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ENVIRONMENTAL NOTES

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CLEAN WATER RULE GETS DOUSED

BY: CHANNING J. MARTIN

In a significant setback for the Obama Administration, the U.S. Court of Appeals for the Sixth Circuit has temporarily blocked implementation of the Clean Water Rule issued jointly by EPA and the U.S. Army Corps of Engineers last June. The rule defined "Waters of the United States" and was designed to put to rest years of controversy about the extent of federal jurisdiction under the Clean Water Act over wetlands and other waters. That didn't happen. Within weeks of its issuance, over 70 parties – including 31 states – filed suit to overturn the rule. Three federal judges in different states were petitioned to temporarily block it while it was challenged in court. Only one of the three – a federal judge in North Dakota – granted an injunction. His order – issued on August 27, just one day before the effective date – blocked the rule from taking effect in 13 western states. Undeterred, EPA issued a press release the next day saying it would enforce the rule in the rest of the country.

Enter the Sixth Circuit. Its order entered on October 9 suspends the rule temporarily *nationwide*, at least until that court can determine whether it has jurisdiction over the case. (Yes, not only is the rule unclear, but it's also unclear which of the many courts in which challenges have been filed has jurisdiction to decide the case on its merits.) In an opinion accompanying the order, the court in a 2-1 panel decision expressed serious reservations about the rule and found that those challenging it "have demonstrated a substantial possibility of success on the merits…" The court said "the rulemaking process by which the distance limitations were adopted is facially suspect," and that EPA has not identified "specific scientific support substantiating a reasonable basis for their adoption." Chief among the court's concerns was the fact that the proposed rule did not include distance-based limitations; those limitations were only in the final rule, meaning the public had no opportunity to know about or comment on them until the final rule was issued. EPA argued that "bright-line tests are a fact of regulatory life," and that it had used its technical expertise to determine them, but the court said that argument was "not sufficient." And the court gave short shrift to EPA's (weak) argument that "the nation's waters will suffer imminent injury if the new scheme is not immediately implemented and enforced."

It's important to note what the Sixth Circuit's order is not – is it not a ruling on whether the rule survives or is invalidated. Instead, it's a temporary injunction that the court says will remain in place until it decides whether it has jurisdiction. Assuming it does have jurisdiction, we expect the injunction to remain in place until the court issues a decision on the fate of the rule.

The bottom line is that the Clean Water Rule is in trouble. We expect all or parts of it to be scuttled by the Sixth Circuit or some other court.

Ohio v. U.S. Army Corps of Engineers, No. 15-3799 (6th Cir. Oct. 6, 2015)

EPA PUTS REFRIGERATION FIRM ON ICE

BY: A. KEITH "KIP" MCALISTER, JR.

Millard Refrigerated Services Inc. learned the hard way that a company's failure to correct deficiencies in its processes can lead to significant consequences. Following three releases to the atmosphere from 2007 to 2010, EPA cited Millard with 36 violations under the CAA, EPCRA, and CERCLA. In 2010, the Alabama facility experienced hydraulic shock, a well-known hazard in the refrigeration industry, causing a pipe to fail and release 32,000 pounds of anhydrous ammonia to the atmosphere. Over a hundred people were hospitalized.

EPA determined that Millard's many violations of the CAA's Risk Management Program arose because Millard

failed to maintain process safety information and update operating procedures and hazard safety analyses, failed to adequately train personnel, and failed to maintain the mechanical integrity of its equipment. There was also evidence that Millard knew of design flaws in its equipment, yet failed to correct them. Millard was also cited under EPCRA and CERCLA for its failure to properly report releases.

Millard, EPA, and DOJ recently entered into a Consent Decree under which Millard will pay a civil penalty in excess of $3 million. It would have been far cheaper for the company to get with the program and comply with the law.

IMPROVEMENTS OR IMPOSITIONS? EPA PROPOSES AMENDMENTS TO HAZARDOUS WASTE GENERATOR RULES

BY: HENRY R. "SPEAKER" POLLARD, V

EPA recently published proposed significant amendments to the generator portions of its hazardous waste regulations, including a major reorganization and consolidation of the generator requirements into one subpart of the Code of Federal Regulations. EPA states the changes are "improvements" based on its 30 years of experience with the program under the Resource Conservation and Recovery Act ("RCRA") and are designed to make it easier for regulated parties to navigate the regulations.

There are a number of substantive changes and clarifications, but, perhaps most fundamentally, the proposed amendments would adjust and clarify three key aspects of the regulations. The first such change involves monthly accounting for three new distinct broad categories of hazardous waste: (i) "acute hazardous waste," (ii) "non-acute hazardous waste," and (iii) residues or media resulting from spill or contamination cleanup. (Corresponding new definitions of "acute hazardous waste" and "non-acute hazardous waste" are included in the proposed amendments.) Each level of generator status – "large quantity generator" ("LQG"), "small quantity generator" ("SQG"), and "conditionally exempt small quantity generator" ("CESQG") – would have its own trigger point for each of these wastes. As a result, generator category status would more clearly be determined not just by the volume of hazardous waste generated per month, but also by the nature of it.

The second fundamental revision is a clarification of the distinctions between "independent requirements" for different categories of generators as opposed to "conditions for exemptions" from generator requirements. Independent requirements would be those mandatory duties that must be met within a generator category, whereas conditions for exemptions are the voluntary steps that allow avoidance of certain generator duties that otherwise apply. Failure to comply with independent requirements subjects the generator to potential penalties and injunctive relief, whereas failure to satisfy a condition for exemption does itself create such liability. However, a failure to satisfy a condition for exemption that in turn causes a violation of an independent requirement could result in penalties and injunctive relief associated with the resulting independent requirement violation.

Third, EPA plans to replace the long-standing term "conditionally exempt small quantity generator" with "very small quantity generator" ("VSQG"). This change is largely intended to align nomenclature for this category with that of the other generator categories and does not on its own change any generator duties.

In addition to these basic changes in generator status and terminology, the proposal would strengthen the documentation duties and steps that generators must take to determine whether a solid waste is a hazardous waste. Among other things, the generator would need to declare in writing that "an accurate determination" was made of the waste's status. Recordkeeping requirements are also enhanced to document that review process and justifying information.

Another proposed change addresses the common problem of episodic increased generation of hazardous waste within a given month that can cause a generator's status to change, such as from SQG to LQG. Such planned or unplanned events can create both substantive and procedural headaches for the generator. The proposed amendments would allow the generator to maintain its lower level despite such episodic increase in volume, but this allowance could be exercised only once per year and under specific conditions unless a waiver is obtained for a second event.

EPA also proposes to revise various other aspects of the regulations, including the following:

- *Flexibility for satellite CESQG (or VSQG) locations to transfer, under certain conditions, hazardous waste generated at that location to a large quantity generator location controlled by the same entity.* This would allow for more efficient, coordinated and better quality management of hazardous waste within the overall organizational structure.
- *Mixtures of hazardous waste and non-hazardous waste by CESQGs (VSQGs).* The amendments would clarify that if a CESQG mixes listed or characteristic hazardous waste with non-hazardous waste, the generator remains eligible for CESQG status (i) if the mixture does not exhibit any of the hazardous waste characteristics (ignitability, corrosivity, reactivity or toxicity) or (ii) if the monthly hazardous waste generation volume limits applicable to CESQGs (or VSQGs) are not exceeded. If either condition is not met, then the CESQG (or VSQG) becomes a SQG or a LQG depending on the resulting situation.
- *Mixtures of hazardous waste and non-hazardous waste by SQGs and LQGs.* EPA proposes to clarify the link between the SQG and LQG requirements and the so-called "mixture rule" found in the definition of hazardous waste. Also proposed are changes that clarify how SQG's may mix non-hazardous waste with hazardous waste and still retain SQG status.
- *Potential for waivers from local fire and emergency response agencies from compliance with 15 meter (50 feet) set-back distance from property boundary for reactive and ignitable hazardous wastes.* This should be particularly useful for generators located in urban areas where such setbacks compromise their ability to accumulate hazardous waste.
- *Expansion and standardization of use of "central accumulation area."* This new term is proposed as a matter of consistent nomenclature treatment for regular SQG and LQG operations for their primary accumulation areas.

As noted, the spin by EPA on the amendments is that they are "improvements." However, it's too early to tell whether these changes will survive as proposed and ultimately prove to be true improvements or just be altered and additional regulatory impositions. The public comment period for the proposed amendments ends November 24, 2015.

80 Fed. Reg. 57918-5802 (Sept. 25, 2015).

EPA DENIES PETITION TO REMOVE EGBE FROM LIST OF TRI FORM R CHEMICALS

BY: ETHAN R. WARE

Ethylene glycol monobutyl ether (EGBE) is a solvent used primarily in the production of paints, coatings, and metal and household cleaners. It's also used in the production of other chemicals. Facilities that manufacture, process, or otherwise use EGBE above reporting thresholds within a calendar year are required to file an annual Form R report under the Emergency Planning and Community Right-to-Know Act (EPCRA) disclosing their permitted and unpermitted releases of EGBE to the environment.

EPCRA authorizes EPA to add and delete chemicals from the list of chemicals subject to Form R reporting. Last December, the American Chemistry Council (ACC) petitioned EPA to remove EGBE from the list on the grounds that available scientific data shows EGBE poses low potential hazards to human health and the environment. Among other things, ACC pointed out that EPA removed EGBE from the Clean Air Act's list of Hazardous Air Pollutants in 2004. In doing so, EPA said then that there is a "reasonable assurance" any potential adverse human health and environmental effects "will not occur" from EGBE facility releases (68 FR 65660). EPA said it was able to conclude "with confidence" that releases of EGBE would "not reasonably be anticipated to cause any adverse effects…."

Despite this prior action under the Clean Air Act, EPA denied the petition. ACC had argued the agency should take into account more realistic assumptions about exposure levels and the fate and transport of EGBE in environmental media. Instead, EPA focused only on EGBE's toxicity. The Notice announcing the denial said:

> This denial is based on EPA's conclusion that EGBE can reasonably be anticipated to cause serious or irreversible chronic health effects in humans….*While EPA acknowledges that there is evidence to indicate that humans are less sensitive than rodents to the hematological effects associated with acute or short term exposure to EGBE, little is known of the long-term or repeated exposure responses in humans to EGBE.*

(Emphasis added.)

The greatest concern over EPA's action is not necessarily its decision to deny the petition, but its refusal to investigate ACC's claims. ACC's delisting petition was incredibly detailed and full of scientific information. Ultimately, EPA's decision not to conduct the exposure assessments necessary to verify ACC's claims was a decision not to do the work required to properly assess the effects of EGBE.

80 Fed. Reg. 60,818 (Oct. 8, 2015)

TSCA 101 FOR IMPORTERS: GOOD FAITH IS NO DEFENSE TO FAULTY COMPLIANCE CERTIFICATION

BY: RYAN W. TRAIL

The Toxic Substances Control Act (TSCA) regulates the manufacture, use, disposal, and import of chemical substances in the United States. By defining the term "manufacture" to include the term "import," TSCA places the burden on importers to ensure their shipments of chemical substances into the country comply with applicable TSCA regulations. That can be a heavy burden because many importers have had nothing to do with the chemical substances before they arrive here. Moreover, the person responsible for compliance may be other than a traditional importer. By defining "importer" to include "the person primarily liable for the payment of any duties on the merchandise or an authorized agent acting on his or her behalf," TSCA can ensnare brokers and other "agents," too.

EPA and the U.S. Customs Service coordinate to enforce TSCA regulations on importers, and section 13 of TSCA requires the Customs Service to deny entry to any shipment that does not comply. To verify a shipment's compliance, the importer must sign a certification statement which states either "I certify that all chemical substances in this shipment comply with all applicable rules or orders under TSCA . . ." or, if the importer claims an exemption from TSCA, "I certify that all chemicals in this shipment are not subject to TSCA." Without this signed certification on the entry document or invoice, the Customs Service is obligated to detain the shipment.

To further burden the importer, TSCA regulations require the certification statement be made based on "actual knowledge" of the chemical constituents of the substances and their compliance with TSCA. While the regulation does recognize the difficulty in obtaining "actual knowledge" of foreign manufactured substances, it states "good faith efforts" of the importer to verify the shipment's compliance is not a defense to a violation, but may be used only as evidence to mitigate civil penalties.

With civil penalties of up to $37,500 per violation per day, TSCA presents a potentially significant impediment to importers. Thus, importers should be proactive in taking steps to gain the knowledge they need to verify compliance. To help, EPA has published a TSCA compliance checklist specifically for importers. It's a helpful resource for those importers seeking to determine the applicability of TSCA regulations and the necessary steps in maintaining compliance prior to and during the importation process.

EPA's compliance checklist may be found at http://www2.epa.gov/sites/production/files/2015-03/documents/checklist.pdf.

AUTHORS FOR THIS ISSUE

Channing J. Martin
Partner, Chair
Richmond, VA
T: 804.420.6422

A. Keith "Kip" McAlister, Jr.
Associate
Columbia, SC
T: 803.567.4604

Henry R. "Speaker" Pollard, V
Partner
Richmond, VA
T: 804.420.6537

Ryan W. Trail
Associate
Columbia, SC
T: 803.567.4605

Ethan R. Ware
Partner
Columbia, SC
T: 803.567.4610