply with water quality standards. If [it] did not do so, it may not invoke the permit shield.

Although the decision is still subject to appeal, it's a wake-up call to all companies that discharge to surface waters within the jurisdiction of the Court (Maryland, Virginia, West Virginia, North Carolina and South Carolina). If the decision stands, it means that the permit shield many of these companies thought they had just got a lot smaller.

Ohio Valley Environmental Coalition v. Fola Coal Co., LLC, Case No. 16-1024 (4th Cir., Jan. 4, 2017).
Piney Run Preservation Ass'n v. Cty. Comm'rs, 268 F.3d 255 (4th Cir. 2001).

EPA PROPOSES USE RESTRICTIONS ON TCE

BY: ETHAN R. WARE

EPA is proposing significant use restrictions and recordkeeping requirements on those facilities using or distributing trichloroethylene (TCE), a widely used industrial solvent. The agency proposed two rules in a month's time in response to what EPA says are "significant health risks" associated with the use of TCE. The first proposed rule would ban the use of TCE in aerosol degreasing and in spot cleaning at dry cleaning facilities. The second proposed rule would ban the use of TCE in vapor degreasing, something that would affect a wide-variety of industries and machine shops. Public comments are being accepted on the first proposed rule through February 14, 2017 and on the second proposed rule through March 20, 2017.

The proposed rules have been promulgated under the Toxic Substances Control Act, and any facilities involved in the manufacture (including import), processing, distribution in commerce, or use of TCE are covered. Specific restrictions in the proposed rule include prohibitions on the manufacture, processing, distribution, and use of TCE in aerosol degreasing products, spot cleaning at dry cleaning facilities and vapor degreasing. These prohibitions would become effective six to nine months after the effective date of the final rules.

Moreover, manufacturers, processors, and distributors (but not retailers of TCE) would be subject to notification and recordkeeping requirements. As proposed, covered facilities would have to "notify companies to whom TCE is shipped, in writing, of the [use] restrictions" and maintain records for two years of the customers receiving TCE products, the amounts shipped, and all downstream notifications made. This requirement would begin forty-five days after the respective effective dates of the final rules.

81 Fed. Reg. 91592 (Dec. 16, 2016).
82 Fed. Reg. 7432 (Jan. 19, 2017).

TIPS FOR TACKLING TIER II TROUBLE

BY: RYAN W. TRAIL

Companies with hazardous chemical reporting obligations know the significance of March 1. On that date each year, facilities that at any time during the prior year had 10,000 pounds or more of an OSHA hazardous chemical, or 500 pounds or more (or the threshold planning quantity, whichever is less) of an extremely hazardous substance (EHS), must file an EPCRA Tier II report identifying such chemicals. Tier II reports must be filed with the State Emergency Response Commission, the Local Emergency Planning Committee, and the local fire department.

While common mistakes and oversights in Tier II filings have often led to significant civil penalties, this year the price of noncompliance has been increased greatly. Effective August 1, 2016 and again on January 15, 2017, EPA's civil penalty policies were amended to account for inflation, resulting in significantly higher civil penalties for violations of many regulatory programs, including EPCRA Tier II reporting. Previously, a Tier II violation could result in a daily maximum civil penalty of $37,500; with the recent amendments, the daily maximum civil penalty is now $54,789.

With March 1 quickly approaching, understanding typical Tier II shortcomings may help facilities avoid steep penalties. The majority of Tier II violations

involve a few very common chemicals. Lead and sulfuric acid frequently are overlooked. Facilities with forklifts or other large battery-powered equipment that contain lead and sulfuric acid often make the mistake of believing that batteries fall under the "article" exemption or the "consumer product" exemption from Tier II reporting. However, because they have the potential to leak, spill, or break during normal conditions of use, batteries in forklifts and other large equipment are not considered exempt "articles." Also, because they are industrial batteries that contain chemicals not in the same form and concentration as a product packaged for use by the general public, these batteries are not exempt "consumer products."

Ammonia is also a commonly overlooked chemical in Tier II reporting. Facilities with onsite refrigeration equipment using ammonia as a refrigerant should remember it is an EHS, with a 500 pound reporting threshold. Finally, diesel fuel, which is commonly stored in large quantities, is frequently cited in Tier II enforcement.

Given the recent increase in civil penalties, companies that discover a Tier II violation should consider the benefits of voluntary self-disclosure to EPA. Under EPA's Audit Policy, a company may be eligible for up to 100% reduction of gravity-based civil penalties for violations disclosed voluntarily. To be eligible, a disclosure must meet nine criteria. The violation must 1) be discovered through an environmental audit or compliance management system; 2) be discovered voluntarily, not through a legally required monitoring procedure; 3) be promptly disclosed (within 21 days of discovery); 4) be discovered independent of agency investigation; 5) be corrected and remediated within 60 days of discovery; 6) be prevented from recurring; 7) not be a repeat violation; 8) not cause serious actual harm or present imminent and substantial endangerment to human health or the environment; and 9) be followed by the company's cooperation with EPA during any investigation of the disclosure.

Even if a voluntary disclosure does not meet the nine criteria of the Audit Policy, the disclosure will still be considered as an adjustment factor when EPA calculates civil penalties. Self-disclosed Tier II violations are eligible for up to a 50% reduction in gravity-based civil penalties under EPA's EPCRA Enforcement Response Policy.

Companies storing or using chemicals should maintain robust environmental auditing practices to ensure proper identification and classification of these chemicals. If violations of Tier II reporting obligations are discovered, companies should remember the potential benefits of self-disclosure. With proper attention to facility conditions, common Tier II mistakes and penalty exposure can be avoided.

EPA's Civil Monetary Penalty Inflation Adjustment Rule, 81 Fed. Reg. 43091 (July 1, 2016); 82 Fed. Reg. 3633 (Jan. 12, 2017).
EPA's Audit Policy, 65 Fed. Reg. 19618 (April 11, 2000).
EPA's EPCRA Enforcement Response Policy

U.S. FISH AND WILDLIFE SERVICE FINALIZES ESA COMPENSATORY MITIGATION POLICY

BY: HENRY R. "SPEAKER" POLLARD, V

We reported in our April 2016 edition that the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") had recently updated certain Endangered Species Act ("ESA") regulations and proposed policy changes for ESA compensatory mitigation. FWS has since finalized

its proposed compensatory mitigation policy, providing the first comprehensive policy by FWS on this subject since the ESA was first enacted. The new policy addresses mitigation required of ESA permittees, species conservation banking, use of in-lieu fee programs to offset species impacts, and other framework aspects for compensatory mitigation. The policy also sets the marker for how other federal agencies engaged in project permitting and review will address species compensatory mitigation in setting conditions as part of those agencies' actions and approvals.

In pursuit of a "net gain or, at minimum, no net loss" approach to species protection, the final policy incorporates "landscape-scale" compensatory mitigation. This approach is designed to broaden the scope of compensatory mitigation to provide greater reliability and efficiencies in species loss mitigation. FWS intends the new policy to align with several Presidential Memoranda, orders of the Secretary of Interior and other FWS guidance addressing species loss mitigation. The final policy also integrates relevant legal authorities addressing species loss mitigation during development activities.

A few key concepts are worth noting. Consistent with current Department of the Interior guidance, FWS defines "compensatory mitigation" as compensation addressing "remaining unavoidable impacts after all appropriate and practical avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions." The policy therefore reiterates the push for avoidance and minimization of adverse impacts before compensatory mitigation should be used, akin to mitigation for impacts to wetlands. In the final policy publication, FWS sought to address a number of comments offered during the public comment period for the draft policy and made several changes, in part supplementing the description of its asserted legal authority for requiring (or even allowing) compensatory mitigation. However, many key aspects of implementation that were included in the proposed policy were struck from the final policy and will instead be folded into implementation guidance to be issued later by the agency. This has left some wondering about the mechanics of how the policy will really work in practice.

It is important to remember that this is a final policy, not formal regulation, despite mandatory-style language throughout the document. There also are concerns about whether the policy exceeds FWS's authority under the ESA and related program regulations. With the change in Administration, and with so much of the final policy prompted by and derived from Presidential memoranda, Secretarial orders, and other agency guidance, it remains to be seen whether, or for how long, the final guidance will survive or whether a very different approach to species compensatory mitigation will follow.

81 Fed. Reg. 95316 (Dec. 27, 2016).

EPA AMENDS CAA 112(R) RISK MANAGEMENT PROGRAM

BY: JESSICA J.O. KING

EPA has published a final rule amending its Clean Air Act (CAA) Risk Management Program ("RMP") regulations. EPA states the new rule will reduce the likelihood of accidental releases at chemical facilities, improve emergency response to releases, and raise public awareness of chemical hazards at chemical facilities. The rule was scheduled to become effective on March 14, 2017, but the Trump Administration

on January 24 delayed its effective date by at least another 60 days to give the Administration time to study it. Although it's possible the rule will never become effective, we've described its provisions below so our readers can be prepared if it does.

Section 112(r) of the Clean Air Act (CAA) requires stationary sources ("facilities") that hold specific "regulated substances" in excess of threshold quantities to implement a risk management program. Under that program, facilities assess their potential release impacts, prevent releases, plan for emergency response to releases, and summarize the program in a Risk Management Plan. A facility's plan is reported to EPA and shared with state and local officials to ensure appropriate responses to chemical releases. EPA is amending the RMP regulations in response to Executive Order (EO) 13650 signed by President Obama on August 1, 2013. The EO was issued in response to a series of chemical accidents reported around the nation, including an explosion at a fertilizer plant in West Texas that same year.

According to EPA, the final rule will accomplish the following:

> Accident Prevention: Prevent catastrophic accidents by improving accident prevention program requirements;

> Emergency Response Enhancement: Enhance emergency preparedness to ensure coordination between facilities and local communities; and

> Enhanced Availability of Information: Improve information access to help the public understand the risks at RMP facilities.

Accident Prevention Program Revisions

The final rule contains the following three changes to the program intended to prevent accidental releases:

1. **Root Cause Analysis**: EPA's RMP establishes three "program levels" for regulated processes. Program 1 applies to processes that would not affect the public in a worst-case scenario release and that have not had a release in the past five years. Program 2 applies to those that do not qualify for Programs 1 or 3. Program 3 applies to processes not eligible for Program 1 and either subject to OSHA's PSM standard (under Federal or state OSHA programs) or classified in 1 of 10 specified industry sectors. When a catastrophic release or "near miss" occurs, facilities with Program 2 and 3 regulated processes must now perform a root cause analysis. EPA believes this analysis can be used to put measures in place to prevent future similar releases at other locations.

2. **Third Party Audits:** Facilities with Program 2 and 3 regulated processes that have an RMP reportable accident must contract with an independent third-party to perform or lead a compliance audit instead of a "self-audit" to determine if the facility is complying with the accident prevention procedures required under the rule.

3. **Safer Technology and Alternatives Analysis**: Paper manufacturing, petroleum and coal products manufacturing, and chemical manufacturing facilities with Program 2 regulated processes must now conduct a safer technology and alternatives analysis (STAA) as part of their process hazard analysis (PHA), which is updated every five years.

Emergency Response Enhancements

There are four major changes in the final rule to the emergency response requirements:

1. **Coordination with Local Responders:** Facilities with Program 2 or 3 processes are now required to coordinate with the local emergency response agencies at least once a year to determine how the source is addressed in the community emergency response plan;

2. **Information:** Facilities with Program 2 or 3 processes are now required to ensure local response organizations are aware of the regulated substances at the source, their

quantities, the risks presented by them, and the resources and capabilities at the facility to respond to an accidental release of a regulated substance;

3. **Emergency Contact Tests:** Facilities with Program 2 or 3 processes are now required to conduct notification exercises annually to ensure emergency contact information on their plans is accurate and complete; and

4. **Field and Tabletop Exercises:** All facilities subject to the emergency response requirements are now required to conduct field and tabletop exercises on a timeline established in consultation with local emergency response officials. However, at a minimum, full field exercises must be conducted once every 10 years and tabletop exercises at least once every 3 years.

Enhanced Availability of Information

To improve the public's access to information relating to chemical releases, the rule contains the following new requirements:

1. All regulated facilities must provide certain basic information to the public upon request;

2. All regulated facilities must provide ongoing notification of availability of information elements on a company website, social media site, or some other publicly accessible means; and

3. All regulated facilities must hold a public meeting for the local community within 90 days of a reportable accident.

The rule was finalized after public input and comment, and the changes are fewer than were expected when the rule was first proposed. For instance, EPA considered modifying the list of regulated substances by adding Ammonium Nitrate and redefining "catastrophic release," but elected not to do so in the final rule.

Although facilities should prepare to implement the rule, it's quite possible the rule may never become effective. With some exceptions, President Trump on January 24 required all agencies to delay the effective date of all recently-issued final rules for an additional 60 days to give the Administration time to review them. In addition, Republicans in Congress have suggested using the Congressional Review Act to void this final rule. We'll keep you apprised of further developments.

82 Fed. Reg. 4594 (Jan. 13, 2017).

EPA ISSUES FORMALDEHYDE EMISSION STANDARDS FOR COMPOSITE WOOD PRODUCTS

BY: ETHAN R. WARE

Title VI of the Toxic Substances Control Act authorizes EPA to reduce formaldehyde exposures from composite wood products, and EPA recently did so by promulgating its long-anticipated Formaldehyde Emission Standards for Composite Wood Products. The final rule establishes formaldehyde emission standards for hardwood plywood made with a composite or veneer core, medium-density fiberboard (MDF), and particleboard, and finished goods containing those products sold in the United States that are manufactured after specified dates. The limits are 0.05 parts per million (ppm) for hardwood plywood made with a composite or veneer core, 0.11 ppm for MDF, 0.13 ppm for Thin MDF, and 0.09 ppm for particleboard. The rule's requirements are consistent

with those promulgated by the California Air Resources Board or CARB.

The rule is phased in beginning in December, 2017, with the last compliance date being in December, 2023. While many of the recordkeeping requirements apply beginning December 12, 2017, the date for compliance with the applicable emission standard depends on the type of wood product imported, manufactured, or sold in the United States. Particleboard, hardwood plywood made with either a composition core or a veneer core, and MDF must comply by December 12, 2017. Laminated products must comply by December 12, 2023. Before that date, manufacturers of laminated products must use compliant composite wood product platforms and comply with certain labeling and recordkeeping requirements

The final rule exempts from the definition of hardwood plywood laminated products that are made by attaching a wood or woody grass veneer to a compliant core with a phenol-formaldehyde resin or a resin formulated with no added formaldehyde. Recordkeeping is required to demonstrate eligibility for the exemption.

The final rule establishes a third-party certification (TPC) process to ensure that composite wood panel producers comply with the new emission standards for composite wood products. TPCs must inspect products and certify formaldehyde emission tests. EPA must accredit all TPCs used to demonstrate compliance with the rule.

Finished goods and composite wood products must be labeled as to formaldehyde content. Products with "de minimis amounts" of composite wood are excluded. De minimis is defined as < 144 in^2 of product. Imported article products must be certified compliant, even though "articles" are excluded from the scope of the TSCA statue.

The final rule is slightly different than the proposed rule. Among other things, EPA has clarified that it applies only to goods, not objects that are constructed on-site, such as buildings that are part of the real estate. The manufacture-by date for non-exempt laminated products is extended to seven years after publication of the rule. Importers will have two years (not one year as proposed) to certify imports as compliant.

The rule is codified as 40 CFR Part 770. Importers and manufacturers of wood products should audit their operations to confirm applicability and compliance with the new standards.

81 Fed. Reg. 89674 (Dec. 12, 2016).

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