

# WILLIAMS MULLEN ENVIRONMENTAL NOTES



## EPA's Big Plans for 2023: Top Air Rulemakings We Are Watching

BY: LIZ WILLIAMSON

An environmental lawyer walks into a cocktail party. An often-asked question is: What is happening at EPA in your world? What should we be watching that could impact business as usual? Any surprises this year? This article will make you cocktail party ready. Buckle up as we navigate through the top potentially impactful rules and sleepers we are tracking in the air world this year.

In early January, EPA projected an aggressive rulemaking agenda for 2023. EPA plans to promulgate a substantial number of Clean Air Act rules as part of its plans. Our watch-list is as follows:

- > Reconsideration of the Particulate Matter ("PM") National Ambient Air Quality Standard ("NAAQS") (2023: Proposed / Final Rules expected): EPA recently released the proposed rule. EPA proposes to lower the existing PM 2.5 NAAQS Annual Standard from 12.0 ug/m<sup>3</sup> (current) to either 9.0 ug/m<sup>3</sup> or 10.0 ug/m<sup>3</sup>. EPA does not plan to modify the 24-hour primary or secondary PM 2.5 standard. EPA has

printed maps of at-risk areas that may become nonattainment for the new standard. EPA also released a list of current ambient concentrations based on monitoring data. A lower PM 2.5 annual standard will impact all industry sectors. The comment period for the proposed rule ended on March 28, 2023. EPA projects the final rule to be released in August of this year.

Potential impacts: A lower PM NAAQS standard will impact economic development. A lower PM NAAQS will make it harder to "pass" ambient modeling, which is essential to pursue a project permit. Most new manufacturing facilities must undertake ambient modelling to obtain an air permit. Major facility expansions and projects will also require modeling if they trigger Prevention of Significant Deterioration ("PSD") significance thresholds. New power generation assets will be more difficult to build and site, especially in urban areas that may have a larger power demand. Grid reliability may be impacted as fossil fuel-fired units retire; yet new generation is more difficult and time-consuming to build.

- > Good Neighbor Federal Implementation Plan ("FIP") (2023: Final Rule released on March 15, 2023): The Final Rule addresses states' compliance with the 2015 Ozone NAAQS of

70 ppb for the primary and secondary 8-hour standards. The Final Rule applies to 23 states to address their Good Neighbor obligations to eliminate significant contribution or interference with maintenance of the NAAQS in other states. The FIP applies to the power sector and many industrial manufacturing sector categories. The Final Rule uses the established Cross-State Air Pollution Rule (“CSAPR”) trading program for power plants in states subject to the rule. It provides for ozone season (May 1-September 30) NOx reductions from utility units beginning in 2023 and from certain industrial stationary sources by 2026. The proposed rule called for dramatic NOx reductions during the ozone season beginning in 2023. The Final Rule follows this trend. Utility units subject to the Rule must contend with substantial reductions in ozone season NOx allocations in 2026-2027, while certain industry sectors will have new NOx rates for certain units beginning in 2026. The Final Rule’s effective date will fall immediately prior to or during the ozone season for 2023. EPA indicates that it may later find that six more states (Arizona, Iowa, Kansas, New Mexico, Tennessee, and Wyoming) are significantly contributing to one or more nonattainment or maintenance receptors. EPA also identifies a future discretionary proposal for adding an auction mechanism to the Group 3 CSAPR trading program. EPA indicates that the auction would increase market liquidity but would also include changes to maintain program stringency.

Potential impacts: The Good Neighbor FIP requires lower NOx rates during the ozone season across many industries and states. The Final Rule calls for stringent ozone season rates for the power sector commensurate with emission rates for units that have installed state-of-the-art NOx controls for coal-fired and gas-fired units. The program adds new concepts, not previously used for prior ozone transport rules, to tighten allowable NOx emissions. Industry sectors are pulled into the rule for the first time. EPA agreed to some concessions in the Final Rule in response to comments, although the Final Rule is still set to achieve significant NOx reductions for both power and industry sectors. EPA opted

not to include a reliability “safety valve” to provide utilities with a compliance solution in a must-run situation to maintain the power grid. The Final Rule is likely to be challenged in the United States Court of Appeals for the District of Columbia Circuit. The Final Rule is complex, providing a myriad of areas for potential challenge. Litigation would add a layer of compliance uncertainty, unless the Court grants a stay of the compliance dates in the Rule.

> Section 111(b) and Section 111(d) Greenhouse Gas Rules (2023: Proposed Rule expected): The Section 111(b) rule will regulate greenhouse gases from new or modified fossil fuel generators, while the Section 111(d) rule will establish greenhouse gas emission guidelines for fossil fuel-fired units that are currently in operation. The Section 111(b) rule will amend the New Source Performance Standards (“NSPS”) for greenhouse gases based on a comprehensive review of the NSPS, portions of which were never finalized. The Section 111(d) rule is the replacement rule for the defunct Clean Power Plan and the Affordable Clean Energy rule. The proposed rules are scheduled for release this spring and are presently undergoing review at the Office of Management and Budget.

Potential impacts: These rules directly impact the power sector. The use of carbon capture and other carbon-reduction technologies is a topic of debate. The universal feasibility of these technologies for new and existing units is disputed. Without a reliable control device for greenhouse gas emissions, reductions can only be achieved by programs that reduce unit runtime, such as trading programs. If capacity factors for existing fossil units are reduced, that generation must be replaced. All industries and ratepayers will likely face increased electricity costs to finance new generation. While the power sector is in transition, grid reliability is a perennial concern of regional transmission organizations. Reliable electricity is important to all industries and citizens.

### The 2023 Sleeper to watch:

> Section 111(d) Implementation Rule (2023: Proposed / Final Rules expected): The implementation rule changes the requirements

for how Section 111(d) rules for existing sources are implemented. All future Section 111(d) rules will follow these rules. Although the rule masquerades as a procedural rule, EPA's December proposal presents new elements that are likely to affect the outcome of these important rulemakings. EPA proposes new requirements that states must undertake and put in their implementation plans, such as meaningful public engagement and source-specific requirements if "remaining useful life" and "other factors" are invoked. The proposal shortens states' time frames to submit state plans yet adds more state development and plan requirements and heightens the standard necessary for plan approval. If states cannot submit an approval plan in time, then EPA can submit a federal plan, essentially subsuming states' roles in the Section 111(d) implementation process. EPA expects to finalize the rule in spring 2023.

Potential impacts: The implementation rule will impact all future Section 111(d) rules for all sectors. Presently, EPA is using Section 111(d) to carry out its greenhouse gas agenda. EPA has proposed Section 111(d) greenhouse gas rules for the oil and gas sector. Power sector greenhouse gas rules are next on EPA's agenda. Other Section 111(d) rules may affect other sectors in the future. If the implementation rule is finalized as proposed, the Section 111(d) cooperative federalism process is in jeopardy. In addition, sources with unique circumstances will be less likely to have the opportunity to use "remaining useful life" and "other factors" to demonstrate that a less stringent emissions guideline should be applied on a source-specific basis.

#### [Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions](#)

**Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 88 Fed. Reg. 5558 (Jan. 27, 2023) (PM NAAQS Reconsideration)**

#### [Maps regarding the PM NAAQS Reconsideration](#)

#### [Lists of ambient monitoring levels regarding the PM NAAQS Reconsideration](#)

**Proposed Rule, Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard, 87 Fed. Reg. 20036 (Apr. 6, 2022)**

[Final Rule, Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, RIN 2060-AV51 \(Pre-Publication version released on Mar. 15, 2023\)](#)

**Amendments to the NSPS for GHG Emissions From New, Modified & Reconstructed Stationary Sources: EGUs in the Fall Unified Agenda, RIN 2060-AV09**

**Emission Guidelines for Greenhouse Gas Emissions From Fossil Fuel-Fired Existing Electric Generating Units in the Fall Unified Agenda, RIN 2060-AV10**

**Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d), 87 Fed. Reg. 79176 (Dec. 23, 2022)**

**Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 87 Fed. Reg. 74702 (Dec. 6, 2022)**

## North Carolina Setting for EPA Announcement of Proposal to Limit PFAS in Drinking Water

**BY: CARRICK BROOKE-DAVIDSON**

### EPA's Proposed Rule

Wilmington, North Carolina was the setting for EPA Administrator Michael Regan's announcement of a new regulatory proposal for so-called "forever chemicals" under the Safe Drinking Water Act ("SDWA"). Following up on a final regulatory determination in March of 2021 to regulate perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonic acid ("PFOS") as contaminants under the SDWA, EPA's most recent action included a preliminary regulatory determination to regulate perfluorohexane sulfonic acid ("PFHxS"), hexafluoropropylene oxide dimer acid ("HFPO-DA") and its ammonium salt (also known as a GenX chemicals), perfluorononanoic acid ("PFNA"), and perfluorobutane sulfonic acid ("PFBS"), and mixtures of these per- and polyfluorinated substances



("PFAS") as contaminants under the SDWA. EPA is also proposing a National Primary Drinking Water Regulation ("NPDWR") and health-based Maximum Contaminant Level Goals ("MCLG") for these four PFAS and their mixtures as well as for PFOA and PFOS.

EPA is proposing to set the health-based value, or maximum level goal of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur (the "MCLG"), for PFOA and PFOS at zero. EPA is also proposing enforceable standards that take the form of maximum contaminant levels ("MCLs") in this proposed regulation. An MCL is the maximum level allowed of a contaminant or a group of contaminants (i.e., mixture of contaminants) in water that is delivered to any user of a public water system ("PWS"). The SDWA generally requires EPA to set an MCL "as close as feasible to" the MCLG. EPA has also included monitoring, reporting, and other requirements to ensure regulated drinking water systems meet the PFAS limits in the regulation.

Considering feasibility, including currently available analytical methods to measure and treat these chemicals in drinking water, EPA is proposing individual MCLs of 4.0 nanograms per liter (ng/L) or parts per trillion (ppt) for PFOA and PFOS. EPA is proposing to use a novel Hazard Index ("HI") approach to protecting public health from mixtures of PFHxS, HFPO-DA and its ammonium salt, PFNA, and PFBS because of their known and additive toxic effects and occurrence and likely co-occurrence in drinking water. EPA is proposing an HI of 1.0 as the MCLGs for these four PFAS and any mixture containing one or more of them because it represents a level at which no known or anticipated adverse effects on the health of persons is expected to occur and which allows for an adequate

margin of safety. EPA says it has determined it is also feasible to set the MCLs for these four PFAS and for a mixture containing one or more of PFHxS, HFPO-DA and its ammonium salt, PFNA, and PFBS as an HI of unitless 1.0.

Compound	Proposed MCLG	Proposed MCL (enforceable levels)
PFOA	Zero	4.0 parts per trillion (also expressed as ng/L)
PFOS	Zero	4.0 ppt
PFNA	1.0 (unitless) Hazard Index	1.0 (unitless) Hazard Index
PFHxS		
PFBS		
HFPO-DA (commonly referred to as GenX Chemicals)		

The HI is a tool used to evaluate potential health risks from exposure to chemical mixtures. This approach has been used in other EPA programs, such as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), but this is the first time it has been used for a drinking water standard. This approach

has already drawn criticism, with the American Chemical Council issuing a [press release](#) on the same day as the EPA announcement claiming the proposed HI approach contravenes EPA's own guidance.

According to the American Water Works Association, treating just PFOA and

PFOS at the EPA's proposed levels will cost \$3.8 billion a year, based on a study the association commissioned. The association also estimated that 5,000 water systems will need to find new water sources or install treatment technology to meet the new standards, while another 2,500 will need to update their existing technology.



## North Carolina DEQ's PFAS Approach

The North Carolina Department of Environmental Quality ("DEQ") has been working with public water systems to prepare for the proposed regulation and to assess PFAS levels in drinking water systems across the state. Under the [Action Strategy for PFAS](#), DEQ is taking a whole-of-department approach to protect communities by identifying, reducing, and remediating PFAS pollution. DEQ is also using federal funding under the Bipartisan Infrastructure Law to help address PFAS contamination.

In late 2022, DEQ performed three months of sampling at [50 municipal and county water systems identified in the 2019 PFAST Network study](#) with PFOA/PFOS detections above the minimum reporting level indicated by the 2022 EPA interim health advisories or GenX above 10 ppt. DEQ is actively working with those systems on next steps and providing technical assistance.

Some public water systems in North Carolina are currently monitoring for PFAS voluntarily. DEQ is also implementing plans to sample hundreds of smaller water systems that may not have that capability to better assess the levels of PFAS on a statewide basis. DEQ recommends that public water systems share their PFAS results with customers.

Beyond public water systems, DEQ has taken several actions to better identify PFAS sources and reduce emissions and discharges:

- > Requiring PFAS information from new facilities and industries and developing permit conditions as appropriate throughout the state;
- > Inventorying and prioritizing locations for additional assessment where these substances may have been manufactured, used, discharged, or disposed;
- > Adding permit conditions as appropriate to address PFAS air emissions, waste generation, or wastewater discharges and require disclosure of data and additional monitoring;

- > Conducting groundwater testing and additional monitoring in areas with known or suspected PFAS contamination;
- > Requiring all solid waste sanitary landfills to include PFAS analyses of all regular groundwater, surface water and leachate samples.

## Public Participation

EPA is requesting comment on this action, including this proposed NPDWR and MCLGs, and has identified specific areas where public input will be helpful for EPA in developing the final rule. Public comments are due by May 30, 2023. In addition to seeking written input, EPA will be holding a public hearing on May 4, 2023.

[PFAS National Primary Drinking Water Regulation Rulemaking-Proposed Rule, 88 Fed. Reg. 18638 \(March 29, 2023\)](#)

## Biden and EPA Continue to Push Environmental Justice Using Cumulative Impacts

BY JESSIE J. O. KING

President Biden is pushing in 2023 to strengthen Environmental Justice (EJ) initiatives and policies from the top down. This includes ordering more action and results from relevant federal agencies and pushing for the use of "cumulative impacts" in permitting, rulemaking and enforcement decisions.

## Another Executive Order

On February 16, 2023, President Biden issued his "Executive Order on Further Advancing Racial Equality and Support for Underserved Communities Through the Federal Government," restating his original charge to federal governing agencies to advance equity for all and to address systemic racism, including the advancement of environmental justice to underserved communities. In this newest Executive Order, he expands the White House's EJ efforts by:



- > requiring federal agencies like EPA to publish annual public Equity Action Plans to measure whether such agencies are doing their part;
- > ordering federal agencies to identify senior leaders accountable for advancing EJ initiatives and environmental equity along with existing agency EJ officers; and
- > putting Susan Rice, the President's top domestic policy advisor, in charge of a new White House Steering Committee on Equity to coordinate equity initiatives among the many federal agencies ordered to take action.

These measures demonstrate that the President wants to hold agencies accountable and to create measuring sticks by which to rate their actions in advancing EJ in disadvantaged communities.

## Cumulative Impacts

In addition to holding agencies more accountable, the President and EPA are taking big steps to understand and use "Cumulative Impacts" in their regulatory actions and decisions. Cumulative Impacts are defined by EPA as "the totality of exposures to combinations of chemical and non-chemical stressors and their effects on health, well-being and quality of life outcomes." To advance this initiative, on January 11, 2023, EPA issued "*The EPA Cumulative Impacts Addendum to EPA Legal Tools to Advance Environmental Justice (EJ Legal Tools)*" which sets forth existing legal authorities the agency and its state analogs can use to address cumulative impacts through permitting, regulations, grants

and enforcement. Among the existing legislative authorities that EPA identifies as existing tools allowing the use of cumulative impacts to address EJ concerns:

### 1. Clean Air Act (CAA):

- > to establish New Source Performance Standards under section 111;
- > to analyze NAAQs Reviews under section 109(d) and state attainment date extensions (including extensions for attainment for Particulate Matter (PM) under section 188(e));
- > to establish Ambient Air Monitoring networks;
- > to regulate hazardous air pollutants (HAPs) and perform risk assessments under section 122, to determine whether to undertake residual risk assessments for area source categories subject to GACT standards;
- > to establish performance standards for new and existing solid waste incineration units under section 129, authority to revise regulations to incorporate a cumulative risk assessment in siting requirements;
- > to perform cumulative impacts analysis of PSD and non-PSD pollutants under the New Source Review (NSR) permitting program when determining BACT for permits to construct a stationary source using section 165(a);
- > to "help prioritize and decide which among the thousands of Title V operating permits



the Agency will scrutinize to ensure that they are consistent with the requirements of the CAA”;

- > to prevent chemical and accidental releases under section 112(r);
- > to collect information under section 114 for impacts of any emission source(s) on communities in developing implementation plans and standards for solid waste combustion, determining violations of any standard or implementation plan, or carrying out any provision of the CAA (with certain exceptions); and
- > to address imminent and substantial endangerment to public health, welfare, or the environment of communities with EJ concerns under section 303, where there are cumulative impacts of air pollution from a source or multiple sources regardless of whether those sources are in compliance.

## 2. Clean Water Act (CWA) and Safe Drinking Water Act (SDWA):

- > to determine relative source contribution in developing human health water quality criteria, Maximum Contaminant Level Goals, and Health Advisories; under section 303(d) of CWA, impaired waters and Total Maximum Daily Loads (TMDLs) for impaired waters;
- > to issue dredge or fill permits by the U.S. Army Corps of Engineers including “impacts of human uses of resources;”
- > to issue underground injection control area permits under SDWA, EPA or a state should consider the cumulative effects of drilling and operation of additional injection wells;
- > to issue National Pollutant Discharge Elimination System (NPDES) permits related to small MS4s and Pesticide General Permit (PGP) and state equivalents, including specific requirements related to illicit discharge detection and elimination and post-construction stormwater conditions and selection of pest management measures; and

- > to exercise imminent and substantial endangerment authorities to address risks to public health from impacts to drinking water sources, including cumulative threats to drinking water from contaminants that are not regulated under the SDWA. EPA can further use section 504 of the CWA to address risks to public health and welfare from the cumulative impacts of water pollution from multiple sources, regardless of whether those sources comply with the requirements of the CWA.

## 3. Hazardous Waste: Resource Conservation and Recovery Act (RCRA):

- > under 40 C.F.R. Part 264, Subpart D, to require facilities to prepare and/or modify their contingency plans to reflect the needs of proximate communities, including cumulative impacts of multiple facilities on pre-existing community vulnerabilities, and hazards created or exacerbated by climate change such as flooding, heat island effect, and wildfires;
- > under RCRA section 3008(h), to take enforcement action to require corrective action at interim status hazardous waste treatment, storage, or disposal facilities, considering multiple contaminants in all media sources, sources other than the facility, and unique exposure pathways (e.g., subsistence fishers, farming communities), or sensitive populations (e.g., children, pregnant women, fetuses, the elderly);
- > using RCRA section 3013, where the presence or release of hazardous wastes at several facilities or sites may present a substantial hazard to a specific area, to issue section 3013 orders to each owner or operator of such facilities or sites in the area to assess the cumulative impact of those activities and follow up with site-specific actions. EPA can take into consideration citizen complaints, site-specific requests under CERCLA section 104, and information on “the potential for exposure to humans . . . and other related factors”;

- > under RCRA section 7003, to address risks to public health and the environment in communities with environmental justice concerns resulting from the cumulative impacts of pollution from solid and hazardous waste;
- > evaluating and giving priority to releases from USTs in communities with environmental justice concerns, taking into account unique exposure pathways and sensitive communities; and
- > under section 1008(a), where appropriate, direct states to include “demographic” factors in determining the location, design, and construction of solid waste management facilities. Factors include “population density, distribution, and projected growth” and the “political, economic, organizational, financial, and management [sic] affecting comprehensive solid waste management.”

#### 4. Emergency Planning and Community Right-to-Know Act (EPCRA):

- > to establish threshold quantities for hazardous chemicals and to allow communities to petition EPA to add chemicals and threshold levels to the EPA list to promote environmental justice for chemicals that “may present particular threats to low-income communities and communities of color, due to cumulative exposures, sensitive populations, or consumption patterns.”

#### 5. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA):

- > under section 105(a), to determine methods for investigating and evaluating sites and developing the Hazard Ranking System (HRS) evaluations for determining priorities among releases, taking into account, to the extent possible, the “population at risk” and several other considerations set out in the statute, as well as “other appropriate factors”;
- > section 104, to choose sites to conduct removals and remediation considering factors

related to the area pollution and multiple unique exposure pathways to identify, assess, and evaluate alternatives to address risk from a release or threatened release in EPA decision-making and actions; and

- > for CERCLA actions that require risk-based decision-making, to perform ATSDR health assessments and site-specific baseline risk assessments and to select appropriate remedies under CERCLA section 121.

#### 6. Civil Rights Act:

- > in enforcing Title VI of the Civil Rights Act of 1964 and other federal civil rights laws when evaluating whether there is an adverse impact from a federal funding recipient’s policy or practice. That is, EPA may consider any adverse impact caused by the policy or practice—and borne disproportionately by persons on the basis of race, color, or national origin (including LEP status)—in light of cumulative impacts from other stressors.

#### Takeaways

The White House is not satisfied that enough has been done to advance EJ initiatives. While there are billions of dollars in funding available to assist in these initiatives from the Federal Infrastructure Act, President Biden and EPA want to send the message now that EPA will be considering cumulative impacts in all regulatory programs where it has existing legal authority to do so. This means EPA will be considering EJ factors in enforcement and remediation decisions and will be watching agencies like SCDHEC, NCDEQ and VADEQ with delegated programs to make sure they are doing the same. Finally, expect nonprofits and local communities to be filing complaints and pushing EPA and the states to use EJ considerations in all environmental regulatory programs.

[Executive Order on Further Advancing Racial Equality and Support for Underserved Communities Through the Federal Government \(White House February 16, 2023\)](#)

[EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum \(U.S. EPA Jan. 11, 2023\)](#)



## DOJ Implements Corporate Self-Disclosure Policy for Criminal Misconduct

BY: CHANNING J. MARTIN

A new voluntary self-disclosure policy issued by the United States Department of Justice (DOJ) provides incentives for companies that voluntarily report criminal misconduct by their employees or agents. The policy applies in the context of federal criminal enforcement actions brought by U.S. Attorneys' Offices against companies, and it has significant implications for companies subject to federal or federally enforceable environmental laws and regulations.

### Incentives

Under the policy, if a company voluntarily self-discloses misconduct by an employee or agent, fully cooperates, and timely remediates the misconduct (including agreeing to pay all disgorgement, forfeiture and restitution associated with the misconduct), it is eligible to receive these benefits:

- > Prosecutors will not seek a guilty plea by the company.
- > Prosecutors are given discretion not to seek any fines against the company.
- > If fines are deemed appropriate, prosecutors are to reduce them to no more than 50% below the low end of the range in the U.S. Sentencing Guidelines.
- > Prosecutors will not seek appointment of an independent compliance monitor to ensure the company implements an effective compliance program instituted as part of any timely remediation.

### Qualification Criteria

The policy details what a company must do to qualify. Under the policy, the U.S. Attorney's Office must ensure the disclosure meets each of the following criteria for the company to be eligible for benefits:



1. The disclosure must be made voluntarily and not pursuant to a regulation, a contract, or a prior DOJ resolution such as a deferred prosecution agreement.
2. The disclosure must be made "prior to an imminent threat of disclosure or government investigation," prior to the misconduct being publicly disclosed or otherwise known to the government, and within a reasonably prompt time after the company becomes aware of the misconduct.
3. All relevant facts concerning the misconduct then known to the company must be disclosed at the time of the disclosure. Further, the company must move quickly to "preserve, collect and produce relevant documents and/or information."

However, even if these criteria are met, not every company will be eligible for benefits. The policy indicates there may be aggravating circumstances where a guilty plea is nevertheless warranted. These include, but are not limited to, misconduct that poses a grave threat to national security, public health or the environment, or is deeply pervasive throughout the company, or involves current executive management of the company. In those circumstances, however, if the company has otherwise met the requirements of the policy, the U.S. Attorney's Office will recommend to the court at least a 50%, and up to a 75%, reduction in fines off the low end of the range in the U.S. Sentencing Guidelines.

In addition to the self-disclosure policy, DOJ has begun a pilot program developed by its Criminal Division to reduce fines for companies that claw back compensation paid to employees and executives found guilty of criminal violations. Even if the company is unable to claw back all compensation, DOJ has indicated it will still discount fines for companies that make a good faith effort to do so.

## Takeaways

These two policies show that DOJ is seeking to enlist companies in identifying and prosecuting law-breaking activity by their employees. The self-disclosure policy likely means that prosecutors will look less favorably on a company that *fails to* self-report even if the company later cooperates and remediates the criminal misconduct. That said, companies that learn of potential misconduct face difficult choices. First, reporting activities that are ultimately determined not to be criminal could lead to significant disharmony between front line environmental personnel and management, not to mention the possibility of civil litigation by employees. Second, making a disclosure before all facts are known could trigger disclosure obligations to others, including investors, shareholders, and lenders. Third, the entity that gets to decide if the company has met the criteria is DOJ itself. That means making the disclosure is no guarantee of obtaining benefits.

Accordingly, companies need to have procedures in place to allow them to conduct investigations quickly and thoroughly. Outside counsel should be involved to assist with both the investigation and counseling the company as to if and how to use the self-reporting policy. Taking steps now will increase the likelihood the company will be ready to take advantage of the policy if the need ever arises.

[United States Attorneys' Office's Voluntary Self-Disclosure Policy \(U.S. DOJ Feb. 22, 2023\)](#)

[The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks \(U.S. DOJ March 3, 2023\)](#)

## Final NESHAP for Metal Coating Manufacturers Triggers Initial Performance Tests and Control Technology

BY ETHAN R. WARE

EPA recently revised the national emission standard for hazardous air pollutants for certain coating manufacturers. The result is new performance tests and controls for existing affected sources adding metal hazardous air pollutant ("HAP") emissions standards to the National Emission Standards for Hazardous Air Pollutants ("NESHAP") for Miscellaneous Coating Manufacturing ("MCM"), at 40 CFR Part 63, Subpart HHHHH ("MCM NESHAP"). The new regulation will have almost an immediate effect, triggering new control technology and performance tests within the first twelve months.

### Scope of Affected Source

The revised MCM NESHAP applies to all equipment used to manufacture coatings made with listed hazardous air pollutants ("HAP") that are metals. The following equipment at a minimum are subject to the new regulation: (1) process vessels; (2) storage tanks for feedstocks and products; (3) components such as pumps, compressors, agitators, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, connectors, and instrumentation systems; and (4) wastewater tanks and transfer racks. Cleaning operations are also part of an affected source if related to any of the covered equipment include cleaning operations.

The term "coatings" as used in the new MCM NESHAP is an important limiting factor of the new MCM NESHAP. As defined, the term applies to paint, ink, or adhesives made from resins, pigments, solvents, and/or other additives when the material is "produced by a manufacturing operation where materials are blended, mixed, diluted, or otherwise formulated." See 40 CFR 63 §§ 7985(b), 8105 (defining "coating"). The term does not include (and



therefore the new MCM NESHAP does not apply) to materials made in processes where a formulation component is “synthesized by chemical reaction or separation activity” and then transferred to another vessel where it is formulated to produce a material used as a coating if the synthesized or separated component is “not stored prior to formulation.” Therefore, some coating manufacturing processes fall outside of the rulemaking.

An effective way to evaluate the applicability of any new NESHAP is to peruse the list of North American Industry Classification System (NAICS) codes subject to the rulemaking and listed in the preamble. In this case, the list of NAICS includes NAICS code 325510, Paint and Coating Manufacturing; NAICS code 325520, Adhesive and Sealant Manufacturing; and NAICS code 325910, Ink Manufacturing. If your business involves formulating these products with an affected source, the new MCM NESHAP likely applies.

### The New Standards

Covered sources will not have much time to adjust to the new MCM NESHAP. New sources (those commencing construction after June 7, 2022) are

subject to the MCM NESHAP immediately, while existing sources (those constructed or reconstructed on or before June 7, 2022) must demonstrate compliance with an initial performance test as early as February 22, 2024. Either way, the new guidelines require performance tests within the first year and new controls when coatings are being charged in process vessels.

#### 1. Performance Tests

Initial compliance tests are required for both new and existing sources under the MCM NESHAP. The required test methodology falls under EPA Method 5. That EPA Method can require establishment of “operating ranges” for the control device, and those ranges may become enforceable emission limits. While an existing facility may rely on recent EPA Method 5 results, a repeat initial performance test conducted pursuant to EPA Method 5 must be made within the next five years (and every five years thereafter). A new source must demonstrate compliance within 180 days of startup.

The MCM NESHAP regulates the type of continuous monitoring allowed for covered emissions points, as well. An affected source



may rely on a variety of systems to meet the requirement, including use of an alarmed bag leak detection system, operation of an alarmed monitoring device (such as for pressure drop) against limits provided by the control device's manufacturer, and operation of a continuous parameter monitoring system (CPMS).

Facilities are required to continuously comply with the emission monitoring standards during all operations that emit metal HAP. These final amendments do not apply to pigments and other solids that are in paste, slurry, or liquid form.

## 2. Control Technology

The most expensive provision in the new requirements appears to be the upgrades plants will have to make for raw material application systems. New controls are required when process vessels are being charged with metal HAP-containing solids. For purposes of the new rule, a covered "process vessel" must have capacity of 250 gallons or more, regardless of how much coatings are actually in-process at any one time. In addition, at new sources, both stationary and portable process vessels are subject to controls, while only stationary units are subject to the MCM NESHAP at existing sources.

Existing sources (those constructed before June 7, 2022) may not exceed 0.014 grains per dry standard cubic foot (gr/dscf) while new sources are subject to emissions limits of 0.0079 gr/dscf.

## 3. Timing

It is important to note what the MCM NESHAP regulation does not do. Despite requests to the contrary, affected sources are not allowed more than one year to perform initial performance tests and comply with new controls. "[Covered sources] must conduct the initial or first periodic performance test before February 22, 2024, unless you are already required to complete a periodic performance test as a requirement of

renewing your facility's operating permit under 40 CFR part 70 or 71, and have conducted a performance test on or before February 22, 2024." Any existing MCM NESHAP source installing new controls will not likely meet this deadline, so immediate action may be necessary. A facility may request an additional two years to comply with the controls under 40 CFR § 63.6(i)(4)(ii) if qualifying criteria are satisfied.

## Conclusion and Next Steps

Metal coating manufacturers do not have a lot of time to evaluate compliance with the new MCM NESHAP. The process can require new continuous monitoring technology, establishment of operational ranges, installation of particulate controls for certain process vessels, and performance of performance tests. As a result, coating manufacturers covered by MCM NESHAP should take steps now to come into compliance with the new regulation:

Step No. 1: Determine whether dry solid materials containing metal HAP are ever added to a covered process vessel. If not, advise operational personnel not to include dry solids without review and approval by environmental professionals.

Step No. 2: In the event the facility is covered because dry solids are added to the coating manufacturing process, the plant should:

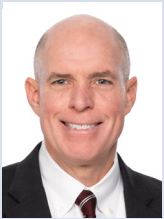
1. Confirm each covered process vessel has required control technology, which is operating while the metal HAP-containing dry solids are being added to the unit or submit a construction permit application to add the pollution control technology;
2. Before February 22, 2024, perform an EPA approved performance test on each affected control device (or provide results of a qualifying past test) and set operating parameters or otherwise meet the rule's requirements for continuous demonstration of compliance; and

- For any affected process vessel not currently controlled, the facility should install a PM control device or route emissions to an otherwise available PM control device.

Step No. 3: In the event the plant confirms no dry solids are added to metal coating production, document results of the technology review and be prepared to provide that information to the State or EPA when inspected.

[88 Fed. Reg. 10842 \(February 22, 2023\)](#)

## CONTACT US



[Ethan R. Ware](#)  
Partner & Chair  
Columbia, SC  
803.567.4610



[Carrick C. Brooke-Davidson](#)  
Partner  
Raleigh, NC  
919.981.4027



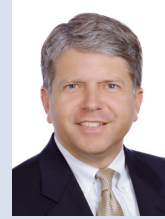
[Jessica J.O. King](#)  
Partner  
Columbia, SC  
803.567.4602



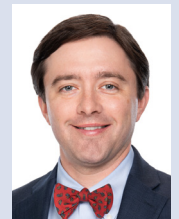
[Channing J. Martin](#)  
Partner  
Richmond, VA  
804.420.6422



[Ramona C. "Mona" O'Bryant](#)  
Partner  
Raleigh, NC  
919.981.4091



[Henry R. "Speaker" Pollard, V](#)  
Partner  
Richmond, VA  
804.420.6537



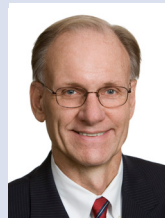
[Ryan W. Trail](#)  
Partner  
Columbia, SC  
803.567.4605



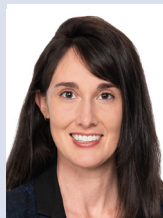
[Liz C. Williamson](#)  
Partner  
Richmond, VA  
804.420.6050



[Richard H. "Dick" Willis](#)  
Partner  
Columbia, SC  
803.567.4611



[Amos C. Dawson, III](#)  
Of Counsel  
Raleigh, NC  
919.981.4010



[Ruth Levy](#)  
Senior Associate  
Columbia, SC  
803.567.4613



[John G. Tamasitis](#)  
Senior Associate  
Columbia, SC  
803.567.4617



[Derek D. Tarver](#)  
Associate  
Columbia, SC  
803.567.4615

STAY IN TOUCH



[linkedin.com/company/williams-mullen](https://www.linkedin.com/company/williams-mullen)



[twitter.com/williamsmullen](https://twitter.com/williamsmullen)