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# WILLIAMS MULLEN
# ENVIRONMENTAL NOTES

## BIDEN ADMINISTRATION COULD QUICKLY ADOPT MANY ENVIRONMENTAL ENFORCEMENT POLICY CHANGES

**BY: CARRICK BROOKE-DAVIDSON**

Federal environmental policies are likely to undergo significant changes at DOJ and EPA under the Biden administration, including alteration of many Trump administration enforcement policies. Since many of these existing policies are not regulations, it likely will not be difficult for the incoming administration to reverse or alter them. For policies that have been adopted as regulations, any attempt to alter them will have to be done using the Administrative Procedures Act (APA). For policies that have been issued as guidance or internal agency requirements, they can be altered with the stroke of a pen. Discussed below are some of the environmental enforcement-related policy changes that can be anticipated from the Biden administration.

### DOJ Structure

The most significant change that could affect environmental enforcement is the Biden administration's stated goal to create a new litigating division at DOJ devoted to environmental and climate justice. The role of environmental justice in enforcement has been a complicated and controversial topic. How this new division would coordinate with DOJ's existing Environment and Natural Resources Division (ENRD) and with EPA would have to be determined, but the stated goal to create such a division indicates that environmental justice and climate-related issues can be expected to receive significant enforcement resources.

In addition to this potential structural change, the Biden administration can be expected to focus on increased federal environmental enforcement. Consequently, a number of existing DOJ and EPA policies are likely to be changed as well. These are discussed below.

### OMB Directive

A significant Trump policy that affected all federal enforcement was announced by OMB in August 2020. OMB Memorandum M-20-31 requested that all federal agencies implement changes in their enforcement practices to conform to the "best practices" described in the memorandum. Among the most significant requests were provisions for a good-faith defense to enforcement actions, implementation of disclosures of exculpatory evidence (a practice that previously applied only to criminal trials), and limitations on the use of tolling agreements. The memorandum was issued to implement the May 19, 2020 Executive Order 13924, *Regulatory Relief to Support Economic*

*Recovery* but many of its aspects echo the October 9, 2019 Executive Order 13892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*. The memorandum requested agencies to issue final rules by November 26, 2020. Neither EPA nor DOJ have issued any new rules in response, and even if there is any last minute rulemaking, agency procedural rules can be modified or rescinded without notice and comment rulemaking (see below), meaning any rule issued pursuant to the memorandum could quickly be altered. Moreover, the document, as a White House memorandum, could be rescinded on the first day of the Biden administration. Whether any of these practices will be re-implemented by the new President will have to await developments.

**DOJ Policies**

There are several DOJ policies, some specifically directed at environmental enforcement and other more general policies that affect enforcement, that likely will be rescinded or altered by the Biden administration. Perhaps the most significant polices are those that concern Supplemental Environmental Projects (SEPs). SEPs have been used for decades as an enforcement tool, allowing environmental defendants to trade penalty reductions for environmentally beneficial projects that go above and beyond regulatory requirements. While SEPs have not been without controversy over the years, it appeared EPA had addressed many of the concerns in a series of policies, the most recent of which was issued in March 2015. DOJ under the Trump administration, however, was more critical of SEPs.

The first action to curtail SEPs was issuance of a DOJ memorandum on June 5, 2017 by Attorney General Sessions which generally prohibited settlement payments to third parties in federal litigation. It was feared this policy would severely curtail SEPs in judicial settlements because implementation of SEPs often involves third party payments. EPA was not subject to the policy as it applied only to judicial settlements in cases handled by DOJ (unless an administrative case required DOJ approval). However, there was concern among many that DOJ's policy would have a chilling effect on the use of SEPs in settling administrative actions. To address these concerns, the acting Assistant Attorney General (AAG) of ENRD issued a lengthy memorandum on January 9, 2018 that appeared to substantially approve the use of SEPs that involved third-party payments. This reprieve was relatively short-lived. In August of 2019, after confirmation of the new ENRD AAG Jeffrey Clark the previous October, ENRD issued a policy that prohibited SEPs in settlement of enforcement actions with state and local governments. This change was arguably required to conform to a general November 2018 DOJ policy. That policy prohibited settlements with state and local governments that resulted in greater relief than could be obtained if the case were litigated to judgment. While the overarching DOJ policy was seen as primarily directed at federal consent decrees with police departments, it was also viewed by ENRD as prohibiting SEPs with state and local governments. The ENRD policy was also hostile to SEPs in general, and this hostility was born out by a subsequent ENRD memorandum in March 2020 that prohibited the use of SEPs altogether in judicial settlements. Again, while not binding on EPA administrative settlements, this policy was viewed as a severe blow to SEPs, as they are most often implemented through judicial consent decrees.

All the DOJ enforcement policies discussed above are subject to being overturned by a new administration. While the March 2020 memorandum prohibiting SEPs goes to some length to argue that SEPs are not just bad policy but illegal, it is not a formal opinion of DOJ's Office of Legal Counsel. As set out on EPA's SEP policy webpage, the issues that Trump's ENRD found troubling had previously been explicitly considered and addressed in the revisions to the SEP policy. EPA never rescinded its SEP policy in the face of the DOJ memorandum, so even in the Trump administration SEPs were still an option in administrative settlements.

Recent litigation in the U.S. District Court for the District of Massachusetts illustrates the underlying ephemeral nature of the SEP prohibition, and

why such prohibition could and likely will be reversed. The Conservation Law Foundation filed suit against Trump Administration officials in October 2020 seeking to have the SEP prohibition overturned. In its first substantive filing in response, a motion to dismiss filed November 24, 2020, one of the government's principal arguments was that the decision to use or not use SEPs is a "civil enforcement decision committed to agency discretion by law." The motion echoes the Clark March 2020 memorandum by alluding to concerns about the legality of SEPs, but ultimately basing its argument on the position that SEPs are a discretionary enforcement mechanism, and, as such, their use cannot be compelled.

But the converse of this position also is true. If the decision not to use SEPs is committed to enforcement discretion and not ultimately dictated by law, then a Biden Administration ENRD also has the enforcement discretion to reimplement SEPs. Given this background, the criticism from many quarters that surrounded DOJ's March 2020 SEP prohibition policy, and the evident popularity of their use in settling enforcement cases, a Biden DOJ can be expected to reimplement SEPs, and the Trump administration's stated justification for its prohibition policy does not hinder but rather supports the authority of the new administration to do so.

Given this background and the criticism that surrounded DOJ's March 2020 SEP prohibition policy, a Biden DOJ can be expected to re-implement SEPs, including allowing payments to third-parties for such things as mitigation projects. (See the EPA settlement with Harley-Davidson, where the government deleted the originally required $3 million mitigation payment to a third party in light of the June 2017 policy discussed above. The policy was issued and the deletion occurred after the consent decree had been lodged but before it had been entered).

Another DOJ enforcement policy that is likely to be revisited is a January 2018 DOJ policy that limits the use of agency guidance as a basis for enforcement actions. Again, this was a policy of general application, not just environmental enforcement, and is subject to revision by a new Attorney General. The policy is of limited utility for defendants, as it has the standard disclaimer that it is not intended to create any rights in a party subject to an enforcement action, meaning it cannot be raised as a defense. Still, it can be used by defendants in negotiations with government personnel if they feel it is not being followed.

**EPA Enforcement Policies**

EPA has issued several enforcement policies that are likely to be revised by the new administration. Among the most significant is EPA's July 11, 2019 policy regarding the respective role of EPA and the states in enforcement and compliance assurance. This memorandum was viewed as a culmination of a series of policy announcements that signaled a reduced role for EPA compared to the states in environmental enforcement. Previously, EPA issued interim guidance in January of 2018 providing for a decreased role for EPA in enforcement. Later in August 2018, EPA announced that it was transitioning from National Enforcement Initiatives (NEI) to National Compliance Initiatives (NCI). All of these actions were seen as diminishing the role of EPA in environmental enforcement, and all can be expected to be revised or altered by a Biden EPA, which is likely to have a more assertive enforcement presence and grant less deference to the states.

In addition to these directives, EPA made other policy changes that affected its role in enforcement. In March 2018, EPA issued procedures requiring EPA headquarters to receive briefing papers from the EPA regional offices on all judicial referrals from EPA to DOJ. This altered a practice that had been in place since the Reagan administration which allowed cases to be referred directly from EPA regional offices to DOJ without headquarters review. This March 2018 action constituted a possible headquarters check on enforcement referrals. The following April, EPA issued a memorandum rescinding a prior January 2015 memorandum regarding the use of so-called Next Generation compliance tools in enforcement settlements. Next Generation compliance and

enforcement was a creation of the Obama EPA and was an attempt to use technology and other approaches to leverage EPA's diminishing resources. Singled out for criticism in the April 2018 memorandum were advanced monitoring and third-party verification of settlement obligations, both of which were encouraged in the 2015 memorandum. Again, these alterations of prior practices were viewed as part of a de-emphasis on enforcement by the Trump administration. They undoubtedly will come under scrutiny by the Biden administration.

In addition to the policy and guidance discussed above, EPA has engaged in at least one enforcement-related rulemaking which could be altered by the new administration. On March 2, 2020, EPA issued a rule governing on-site civil inspection procedures. This rule was adopted pursuant to an Executive Order, and as a rule regarding agency procedure it was exempt from notice and comment rulemaking. The rule basically codified practices that were already in place in EPA guidance. Whether a Biden EPA would want to revisit this rule is not clear, but it could do so easily using the same abbreviated rulemaking procedure as was used for the original rule. It is important to note that EPA's October 19, 2020 final rule regarding processes and procedures applicable to the development of guidance documents is not an internal enforcement policy but is instead a regulation promulgated under the APA that has an indirect effect on enforcement. Unless negated using the Congressional Review Act, which is not likely for several reasons, alteration or rescission of this rule would require notice and comment rulemaking.

While much attention will be focused on potential changes in substantive legal and regulatory requirements under the Biden administration, many of these changes will have to go through detailed and potentially lengthy rulemaking and the inevitable litigation that goes with it. In contrast, there are many enforcement-related policy pronouncements at DOJ and EPA that could be changed literally overnight. With a likely increased focus on enforcement in a Biden administration, the policies discussed above may not have much continued viability.

## EMERGENCY PREPAREDNESS AND PREVENTION UNDER THE HAZARDOUS WASTE GENERATOR IMPROVEMENTS RULE

**BY: RYAN W. TRAIL**

Generators of hazardous waste have long understood the importance of emergency preparedness and prevention to regulatory compliance and facility safety. Contingency planning and coordination with emergency service providers have been requirements of RCRA regulations for many years. For states that have adopted the Hazardous Waste Generator Improvements Rule (HWGIR), however, new and more stringent requirements for emergency preparedness and prevention now apply. These states include Virginia, North Carolina and South Carolina, as well as 28 other states. All authorized states are required to adopt most aspects of the HWGIR, including those aspects discussed below, but many have not yet done so.

Under the old regulations, generators of hazardous waste (both small and large quantity) had to make arrangements with local emergency response entities, which may be called upon in the event of a release, fire, or explosion involving hazardous waste at the facility. Facilities were required to make the emergency responders familiar with the layout of the site, the risks associated with the type(s) of hazardous waste onsite, the locations where employees would likely be throughout the site, and possible evacuation routes. While not specified in the regulations, many facilities accomplished this by inviting local emergency response personnel to tour the facility.

Under the HWGIR, generators must still make arrangements with emergency response personnel. However, the associated recordkeeping requirements have changed. Previously, there was no affirmative duty to document the arrangements. Generators who were unable to make the necessary arrangements were required to document this shortcoming, but otherwise no recordkeeping obligation existed. The HWGIR added a requirement that the generator must keep documentation of the

fact that it made arrangements with local emergency responders. The arrangements must be noted in the facility's operating record.

Hazardous waste contingency plans are another essential element of emergency preparedness and prevention under both the prior regulations and the HWGIR. A contingency plan ensures facility and emergency response personnel have complete and accurate information to respond safely and efficiently to an emergency involving hazardous waste.

The HWGIR created new obligations for facilities with hazardous waste continency plans. One significant update is the requirement to produce a Quick Reference Guide as part of the contingency plan. The Quick Reference Guide is intended to summarize the broader contingency plan and must include eight elements essential for local responders when an emergency occurs:

1. Types/names of hazardous wastes and the hazard associated with each;
2. Estimated maximum amount of each hazardous waste that may be present;
3. Identification of hazardous wastes where exposure would require unique or special medical treatment;
4. Map of the facility showing where hazardous wastes are generated, accumulated and treated and routes for accessing these wastes;
5. Street map of the facility in relation to surrounding businesses, schools and residential areas for evacuation purposes;
6. Locations of water supply (e.g., fire hydrant and its flow rate);
7. Identification of on-site notification systems (e.g., fire alarm, smoke alarms); and
8. Name of the emergency coordinator(s) and 7/24-hour emergency telephone number(s) or, in the case of a facility where an emergency coordinator is on duty continuously, the emergency telephone number for the emergency coordinator.

A facility that became a large quantity generator after the date the HWGIR became effective in its state must submit a Quick Reference Guide of its

contingency plan to local emergency responders at the time it becomes a large quantity generator. However, for large quantity generators in existence on the effective date of the HWGIR in their state, the Quick Reference Guide need only be submitted when the contingency plan is next amended. A facility is required to amend its contingency plan if any of the following occur:

- Applicable regulations are revised;
- The plan fails in an emergency;
- The facility changes—in its design, construction, operation, maintenance, or other circumstances—in a way that materially increases the potential for fires, explosions, or releases of hazardous waste or hazardous waste constituents, or changes the response necessary in an emergency;
- The list of emergency coordinators changes; or
- The list of emergency equipment changes.

Violations for inaccurate, incomplete or deficient hazardous waste contingency plans are common among RCRA enforcement actions. With the HWGIR now in effect in many states, facilities may soon be amending their contingency plans. New requirements for documenting arrangements with emergency responders and creating and maintaining a Quick Reference Guide could easily be overlooked. It is important for hazardous waste generators to review emergency preparedness and prevention requirements of the HWGIR carefully to ensure continued compliance.

*Hazardous Waste Generator Improvements Rule*, 81 Fed. Reg. 85732 (Nov. 28, 2016)

## DON'T SLIP AND FALL INTO NONCOMPLIANCE: EPA'S PROPOSED CRIMINAL NEGLIGENCE STANDARD UNDER THE CLEAN WATER ACT

**BY: HENRY R. ("SPEAKER") POLLARD, V**

The Clean Water Act (CWA) provides various means of enforcement against violators of its permitting programs, including sanctions for those guilty of criminal negligence. The chief programs in this regard are the National Pollutant Discharge Elimination System (NPDES) program addressing discharges of wastewater and stormwater into regulated "waters of the United States" and the Section 404 program addressing discharges of dredge or fill material into such waters. For states and Indian tribes to be authorized by EPA to administer the NPDES program or the Section 404 program, the states and tribes must demonstrate sufficient authority for enforcement, including criminal enforcement, to ensure compliance with these programs within their respective jurisdictions.

EPA recently proposed to grant more flexibility to states and tribes for enforcement of criminal negligence-based violations of their own NPDES and Section 404 programs. In short, EPA is proposing amendments to its NPDES and Section 404 program authorization regulations at 40 C.F.R. §§ 123.27 and 233.41 to clarify that states and tribes may pick their own level of negligence for what constitutes a criminally negligent violation of their corresponding program laws and regulations. More particularly, the amendment, if finalized, would provide that, "[t]he burden of proof and degree of knowledge or intent required under State law for establishing [criminal] violations . . . shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the [CWA], *except that a State may establish criminal violations based on any form or type of negligence*." (Emphasis added.)

Criminal enforcement is not the normal route for agencies to take; most violations are settled through administrative or civil judicial proceedings. Still, ordinary negligence – the legal liability standard used for most retail customer slip-and-fall personal injury cases – does not present a very high burden of proof for a criminal violation of an environmental law. As a legal principal, negligence does not require the offending party to know or intend that its action or inaction will be a violation of law or will even cause the resulting harm. Indeed, many people may still be unaware that mere negligence can even serve as a basis for criminal liability for a violation of a Clean Water Act-based regulation or permit. Even so, for decades now, CWA § 309(c)(1) has explicitly provided that negligence is a basis for criminal liability when EPA is the enforcing agency, and approved state and tribal CWA program laws have followed suit.

What different forms of negligence might be used by states and tribes? Generally, negligence entails one party failing to exercise the level of care towards another party that a reasonable or prudent person would exercise under the same circumstances. To prove someone acted negligently, one must generally show that a duty of care existed, that this duty was breached, that the breach was the legally recognizable cause of an injury, and that the injury resulted in legally recognizable damages. Negligence can involve various injuries to people or property. There are different degrees of negligent behavior that can lead to different levels of liability: (i) ordinary negligence, as described above; (ii) gross

negligence, which goes beyond a mere accident or mistake and involves lack of any regard or great indifference; and (iii) willful, wanton and reckless negligence. There is also negligence per se, when negligence is inferred based on a violation of some statute, regulation or rule that sets a duty of care. In the environmental regulatory context, violation of a statutory or regulatory duty, standard or prohibition can be readily inferred as a negligent act.

EPA reasons in support of its proposed approach that the CWA provisions for authorizing state and tribal administration of NPDES and Section 404 programs do not require these state and tribal enforcement powers to mirror exactly EPA's provisions under CWA § 309 to effectuate reasonably sufficient and enforceable programs. EPA also expresses concern that some state constitutions may limit criminal sanctions for ordinary negligence, the level of negligence set by CWA § 309 for EPA enforcement based on criminal negligence. Therefore, EPA considers it appropriate to let states and tribes sort out which level of negligence fits best within their respective program enforcement regimes.

Despite the relatively low bar of proof for negligent violations, CWA § 309's sanctions for criminal negligence have serious teeth: a fine of at least $2,500 and up to $25,000 per day of violation, or imprisonment for up to one year, or both, with a second offense triggering twice these limits. As noted, state NPDES programs and Section 404 programs already include criminal negligence liability, and they also carry substantial sanctions. *See, e.g.,* Virginia State Water Control Law, Va. Code § 62.1-44.32(b) (negligent violation of this statute or related regulation, order or permit generally constitutes a "misdemeanor punishable by confinement in jail for not more than 12 months and a fine of not less than $2,500 nor more than $32,500, either or both").

The net result of the proposed rulemaking would be that states and tribes may set levels of negligence that hinge on a higher burden of proof, such as gross negligence, for criminal liability to be imposed, or they may choose to keep ordinary negligence as the requisite standard for this liability. While some greater flexibility may be in the offing, no one should view the proposed amendments as an abandonment of criminal negligence sanctions altogether; some type of criminal negligence sanction is still expected as part of the enforcement arsenal for state and tribal NPDES or Section 404 programs. Where the state or tribe does not have an approved program, EPA will have program primacy, so CWA § 309's ordinary negligence standard would apply.

The public comment period for EPA's proposed regulatory amendment ends January 13, 2021. No doubt, some will praise it as reasonable regulatory flexibility for states and tribes, while others will pan it as a reckless disregard of EPA's duty to ensure adequate enforcement by the states and tribes that will in turn damage the fabric of CWA programs nationally. It remains to be seen whether, once the noise and dust settle from the related clash of competing viewpoints, EPA's proposal is found to be a reasonable and prudent action or neglectful regulatory oversight.

*Criminal Negligence Standard for State Clean Water Act 402 and 404 Programs,* 85 Fed. Reg. 80713 (December 14, 2020).

## DOJ DEFERS TO STATES FOR CWA ENFORCEMENT

**BY: ETHAN R. WARE**

The threat of EPA administrative action often drives industry to consider quick, administrative settlements with state or local environmental agencies for even the slightest environmental violations. Unless the Biden Administration changes course, industries can now do the same to avoid federal civil actions for Clean Water Act violations, which heretofore were excluded from the exercise of enforcement discretion.

The Clean Water Act, 33 U.S.C. §§ 1251 to 1388

(CWA), authorizes the discharge of pollutants to waters of the United States (WOTUS) or publicly owned treatment works (POTW) pursuant to a federal or state permit. Most states have obtained delegated authority to issue CWA permits in lieu of EPA. The CWA envisions a role for EPA in delegated states when it comes to enforcement. For the first time, a recent Department of Justice (DOJ) guidance document directs DOJ not to file a federal civil action on behalf of EPA where a state proactively seeks enforcement against a violator.

**Clean Water Act**

Congress reserved to the United States the lead role in enforcing water quality standards in the CWA. EPA is granted special oversight in citizen suits, CWA § 505 (c)(d), 33 U.S.C. § 1365 (c)-(d), and the federal government retains emergency authority to sue "any person" to prevent imminent and substantial endangerment to human health and the environment, CWA § 504 (a), 33 U.S.C § 1364 (a).

On the other hand, states are the primary enforcement arm for violations of the CWA:

> It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States to prevent, reduce, and eliminate pollution*, to plan the development and use…of land and waste resources, and to consult with [EPA] in the exercise of [its] authority under this chapter.

53 U.S.C. § 1251 (b) (emphasis added). A state's right to enforce environmental statutes like the CWA makes sense because it is constitutionally required. *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (quoting *The Federalist* by James Madison). In fact, the CWA precludes a federal civil penalty action when a state (1) commences and is diligently prosecuting or (2) successfully pursues or is pursuing *administrative* action under state law "comparable" to the federal administrative penalty scheme. CWA § 309(g), 33 U.S.C. § 1319 (g). Strangely, however, the statutory deference to states does not apply to state civil *judicial* enforcement actions. Likewise, the CWA does not explicitly prevent the federal government from pursuing a subsequent administrative action even when civil judicial enforcement is precluded by the CWA.

**New DOJ Policy**

Recognizing the incongruity of state action precluding a federal administrative action but not a federal judicial action for the same violations, DOJ recently adopted a revised enforcement policy. The new policy requires DOJ to defer to states in civil judicial actions, as well as administrative actions:

> Accordingly, [DOJ has] come to the conclusion that – as a matter of enforcement discretion – civil enforcement actions seeking penalties under the CWA will henceforward be strongly disfavored if a state has already initiated or concluded its own civil or administrative

proceeding for penalties under an analogous state law arising from the same operative facts.

Memorandum: "Civil Enforcement Discretion in Certain Clean Water Act Matters Involving Prior State Proceedings," Clark to Section Chiefs (July 27, 2020) (the "Policy").

The Policy is remarkable for three reasons. First, DOJ actions are "strongly disfavored." This elevates the burden of proof for DOJ and gives increased opportunity to the alleged violator's legal counsel to work with the delegated state to avoid CWA litigation.

Second, it applies where states have taken or are taking either administrative or judicial action. This encourages industries to work with POTWs and states informally when a CWA violation occurs to work out a solution promptly and efficiently. The company does not have to be sued by a state for the Policy to apply.

Third, state penalties need only be assessed under "analogous state law" to avoid DOJ action. The Policy does not appear to require that the amount of penalties assessed by the state be equivalent to the amount EPA could demand under EPA penalty policies. This may result in substantial savings if the violation is promptly settled with the state or POTW using state or local penalty policies.

**Application of the Policy**

For the Policy to apply, the state action must be initiated prior to a federal civil penalty action, which suggests CWA violators may wish to seek out state or POTW enforcement in complex cases right away. Also, the Policy is not absolute, meaning there are circumstances where DOJ reserves the right not to apply it. These circumstances are limited and include:

1. The violator would receive an "unfair windfall" if a federal action is not filed;
2. The state is not "diligently prosecuting" the action;
3. The state requests EPA assistance and the request "would not amount to unfair piling on"; or
4. The federal action is necessary to protect an important federal interest or there is a "discernible gap in the prior state relief," or "other exceptional circumstances."

Policy at pp. 8-9. The last category carries the greatest risk of the Policy not applying since it is not clearly explained by the guidance.

**Conclusion and Use of Policy**

Where a company experiences a violation of CWA permit requirements, the Policy offers an opportunity to resolve non-compliance efficiently with a local POTW or state agency. By settling early, the company limits the potential for EPA civil actions where significant fines are common. EPA action is "strongly disfavored" under the Policy when this occurs. Preclusion is available even if the underlying POTW or state action is merely administrative, as long as the state law is analogous to the CWA, which is likely to be the case.

To maximize use of the Policy, companies under threat of EPA enforcement for noncompliance with wastewater permits may wish to take the following measures:

Step 1: Audit wastewater permit compliance and implement corrective action where possible;
Step 2: Evaluate the need to voluntarily disclose non-compliance to the appropriate agency, and in cases where significant non-compliance may be a risk, apply voluntary disclosure procedures; and
Step 3: Resolve the non-compliance consistent with the scope and intent of the Policy.

This approach could remove the risk of substantial enforcement by DOJ in the future for the covered violations.

With all of this said, however, the Policy may be short-lived. The Biden Administration will

undoubtably be tougher on enforcement than the Trump Administration and is unlikely to bind DOJ to policies that defer enforcement to the states. Accordingly, the new Attorney General or the Assistant Attorney General for the Environment and Natural Resources Division may void the Policy shortly after taking office. We will keep you apprised.

*Civil Enforcement Discretion in Certain Clean Water Act Matters Involving Prior State Proceedings* (DOJ July 27, 2020).

## VIRGINIA'S AIR POLLUTION CONTROL BOARD IMPLEMENTS ENVIRONMENTAL JUSTICE INITIATIVE

**BY: JAY HOLLOWAY**

The Virginia Department of Environmental Quality's (DEQ's) new Environmental Justice (EJ) Initiative announced October 16, 2020 is in motion and moving in parallel before the State Air Pollution Control Board (Air Board). The EJ Initiative will involve the creation of an Office of Environmental Justice at DEQ and the development of an Environmental Justice Action Plan. The Air Board, through its Committee on Public Engagement, took public comments in early December 2020 on those portions of DEQ's EJ Initiative that relate to the work of the Air Board. Shortly thereafter, the Air Board conducted a hearing approving the first Prevention of Significant Deterioration (PSD) permit subject to DEQ's EJ review process. This article discusses the new EJ program and how it is likely to be implemented going forward.

### EJ New Source Permitting

On December 3, 2020, the Air Board held a hearing to consider a Prevention of Significant Deterioration (PSD) permit for the U.S. Navy's Norfolk Naval Shipyard (NNS) to construct a 17 MW state-of-the-art Combined Heat and Power (CHP) Plant to provide steam and electricity to the Shipyard. The project will replace an aging CHP Plant and employ Best Available Control Technology (BACT) Selective Catalytic Reduction (SCR) to control emissions.

The hearing lasted more than 6.5 hours, with much of the hearing devoted to EJ issues. Opponents argued the project would disproportionately impact a nearby minority, low-income community. Weighing on the Board's consideration of the permit was DEQ's October 2020 EJ Initiative and the January 2020 court opinion that held the Board failed to adequately consider the disproportionate health effects of a natural gas compressor station in Buckingham County on a nearby minority and low-income community. The Navy and DEQ made a series of presentations showing how EJ concerns had been and would be addressed.

The Navy conducted a detailed environmental justice analysis of surrounding communities, including a public health assessment that focused on the health effects of the pollutants to be emitted. The concentrations of these pollutants were shown to be well below health-based standards. The Navy held three virtual information sessions in May, August and October 2020 and provided information by social media. It also engaged in direct outreach to 71 organizations, 98 individuals, 9 civic organization, and 2 churches in the vicinity of the Shipyard, including clergy/faith leaders, non-profit, education, public housing, workforce development, and minority community representatives, civic leagues, minority/small businesses, and elected officials. Finally, it attended a meeting organized by the Portsmouth NAACP in October 2020 to discuss the project.

In its presentation, DEQ noted that it used an EPA EJ screening tool called "EJSCREEN" that maps and screens a nationally consistent data set to identify minority and low-income populations where EJ concerns may be warranted. Using that tool, it ran three EJSCREEN runs centered on the new CHP plant location using one, two, and five-mile radii. For all runs, the minority population was above the Virginia average of 37%, and the low-income population was above the Virginia average of 27%. The screen showed the population within one mile of the plant is 2,443 (86% minority, 68% low income), within two miles is 35,951 (70% minority,

50% low income), and within five miles is 231,870 (63% minority, 40% low income). Based on these data, and the definitions of "environmental justice community," "population of color," "community of color," "low income," and "low income community" in the Virginia Environmental Justice Act, Va. Code Ann. 2.2-234, et seq. (EJ Act), DEQ concluded that one or more Environmental Justice communities existed at least within two miles of the project and possibly within five miles and beyond. DEQ also looked to the EPA External Civil Rights Compliance Tool Kit which applies to Title VI civil rights investigations of existing facilities and as a check on state greenfield permits.

DEQ's position at the hearing was that the public outreach, the pollution control requirements, and modeling and toxicology analyses ensured that the CHP plant will not have any disproportionate adverse environmental or health impacts on the surrounding area, including the environmental justice communities. The Board ultimately agreed with DEQ's position and voted to grant the permit.

**Future EJ Permitting**

The EJ Act is very vague as to how EJ is to be addressed by state agencies. It says only that "[i]t is the policy of the Commonwealth to promote environmental justice and ensure that it is carried out throughout the Commonwealth, with a focus on environmental justice communities and fence-line communities." VA Code Ann. 2.2-235. DEQ's EJ Initiative is intended to formalize an EJ process that will apply to all permitting.

Going forward, it is clear that permits before the Air Board will have a very steep hill to climb. DEQ has already announced that it plans to identify potentially controversial permit applications with EJ implications early in the process. These permits may not be limited to PSD permits. Under Va. Code Ann. 10.1-1322.01, if 25 individual requests for a public hearing are made during the public comment period, DEQ's Director must decide whether to grant a public hearing. Among the criteria the Director is to consider is whether there is significant public interest in issuance of the permit and whether there are substantial disputed issues raised. Considering DEQ's focus on EJ, it seems unlikely the Director would decide not to grant a hearing if EJ objections are raised.

Those applying for an air permit of any type would be well advised to consider EJ concerns early in the application process and take appropriate steps to address them.

Environmental Justice Initiative (DEQ Oct. 16, 2020).

## ARE JURISDICTIONAL DETERMINATIONS VALID ONLY FOR FIVE YEARS?

**BY: CHANNING J. MARTIN**

As part of its Clean Water Act § 404 Permit Program, the Army Corps of Engineers regulates certain activities in "waters of the United States," a regulatory term that includes wetlands. To determine the extent of its jurisdiction, the Corps makes an official confirmation of the geographic boundaries of waters and wetlands on a given property and whether those waters and wetlands are regulated under the Clean Water Act. This confirmation is called an approved "Jurisdictional Determination" (JD).

An approved JD is a written document issued by the Corps, and one that can be relied on by the landowner to determine what areas of the property can and cannot be disturbed without obtaining a 404 permit from the Corps. It remains valid for a period of five years, unless new information warrants revision of the determination before the expiration date or a District Engineer identifies specific geographic areas that merit re-verification. Regulatory Guidance Letter (RGL) 05-02 (June 14, 2005). The five-year period was selected by the Corps because wetlands and other waters of the United States are affected over time by both natural and man-made activities, resulting in changes in jurisdictional boundaries. In addition, what is and is not "jurisdictional" under the Clean Water Act changes as regulations and guidance documents change.

What happens when the JD expires? The answer is that – with one important exception -- any development requires a new JD to determine whether the boundaries of waters and wetlands have changed. Developing the property without a new JD risks impacting regulated waters and wetlands without a permit.

The exception is when a landowner has obtained a 404 permit based on the JD. In that instance, the Corps has made clear that "Jurisdictional Delineations associated with issued permits and/or authorization are valid until the expiration date of the authorization/permit." RGL 05-02. Thus, for example, if a developer has been issued an individual 404 permit for a term of 10 years, it is not necessary for the developer to obtain a new JD when the original JD expires. The Corps went further in a memorandum issued on December 13, 2013 by the Assistant Secretary of the Army for Civil Works. There, the Corps said, "In the event an extension is requested for a permit pursuant to 33 CFR § 325.6(d), any previously granted jurisdictional determination or delineation concurrence associated with the issued permit shall remain valid for the duration of any subsequent permit time extension and no new jurisdictional determination or delineation will be required unless the permittee fails to obtain an extension before expiration of the permit."

Thus, permit holders can rest assured that their 404 permit will remain valid even if the JD on which it was based has expired. This also holds true if the duration of the permit is extended by the Corps. What happens if a permit holder forgets to request an extension of the permit and the permit expires? The answer is it's time to go back to square one.

*Expiration of Geographical Jurisdictional Determination of Waters of the United States,* Regulatory Guidance Letter 05-02 (June 14, 2005).

*Memorandum on Duration of Permits and Jurisdictional Determinations,* USACE Regulatory Policy Directive (Dec. 13, 2013).

## GOOD NEIGHBOR OZONE TRANSPORT IN 2021: WHAT'S THE FUSS FOR NOX SOURCES IN UPWIND STATES?

**BY: LIZ WILLIAMSON**

Congress addressed the issue of interstate transport of air pollution in the Clean Air Act by enacting a "Good Neighbor Provision." That provision requires upwind states to eliminate their contributions to air pollution in downwind states. EPA has promulgated various rules to implement the Good Neighbor Provision, beginning with the NOx Budget Trading Program and including the Clean Air Interstate Rule and, most recently, the Cross-State Air Pollution Rule (CSAPR). These rulemakings address the interstate transportation of ozone. CSAPR is updated regularly to align with the current ozone

National Ambient Air Quality Standard (NAAQS). In response to various legal challenges and to update CSAPR with respect to the 2008 ozone NAAQS, EPA amended CSAPR in 2016. In 2019, the D.C. Circuit in *Wisconsin v. EPA* found that EPA's 2016 amendment only partially addressed downwind contributions from upwind states. Because upwind states were continuing to contribute to the inability of downwind states with moderate nonattainment areas to meet the July 2018 attainment date for the 2008 ozone NAAQS, the D.C. Circuit remanded the rulemaking and required EPA to revisit required reductions of upwind contributors.

In response to the D.C. Circuit's order, EPA recently published its proposed Revised Cross-State Air Pollution Rule Update for the 2008 ozone NAAQS (the Proposed Rule). Unlike past iterations of CSAPR, the Proposed Rule prescribes emissions reductions that are likely to significantly impact electric generation unit (EGU) operation, electricity costs, and may affect non-EGUs. Comments were due on December 14, 2020. The proposal drew a large array of commenters, from the usual suspects (eNGOs and consortiums of EGUs) to states, trade associations, and companies representing non-EGU interests, such as the American Chemistry Council, the American Petroleum Institute, the Portland Cement Association, and the American Forest and Paper Association.

**Proposed Rule Summary**

The Proposed Rule addresses the contributions of upwind states to downwind state ozone attainment of the 2008 NAAQS of 75 ppb. Notably, this rulemaking does not address possible future adjustments that may result from the final 2015 ozone NAAQS, which has a lower attainment benchmark of 70 ppb. The Proposed Rule dictates NOx reductions exclusively from EGUs. However, it contemplates contributions from non-EGU sources because it requested comment on information gaps and the cost and ability of non-EGUs to employ certain NOx reduction technologies. EPA has a court-ordered deadline of March 15, 2021 for final rule signature.

The Proposed Rule seeks to implement the requirements ordered by the court. It proposes substantial NOx seasonal emission reductions for EGUs in 12 states beginning in the 2021 ozone season through 2024. These upwind states are Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and West Virginia. EPA found that 10 states that previously were determined to be "upwind" are no longer linked to downwind receptors. EPA identified the 12 upwind states because those states' projected 2021 emissions contribute at or above a threshold of 1% of the 75 ppb NAAQS to the identified nonattainment and/or maintenance problems in downwind states. Seasonal NOx budget reduction amounts and timelines are based on existing controls on EGUs, such as existing selective catalytic/noncatalytic reduction (SCR/SNCR) controls and installation or upgrade of low NOx burners and SCRs/SNCRs.

The Proposed Rule also imposes a one-time conversion of allowances banked between 2017 and 2020 from the Group 2 to the Group 3 Trading Program. The conversion is set to occur no later than 180 days after publication of the Final Rule, which is anticipated prior to the 2021 Ozone Season that begins on May 1, 2021. Data analysis from third party sources suggests that the banked emissions reductions will be at least 7:1.

**What's the Fuss?**

1. Could the Final Rule require non-EGUs to reduce NOx emissions? EPA concluded that emissions reductions at non-EGUs were too expensive versus options for EGUs. EPA solicited comment on the cost and feasibility of emissions reductions. Non-EGU trade associations responded with support for no non-EGU emissions reductions, arguing that reductions would be too expensive. It is uncertain if EPA will agree.

2. Current unit emissions budgets are aggressive and are unprecedented. Coal units are likely to be forced to operate less during the ozone season. Calculations of the emissions budgets

show that higher NOx emitters, even those with SCRs, will not have enough allowances to operate at higher capacity factors if called upon by regional transmission organizations.

3. The Proposed Rule calls for erosion of allowance bank cushions that could be a fallback should a hot summer require additional generation. EGUs that have been low NOx emitters have been allowed to bank allowances. Those banks will be reduced, removing the incentives these units earned by installing and using SCRs and SNCRs. With less in the banks, units will not have any cushion should a hot summer require additional run-time.

4. Coal units will be held at lower capacity factors due to the state budgets based on 2019 and the five-year unit allocation baseline (2015-2019) used by EPA. Coal units have been dispatched less frequently in the last five years due to less expensive natural gas prices. EPA's methodology holds coal units to past utilization rates by decreasing state budgets and determining unit allocations using low-emitting baseline years. As a result, the Proposed Rule caps coal fleet generation even though future demand and economics (pricing changes) may otherwise dispatch these units in the future.

5. The Proposed Rule has a bias against small generation systems that do not have the option of generation shifting. With allowance budgets so tight, EGUs with large generation systems will survive better than EGUs that own fewer assets. Large systems can dispatch lower NOx emitters when emissions from coal-fired assets begin to eclipse budgets. In contrast, many systems serving rural communities are served by municipalities and electric cooperatives that do not own many EGUs. Without options, smaller system owners will likely be forced to purchase power if owned assets exceed CSAPR budgets. These costs will be passed along to customers.

6. The Proposed Rule removes allowances from retired units but does not let EGUs make up that generation formerly supplied by those units. When units retire, their allocations will sunset from the state budget. The result is a decreasing state budget, although customer demand will not decrease. It is unclear how the lost generation can be made up if the state budget does not allow for allocations to be re-distributed.

**Conclusion**

Electricity will become more expensive in the 12 upwind states. Why? State budgets are tight. If an EGU exceeds its NOx seasonal allocation budget, it must purchase allowances. Allowances are expected to quadruple in cost, which will be passed along to customers in rates. EGUs will also have the choice of purchasing power. However, purchased power costs will be added to costs to maintain and pay off owned asset debt. For instance, if an EGU is paying off debt incurred due to adding a SCR on a coal unit, that debt must still be paid off, even if the unit cannot run due to the Final Rule updating CSAPR. Either way, electricity costs will increase due to the scarcity of seasonal NOx allowances. Those increases will be borne by the customers.

The Final Rule is likely to have a substantial impact on EGU generation in the 12 upwind states beginning in May 2021. EGUs and non-EGUs will be tracking the outcome of the rulemaking in the first quarter of 2021. Meanwhile EPA will have the tall task of wading through the 86 public

comments, developing the final rule, obtaining OMB approval, and finalizing the rule in only four months.

*Revised Cross-State Air Pollution Rule Update*, 85 Fed. Reg. 68964 (Oct. 30, 2020).

Wisconsin v. EPA, 938 F.3d 303 (D.C. Cir. 2019).

## NEPA CHALLENGES TO PERMITS LEAD TO PROJECT DELAYS

**BY: PIERCE M. WERNER**

The United States District Court for the Western District of Washington recently entered an order vacating U.S. Army Corps of Engineers permits issued pursuant to the Clean Water Act (CWA) and Rivers and Harbors Act (RHA). The Order serves as an important reminder to permittees and industry that NEPA cannot be ignored, and, despite the vast deference afforded to them by courts, agency permitting decisions are not incontrovertible.

The National Environmental Policy Act (NEPA) is often summarized simply as requiring an agency to abide by certain procedural requirements that require it to take a "hard look" at the environmental impacts and consequences of its actions before taking those actions. NEPA requires federal agencies to prepare environmental impact statements (EISs) whenever they propose major federal actions that would significantly affect the quality of the human environment. On its face, NEPA's policy statement is a strongly phrased directive on the need for the United States to preserve and safeguard the natural environment in the interest of harmony with and the benefit of humans. The operative provisions of the Act carry out that policy by imposing procedural obligations an agency must meet before taking an action that may have significant environmental consequences. In that respect, it is a hurdle to agency actions, not a complete barrier.

In the case at hand, environmental groups challenged water permits issued by the Corps related to the construction of a portion of the Kalama Manufacturing and Marine Export Facility—a proposed methanol refinery with an associated export terminal and pipeline. The project sits on approximately 90 acres, is funded by a $2 billion loan from the U.S. Department of Energy and, if completed, would be one of the largest fracked gas-to-methanol refineries in the world.

Before the court were cross motions for summary judgment related to the permits authorizing the discharge of dredge and fill materials into the Columbia River. The permits were necessary for construction of the export terminal portion of the facility, consisting of a dock, methanol pipelines, inert gas and vapor return lines, a stormwater system, and associated structures. The basis for the challenge was the Corps' findings in its

Environmental Assessment (EA) and its failure to conduct an EIS prior to issuance of the permits. Ultimately the court granted partial summary judgment in favor of the environmental groups. The court vacated the permits and held the Corps was obligated under NEPA to take into account the indirect and cumulative greenhouse gas emissions resulting from the project. The court held the failure of the Corps to consider "reasonably foreseeable" greenhouse gas emissions beyond the states of Oregon and Washington was arbitrary

and capricious, ultimately ordering the Corps to conduct an EIS. Importantly, there was an EIS conducted for the project in 2016 and a draft EIS conducted in 2009 by another agency, but the court held the failure of the Corps to conduct its own EIS, instead relying on and considering an already-completed EIS by the State Department of Ecology, was arbitrary and capricious.

This Order is important for several reasons. First, while this is a high-profile project with significant public interest, environmental groups or private interest challengers can be just as successful using a NEPA or APA challenge on the local level with smaller projects. Second, the Order highlights the most likely way agency action will be overturned when successfully challenged: the agency did not follow necessary procedural obligations. As past newsletter articles have discussed, agency decisions are given considerable deference by the courts. That makes it difficult to overturn these decisions based on substance. Finally, while the Order resulted in a considerable setback and cost for the potential permittee, it did not prohibit the proposed action. Instead, the agency must now work to correct the procedural error.

It is likely the project here will go forward and ultimately be constructed after the EIS, but similar challenges to smaller projects can often create too much of a burden for potential permittees and stymie the action indefinitely if the permittee is not fully aware of its options in responding to challenges. A well-reasoned response to a procedural challenge under NEPA can be the difference between a delay in a project and the cancellation of the project.

*Columbia Riverkeeper v. U.S. Army Corps of Engineers*, No. 3:19-cv-06071 (W.D. Wash. Nov. 23, 2020) (Order on Cross Motions for Summary Judgment)

## EPA SAYS NO RISK FROM CERCLA FINANCIAL ASSURANCE EXEMPTIONS FOR THREE NAMED INDUSTRIES

**BY: JESSIE KING**

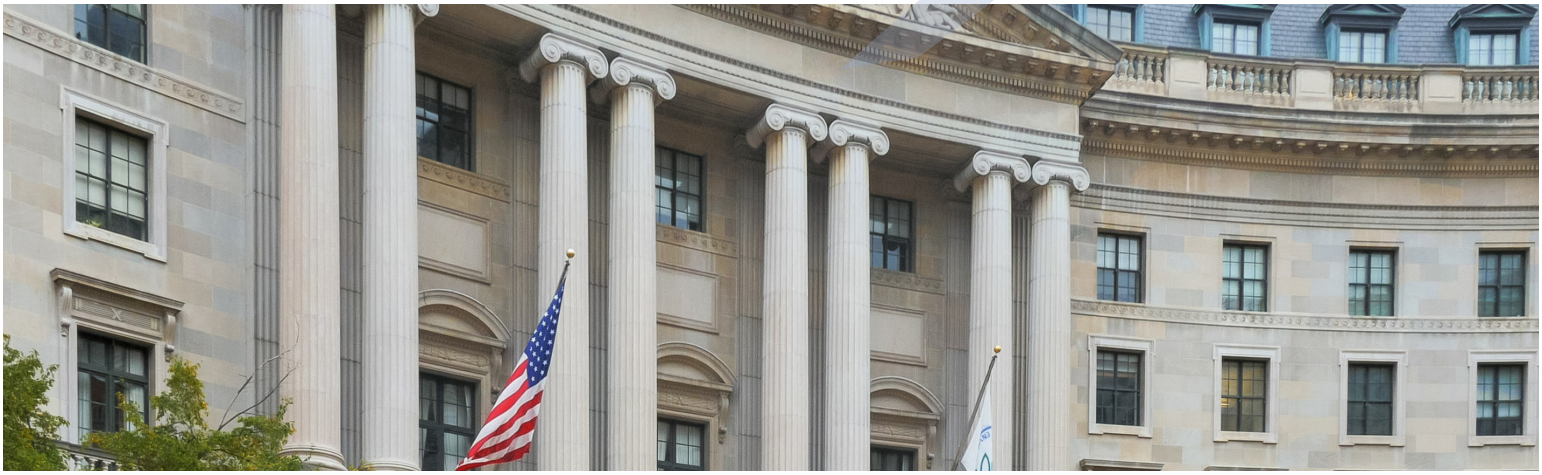
EPA has promulgated a final rule declining to impose final assurance requirements on the electric power, petroleum and coal manufacturing, and chemical manufacturing industries to clean up spills of hazardous substances.

### I. CERCLA

Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980 to promote timely cleanup of pollution and ensure the costs of cleanup are borne by "potentially responsible parties" (PRPs) – not taxpayers. CERCLA allows EPA to either clean up a site using "Superfund" and, where possible, sue to recover those costs, or order PRPs to clean it up using the PRPs' money.

Section 108(b) of CERCLA authorizes EPA to require certain classes of facilities to establish financial assurance to cover the costs associated with cleaning up a release of hazardous substances from their facilities. The classes of facilities are determined by "the degree and duration of risk associated with the production, transportation, treatment, storage or disposal of hazardous substances." The level is set and adjusted based on the payment experience of EPA using the CERCLA Superfund, commercial insurers, court settlements and judgments, and voluntary claims satisfaction. The types of financial assurance that can be used to meet the requirement include insurance, guarantees, surety bonds, letters of credit, or qualification as a self-insured.

Section 108(b) required EPA to develop and publish a list by 1983 of the first priority classes of facilities for which financial assurance would be required. EPA failed to do so, was sued in 2008 to compel its performance, and was ordered by a court to issue a priority list in 2009. EPA published a 2009 Priority



Notice naming the hard rock mining industry as its first priority for financial assurance requirements and committing to gather information on other classes of facilities to which Section 108(b) might apply.

## II. Final Rule History

In 2010, EPA published an "Advance Notice of Proposed Rulemaking" (Advance Notice) requesting comments on whether or not to propose CERCLA financial assurance requirements on the hard rock mining industry and three other industries: electric power, petroleum and coal manufacturing, and chemical manufacturing industries. In 2014, environmental groups sued, requesting an order requiring EPA to issue rules immediately requiring CERCLA financial assurance from all four industries. The Court did not issue the requested order, but agreed the administrative rulemaking process should proceed. EPA consented to a schedule for the administrative rulemaking process for all four industry classifications, beginning with the hard rock mining industry.

In 2017, EPA published a proposed rule setting financial responsibility requirements for the hard rock mining industry and requesting comments. In February of 2018, EPA announced its final decision not to require financial assurance for hard rock mining facilities, finding it was unnecessary due to existing federal and state programs and modern mining practices. Another lawsuit followed, and EPA's decision was upheld by the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit held that the "risk" requiring financial assurance under Section 108(b) does not refer to risk to human health or the environment, but refers to financial risk and, more specifically, the risk of having to use taxpayer money to clean up releases of hazardous substances from a particular class of facilities. The court further found that EPA has discretion to decide which classes of facilities need regulating in this area, and, where existing financial assurance obligations exist under other state or federal statutes or regulations for a particular class or the risk is otherwise determined to be low, EPA may exempt that class from CERCLA's financial assurance obligations.

Following the D.C. Circuit ruling in the hard rock mining case, EPA addressed the remaining three industries by issuing three separate proposed rules in late 2019 and early 2020 (Proposed Rules). The Proposed Rules addressed comments received from the 2010 Advance Notice and requested further comments on whether the electric power, petroleum and coal manufacturing, and chemical manufacturing facilities pose a financial risk of future use of Superfund for releases of hazardous substances. During the comment period, EPA received comments, evaluated modern management practices and existing regulations governing the affected industries, and looked at funds used at current CERCLA cleanup sites connected to these industries. As stated in the Proposed Rules, EPA found adequate protections already exist to protect against costly releases and to require financial accountability from operators. For example, EPA found that the chemical manufacturing industry is highly regulated under other federal and

state programs governing hazardous waste and stormwater and wastewater management, are generally financially viable, often have existing financial assurance in place under state or federal hazardous waste laws, and do not have a modern day history of releases requiring uses of Superfund for cleanup. In fact, EPA found only 34 CERCLA sites connected to the chemical manufacturing industry that have a potential to impact the Superfund, a small number given EPA's estimate of approximately 13,480 chemical manufacturing facilities in existence today.

### III. Conclusion

EPA's recent announcement exempting electric power, petroleum and coal manufacturing and chemical manufacturing industries from CERCLA financial assurance requirements is not a decision to give these industries free rein to pollute the environment with no consequences. If a chemical manufacturing or coal manufacturing site releases hazardous substances and a CERCLA cleanup is ordered, the potentially responsible parties (including the owner or operator of the facility) will be on the hook for cleanup costs whether or not they have financial assurance in place. The Consolidated Notice does not take away this result. Rather, EPA's decision is a pragmatic one that does not impose additional proactive financial burdens on certain industries that already are heavily regulated and often already have other financial assurance requirements. EPA's decision simply finds the financial risk of not imposing additional financial assurance requirements so low as to make such additional requirements unnecessary. Of course, this is not a done deal, as lawsuits are likely, and the Biden administration may require EPA to reevaluate its current position. Further, if Democrats control both the House and the Senate, the Congressional Review Act could be used to roll back this final action.

*Financial Responsibility Requirements Under CERCLA Section 108(b)*, 85 Fed. Reg. 77384 (Dec. 2, 2020).

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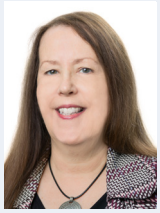

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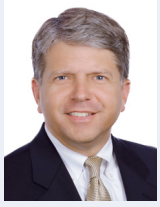

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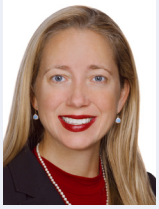

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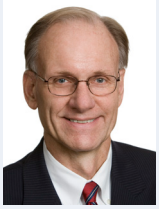

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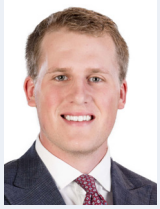

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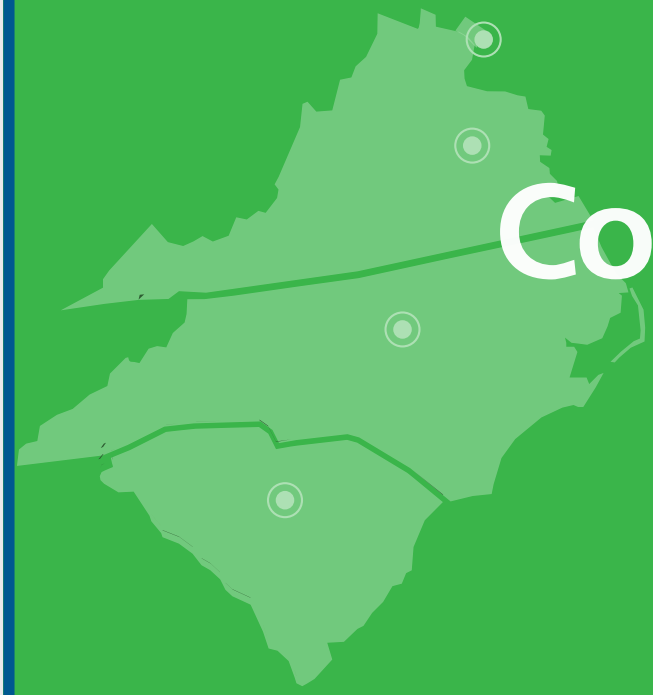

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