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ENVIRONMENTAL NOTES

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SUCCESSFULLY MANAGING ENVIRONMENTAL REGULATORY INSPECTIONS

BY: PHILLIP L. CONNER

Most industrial facilities will, at some point, be inspected by an environmental regulatory agency. Generally, regulatory agencies have authority to enter public or private property that is governed by an environmental regulation or permit. For certain facilities, inspections occur at least annually. Regulatory inspectors generally have discretion as to the extent of their inspection and what is ultimately identified as a violation. Handling a regulatory inspection in a courteous, reasonable and professional manner will often result in the most beneficial outcome.

Preparation is key to making a regulatory inspection as painless as possible. In terms of avoiding violations, environmental self-auditing is the best preparation. Periodic auditing ensures that the appropriate management systems are in place and working. However, well-meaning documents and even notes created pursuant to a self-audit can become discoverable in a lawsuit or criminal investigation where information can be taken out of context and used against a company. That's why facilities should consider having self-audits performed under the attorney-client privilege. There is no guarantee the attorney-client privilege will protect documents from disclosure in all instances, but structuring the audit with an attorney involved is always a good precautionary measure.

It is difficult to prepare for a regulatory inspection since most are unannounced; however, a facility should have in place a procedure that can be implemented when an inspector arrives. At a minimum, someone at the facility who is knowledgeable about environmental issues should be designated to meet with and accompany the inspector. If possible, the facility should have an alternate person available to handle an inspection should the primary person be absent when an inspector arrives. In addition, a plan should be in place to notify facility supervisors that an inspection is taking place so the supervisors can do a quick inspection of their respective areas and be sure the areas are ready to be inspected.

If the inspector is not known by facility personnel, the inspector should be asked for identification. An opening conference should be held in which the purpose of the inspection is discussed. Afterwards, the inspector should only be escorted to those portions of the facility that are relevant to the purpose of the inspection. The inspector should understand that he or she is expected to follow all facility safety rules and, for safety's sake, must remain with the facility escort.

The person designated to accompany the inspector should remain with the inspector at all times. He or she should ensure that the inspector goes only to those areas of the facility that are relevant to the purpose of the inspection. Many facilities have predesignated routes along which the inspectors are taken. The predesignated route that is used depends upon the purpose of the particular inspection, e.g., air inspection, hazardous waste inspection, wastewater inspection, etc.

If an inspector takes samples of any kind, it is generally desirable for the facility to split samples and have its own analyses done. There are occasions where the results from an agency's laboratory differ substantially from data obtained from a commercial laboratory. In such cases, split samples obtained by the company can prove valuable.

On rare occasions, an inspector may want to take photographs of portions of a facility. If this is the case, ground rules should be established as to what, if anything, can be photographed. If the facility has in place a policy prohibiting unrestricted photographs, this policy should be explained to the inspector along with the expectation that the inspector follow the policy. Photographs of confidential processes or equipment should not be allowed. If the inspector will not agree to the ground rules, the facility has the option of telling the inspector that he or she will need to obtain a search warrant specifying which areas they want to photograph. Alternatively, the facility representative can try to compromise by offering to take the photographs so that they can be screened by company officials before being sent to the inspector.

Regulatory inspectors will usually want to review various documents and records. Documents typically reviewed during an inspection include such things as hazardous waste manifests and reports, contingency plans, discharge monitoring reports, Emergency Planning and Community Right-to-Know Act reports, and air permit records. These documents should be kept in one place so they are easily accessible and not comingled with other documents. In many instances, violations are cited simply because the facility cannot produce the proper documents during an inspection. Attorney-client privileged documents and company confidential documents should be kept in a secure location separate from other facility documents.

Environmental inspections are a fact of life for most industrial facilities. Preparation by the facility through self-auditing and planning of an inspection procedure can pay big dividends.

TRUMP SEEKS TO DROWN CLEAN WATER RULE AND SLASH EPA'S BUDGET

BY: CHANNING J. MARTIN

Since the last edition of *Environmental Notes*, President Trump has taken two significant actions concerning the environment. First, he has begun the process to rescind or revise the Clean Water Rule, EPA's regulation that seeks to define the scope of federal jurisdiction over wetlands and other Waters of the United States ("WOTUS"). Second, he has

proposed slashing EPA's budget by a whopping 31%. Each of these actions is discussed below.

Clean Water Rule

President Trump signed an Executive Order on February 28 directing EPA to revisit its rule defining WOTUS under the Clean Water Act. The rule, issued by EPA and the Army Corps of Engineers, sought to provide clarity on the limits of federal jurisdiction under the Clean Water Act. Uncertainty concerning the extent of federal jurisdiction has been rampant for years. The Clean Water Act itself is of no help. The Act applies to "navigable waters," and then goes on to define that term as "waters of the United States." That's about as clear as mud.

As a result, courts and federal agencies have struggled for decades to determine when wetlands and other WOTUS are subject to federal jurisdiction. In *Rapanos v. United States*, the United States Supreme Court held the government erred in determining that the wetlands at issue in the case were jurisdictional, but the Court could not agree why. Writing for a plurality of the Court, Justice Scalia believed jurisdiction should be limited to "relatively permanent, standing or continuously flowing bodies of water," excluding ephemeral or intermittent streams and most drainage ditches. In his concurring opinion, Justice Kennedy determined that a "significant nexus test" was more appropriate. Under this test, jurisdiction would apply if a hydrologic connection could be established between wetlands and truly navigable waters. Most courts have applied Justice Kennedy's test, but the problem is that it requires a case-by-case review and the exercise of best professional judgment by the Corps of Engineers. The Clean Water Rule sought to reduce much of the regulatory uncertainty surrounding WOTUS, but in the process extended jurisdiction by rule to a number of areas that opponents of the rule believe to be unwarranted.

More than one million comments were filed during the public comment period after the proposed rule was issued in April, 2014. The final rule was issued in June, 2015, and EPA and the Corps were quickly sued in more than 15 United States District Courts. In addition, more than 20 petitions for review were filed in various United States Circuit Courts of Appeal. One of those Courts of Appeal – the Sixth Circuit – issued a nationwide stay of the rule in October, 2015 pending its review of the rule. Thereafter, the United States Supreme Court agreed to decide which of the many courts in which the rule had been challenged had jurisdiction to hear the case.

It's difficult to know how the rule will be dismantled, but all indications are that's what will occur. President Trump's Executive Order has no legal effect other than to start the process of having EPA revisit the rule. That process is likely to take years because any new regulatory action EPA proposes to take must go through public notice and comment. In addition, it's a sure bet there will be significant litigation filed over any attempt by the Trump Administration to rescind or revise the rule. In the meantime, the United States Supreme Court is likely to weigh-in. First up will be a ruling by the Court on which lower court has jurisdiction to hear the challenge to the rule. Once that ruling is made and a lower court decision is issued, then the Supreme Court is likely to rule on the merits. Based on our expectation that Judge Gorsuch will be a member of the Supreme Court by then, we expect the rule to go down to defeat in a 5-4 decision. Of course, there's always the possibility the courts will delay action on the rule if EPA indicates it plans to

revise or rescind it. What's the bottom line? It's this: The Clean Water Rule is unlikely to ever see the light of day; it's just a matter of how and when it dies.

EPA's Budget

Like him or hate him, President Trump has done what he said he would do. The President's proposed budget reduces funding for EPA by 31% from its 2017 funding levels. That's a $2.6 billion cut and will result in the elimination of about 3,200 EPA positions and more than 50 programs. The proposed budget eliminates all funding for the Clean Power Plan as well as funding to reduce nutrient pollution in the Chesapeake Bay and the Great Lakes. As expected, numerous environmental groups and members of Congress have announced their strong opposition to the President's plans.

We agree there is no chance the budget as proposed will pass. However, perhaps it's part of President Trump's negotiating style to take an aggressive position knowing full well it won't be accepted, and then negotiate from there. There's more to come from President Trump on the environment, and we'll keep you apprised.

PRESIDENT TRUMP'S TWO FOR ONE DEAL

BY: RYAN W. TRAIL

In his first week in office, President Trump issued executive orders freezing all pending federal regulations and halting executive agency hiring. To begin week two, the President issued an executive order requiring federal agencies to identify at least two existing regulations for repeal for every new regulation issued.

The executive order, entitled *Reducing Regulation and Controlling Regulatory Costs*, is intended to promote "the prudent and financially responsible expenditure of funds, from both public and private sources." By reducing the number of federal regulations, the President seeks to save both public funds (agency implementation costs) and private funds (industry compliance costs). In addition to directing the repeal of two existing regulations for every new regulation, the order tasks agency heads with achieving a total incremental cost of "zero" for all new regulations issued in fiscal year 2017. According to the order, incremental costs associated with any new regulations, to the extent permitted by law, must be offset by the elimination of existing costs associated with at least two existing regulations.

Not surprisingly, the order was quickly challenged in court. On February 8, 2017, the Natural Resources Defense Council ("NRDC") and others filed a complaint against the President in the U.S. District Court for the District of Columbia. The complaint seeks a declaratory ruling that the order is an infringement on legislative authority in excess of the President's powers under the Constitution. Among other things, the complaint alleges that the order will block or force the repeal of regulations necessary to protect health, safety, and the environment.

Specifically, the complaint emphasizes how the order's two-for-one and incremental cost mandates "focus on costs while ignoring benefits." The complaint discusses a number of regulations that may be affected by the order, including under

the Occupational Safety and Health Act, Toxic Substances Control Act, Hazardous Materials Transportation Act, Clean Water Act, Endangered Species Act, and Clean Air Act. NRDC alleges that the order is arbitrary, capricious, an abuse of discretion, and not in accordance with law, because (1) there is no statute authorizing agencies to withhold a needed regulation based solely on the increase in cost the regulation may cause; (2) agencies may not be forced to repeal regulations already determined to be appropriate through the rulemaking process; and (3) there is no statute authorizing agencies to base regulatory decision-making on a goal of zero net cost increase.

While the NRDC lawsuit is only one of several challenging President Trump's recent flurry of executive orders, the outcome will have a significant impact on the regulated community. We'll keep you apprised of developments.

***Reducing Regulation and Controlling Regulatory Costs,* Executive Order, January 30, 2017**
***Public Citizen Inc. et al. v. Donald Trump et al.*, No. 1:17-cv-00253 (D.D.C).**

EPA'S WATER TRANSFERS RULE RESURRECTED, BUT FOR HOW LONG?

BY: HENRY R. "SPEAKER" POLLARD, V

The United States Court of Appeals for the Second Circuit recently resurrected EPA's embattled Water Transfers Rule ("WTR") in a case particularly important to municipal water suppliers and others engaged in interbasin transfers of raw water supplies. The WTR codified EPA's 2008 interpretation of the federal Clean Water Act ("CWA") that mere transfers of water from one water body to another, without any intervening industrial, commercial or municipal use, do not require a NPDES discharge permit. In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (Catskill III)*, the court reversed the ruling of a lower district court and held that the WTR warranted deference by the courts because it was a reasonable interpretation of the CWA by EPA.

Catskill III is the third in a line of cases involving the same parties and similar issues to be decided by the Second Circuit. Other federal courts, including the U.S. Supreme Court, have played key roles

in reviewing related issues over the years. The fundamental question driving most of these cases is whether a water transfer should be considered a discharge of a pollutant requiring an NPDES permit. "Discharge of a pollutant" is defined in the CWA as "any addition of any pollutant to navigable waters from a point source." "Navigable waters" is defined in the CWA as "waters of the United States." Along with a number of states and many public water suppliers, industries, and agricultural interests, EPA has held the view that water transfers merely constitute the movement of any preexisting pollutants within waters of the United States, rather than an addition of pollutants to such regulated waters. This reflects the so-called "unitary waters" principle of interpretation of the term "waters of United States." While this distinction may seem like a fine point, it has substantial implications: across the nation, thousands of such water transfers exist and many more are planned, forming the basic infrastructure of many raw water supply systems. Subjecting them to NPDES permitting could significantly change their use and operation and present new and substantial regulatory hurdles.

Catskill III involves key principles of court deference to an agency's regulation where that regulation serves as the agency's interpretation of a statute. These principles were established in 1984 by the U.S. Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Under *Chevron's* two-step analysis, a court must first find that the statutory language in question is either silent or ambiguous as to the issue at hand. If so, then the court must determine whether the agency's interpretation of the statute is reasonable. In doing so, the court examines whether there is a rational explanation and policy choice by the agency for its interpretation. The agency interpretation need not be what the court believes is the most correct or logical interpretation; the interpretation just needs to be reasonable and reasonably supported. (While sounding similar, this standard of review is different than the arbitrary and capricious standard of review under the federal Administrative Procedure Act.)

The Second Circuit found that both *Chevron* requirements were met when EPA issued the WTR, even if the WTR arguably is not completely aligned with the CWA's primary goal of reducing pollutants in regulated waters. However, there was a spirited dissent by one of the court's judges, and the matter is not yet completely finalized, as *Catskill III* could yet be reheard by the full panel of the Second Circuit or appealed to the U.S. Supreme Court.

The decision may have other, broader implications, as the new Trump Administration and Congress contemplate restricting federal court deference to agency interpretative rulemakings. The *Catskills III* case reminds all stakeholders that a *Chevron* deference analysis can cut both for and against the regulated community, depending on the interpretative rule issued by the agency. It seems possible that the WTR's legal footing, as supported in the *Catskills III* case, could be undermined should legislation undo a court's deference to agency interpretations of statutes, particularly without an amendment to the CWA to expressly secure the exclusion from NPDES permitting for water transfers. How this potential dilemma will unfold remains to be seen, but it certainly warrants continued and close observation.

***Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. Environmental Protection Agency (Catskill III)*, 2017 WL 192707 (2d Cir., Jan. 18, 2017); 73 Fed. Reg. 33697 (June 13, 2008), *codified* at 40 C.F.R. § 122.3(i) (Water Transfers Rule).**

EPA WASTEWATER SETTLEMENT HIGHLIGHTS INDUSTRY FOCUSED ENFORCEMENT INITIATIVE

BY: RYAN W. TRAIL

EPA and the Department of Justice recently settled a Clean Water Act enforcement action with EMD Millipore Corp. of Jaffrey, NH, by lodging a Consent Decree in the U.S. District Court for the District of New Hampshire. The settlement is noteworthy because the enforcement action was taken as part of EPA's recent initiative targeting industrial wastewater dischargers. First announced in October, 2016, EPA's National Enforcement Initiative entitled

Keeping Industrial Pollutants out of the Nation's Waters targets industrial sectors such as mining, chemical manufacturing, food processing, and primary metals manufacturing. The goal of the initiative is to build "compliance with Clean Water Act discharge permits" and cut "illegal pollution discharges."

Millipore is the life science division of Merck, a multinational pharmaceutical and chemical company. The Millipore facility at issue is in Jaffrey, New Hampshire, and it manufactures plastic membrane water filtration devices for the pharmaceutical and biomedical industry. The facility discharges industrial process wastewater to the local Publicly Owned Treatment Works (POTW) pursuant to a pretreatment permit issued by the Town of Jaffrey.

Federal and state regulations prohibit the discharge of pollutants that interfere with a POTW's operation or that pass through a POTW untreated. Millipore allegedly violated pretreatment regulations by allowing its wastewater discharge to cause "pass through or interference" at the POTW. Millipore also allegedly violated federal pH prohibition standards, failed to notify the POTW of slug loadings, and violated its permitted discharge flow rate limits. The violations allegedly occurred periodically from 2011 – 2015, when Millipore was said to have introduced organic waste into the POTW's treatment system which caused excessive ammonia nitrogen and cBOD to be discharged into the Contoocook River.

The Consent Decree requires Millipore to upgrade its wastewater treatment system, initiate annual training for operators, and conduct sampling, analysis and quarterly monitoring. In addition, Millipore must pay a $385,000 civil penalty.

The Millipore settlement is an important reminder to facilities discharging wastewater to a POTW pursuant to a locally-issued pretreatment permit. Although a pretreatment permit may be issued by a local POTW under authority of a sewer use ordinance or regulation, EPA has enforcement authority over the discharge pursuant to federal pretreatment regulations. If the threat of enforcement from a POTW is not enough to encourage compliance, the risk of an EPA enforcement action should be.

United States of America v. EMD Millipore Corporation - Consent Decree

CHAMBERS AND PARTNERS

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Our Environment & Natural Resources team features six attorneys who are ranked in *Chambers USA*. These attorneys are located throughout our footprint and give our team a wealth of knowledge and experience in a number of key environmental topics. Congratulations to Phil Conner, Jessie King and Ethan Ware in Columbia, Amos Dawson in Raleigh, and Channing Martin and Speaker Pollard in Richmond for receiving the recognition.

CONTACT US

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

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

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

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

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

A. Keith "Kip" McAlister, Jr.
Associate, Columbia, SC
803.567.4604
kmcalister@williamsmullen.com

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

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

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