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ENVIRONMENTAL NOTES

EPA'S HAZARDOUS WASTE GENERATOR IMPROVEMENT RULE: FIVE CHANGES TO THE SATELLITE ACCUMULATION RULE

BY: ETHAN R. WARE

In 2016, EPA published the long-anticipated Hazardous Waste Generator Improvement Rule (HWGIR) updating requirements for generators of hazardous waste. The HWGIR also clarifies EPA polices governing accumulation of hazardous waste in satellite accumulation areas (SAA). Because many states have now adopted the HWGIR into their state hazardous waste regulations, now is a good time for facilities in those states to audit onsite SAAs to be sure the correct hazardous waste practices are being followed. And for facilities in states that have not yet adopted the HWGIR, now is a good time to begin preparing for changes to SAA requirements.

Background on Satellite Accumulation Area Rule

A generator of hazardous waste must obtain a permit to treat, store, or dispose of hazardous wastes. Fortunately, there are a number of exceptions to the permit requirements, and as a result most generators fall outside of the permitting scheme.

One widely-used exception is the satellite accumulation area rule ("SAA Rule"). Under it, generators may accumulate hazardous waste in containers at or near the point of generation without obtaining a hazardous waste storage permit. 40 CFR 262.15(a). The SAA Rule applies, however, only if the facility does not accumulate more than 55 gallons of hazardous waste and/or one quart/ one pound of acute hazardous waste and the SAA container is in good condition, remains under the control of an operator, is labeled "Hazardous Waste," and stays closed except to add or remove wastes. The HWGIR includes changes to the existing SAA Rule and implementing policies. For simplicity, these changes will be referred to herein as the "New SAA Rule."

New Satellite Accumulation Area Rule

A stated objective of the HWGIR requirements is to close gaps in regulations and strengthen EPA oversight of hazardous waste management practices. The New SAA Rule does just that by adding five notable changes to prior SAA policies.

Change No. 1: Incompatible Wastes

While previously implied, placement of incompatible wastes in the same SAA container is now regulated. The following restrictions were added by the New SAA Rule to ensure incompatible wastes are not a threat to employees or the environment in SAAs:

- Generators are expressly prohibited from accumulating incompatible hazardous wastes in the same SAA container;
- All SAA containers must be "washed" if subsequently they will be used to hold incompatible waste, although the nature and scope of washing is not detailed; and
- A dike, berm, or wall must be installed to separate incompatible waste units in a single SAA.

Change No. 2: Exceptions to Closed Containers

The previous SAA Rule required SAA containers to be closed, except to add or remove hazardous wastes. This is also the case under the New SAA Rule. However, under the New SAA Rule, a SAA container may be opened for "temporary venting" when necessary for "proper operation of equipment" or to "prevent dangerous conditions" such as pressure-builds. This flexibility does not apply to containers in central accumulation areas (CAA).

Change No. 3: Three Calendar Days

Once the amount of hazardous waste accumulated in a SAA exceeds the volume caps of 55 gallons of non-acute hazardous waste or one quart/one pound of acute hazardous waste, existing regulations allow the generator "three days" to comply with a panoply of hazardous waste storage container requirements (inspections, labels, berms, alarms, training, preparedness/prevention plans, and contingency plans). Over the years, EPA has provided a myriad of guidance on what is meant by "three days." The New SAA Rule preamble clarifies how the Agency will enforce the requirement going forward:

- "Three days" now means "three consecutive calendar days," not three business or work days;
- No relief from counting days is provided just because hazardous waste is not being generated at the SAA or the facility is not operating;
- "Three consecutive calendar days" is not to be measured in hours, and as a result the SAA generator may actually have less than 72 hours to comply; and
- Full hazardous waste storage container requirements are only triggered for "excessive wastes," which are defined as that portion of SAA hazardous wastes exceeding regulatory caps.

Because this is a clarification of an existing requirement, it applies immediately in all states, including those that have not yet adopted the HWGIR.

Change No. 4: Reactive Hazardous Waste

The preamble to the New SAA Rule revokes prior guidance on storing reactive hazardous waste at a SAA. Under the prior guidance, a SAA generator could elect to accumulate reactive hazardous waste in a separate, explosion-proof room and still comply with the requirement that the SAA be "at or near the point of generation" - - thereby staying within the parameters of the SAA exception. The preamble to the New SAA Rule vacated this option by stating that an area used for the accumulation of reactive wastes away from the point of generation should be managed as a CAA, not an SAA. However, the preamble also indicates that generators may move a container of reactive hazardous waste from an SAA to a CAA for storage and then back to the SAA for further accumulation of reactive wastes. Employee training and recordkeeping are critical to successfully navigating this option.

Because this change revokes prior guidance, it applies immediately in all states, including those that have not yet adopted the HWGIR.

Change No. 5: Control of an Operator

The existing SAA Rule, as well as the New SAA Rule, require all SAAs to be "under the control of an operator." EPA used the preamble to the New SAA Rule to clarify what is meant by that phrase. The clarification indicates that:

- The operator must have a regular presence in the SAA and be able to control accumulation of hazardous waste;
- Control over access to the area, building, or room in which a SAA is located is not necessarily required; and
- There can be more than one operator serving different functions for each SAA.

Employee training is a key component of ensuring the SAA is under the control of an operator.

Because this change is an interpretation of a requirement in both the existing and New SAA Rule, it applies immediately in all states, including those that have not yet adopted the HWGIR.

Conclusion and Next Steps

The HWGIR, including the New SAA Rule, is effective in Iowa and Alaska where EPA runs the hazardous waste program and in fifteen other states, including Virginia and North Carolina, that have adopted it into their delegated state program. In states with delegated programs that have not yet adopted the HWGIR, it's appropriate for companies to take the following steps now to plan for the new EPA SAA policies at their facilities:

Step No. 1: Audit compliance with the New SAA Rule as compared to existing requirements;

Step No. 2: Upgrade operating records, training, management plans, recordkeeping, and inspection procedures and be prepared to include notable revisions to SAA requirements, including:

- Management of "incompatible hazardous waste" in the SAA;
- Use of "temporary venting" to protect employees without violating open container rules;
- Provide for full compliance with hazardous waste regulations for excess wastes within "three consecutive calendar days";
- Evaluation of the proper storage area for reactive waste; and
- Provision of "operational control".

Step No. 3: Implement changes under oversight of legal counsel if compliance may become a problem.

81 Federal Register 85732 (November 28, 2016).

SUPERFUND NEIGHBORS COME KNOCKING

BY: RYAN W. TRAIL

A case currently pending before the United States Supreme Court may significantly impact legal rights of potentially responsible parties (PRPs) involved in the cleanup of Superfund Sites. The case was brought in Montana State Court by owners of properties near the Anaconda Smelter Superfund Site near Opportunity, Montana.

The issue in the case concerns the extent to which the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) preempts the ability of private parties to sue PRPs for the costs they incur to implement cleanup remedies that are at odds with the remedies selected by EPA. The facts showed that arsenic and other hazardous substances were deposited on the property owners' land by emissions from a nearby copper smelter operated by Anaconda Company (now Atlantic Richfield Company). The Montana Supreme Court held the property owners could bring claims for property restoration under state common law. Atlantic Richfield then appealed to the U.S. Supreme Court, and the Court in June 2019 decided to hear the case.

If upheld by the United States Supreme Court, the Montana decision would allow residents whose property is impacted by contamination from a neighboring Superfund Site to bring state common law restoration claims against PRPs for cleanup costs incurred. This would be contrary to the majority of courts' interpretation of CERCLA § 122(e)(6), which provides "no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by" EPA. Atlantic Richfield contends these private landowners

are themselves PRPs because the term "potentially responsible party" includes the "owner" of "any site or area where a hazardous substance has ... come to be located." It says the definition extends even to landowners "not responsible for contamination," *United States v. Atl. Research Corp.*, 551 U.S. 128, 134 n.2, 136 (2007), which in turn means the private landowners cannot undertake any remedy that has not been approved by EPA.

The decision by the Montana Supreme Court also allows the residents to perform cleanup of their

property in excess of and in addition to the remedy selected by EPA and then sue the PRPs for the costs. Atlantic Richfield says this conflicts with CERCLA § 113(h) which bars any "challenges" to EPA cleanups. It notes that section 113 "protects the execution of a CERCLA plan during its pendency from lawsuits that might interfere with the expeditious cleanup effort." *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (emphasis omitted).

If upheld, the decision by the Montana Supreme Court could lead other state high courts to allow owners of neighboring properties on which contamination was released to control the cleanup remedy on their property regardless of EPA's chosen remedy. If owners of these properties choose to restore their properties in a more stringent manner than EPA's remedy, the Montana Supreme Court's decision may mean PRPs have to pay twice: once to implement EPA's remedy and once to pay landowners who decide to go beyond EPA's remedy and do more.

Several amicus curiae briefs have been filed in support of Atlantic Richfield's position. PRPs involved in Superfund cleanups should closely monitor this case as its outcome could be significant. A decision is expected by June 2020.

Atlantic Richfield Company v. Christian, Docket No. 17-1498 (U.S. Sup. Ct.)

VIRGINIA'S RENEWED GENERAL INDUSTRIAL STORMWATER DISCHARGE PERMIT INCLUDES A MIX OF TOUGHER AND MORE FLEXIBLE STANDARDS

BY: HENRY R. "SPEAKER" POLLARD, V

In the ever-increasing effort to control nutrient (phosphorous and nitrogen) loads into the Chesapeake Bay watershed, Virginia and other Bay states are looking for additional means to ratchet down nutrient-laden stormwater discharges. Driven in large part by EPA's Chesapeake Bay TMDL Rule ("Bay TMDL") setting allowable nutrient and sediment load limitations for the Bay and its tributaries, this effort so far has been focused on traditional sources of nutrients and sedimentation in stormwater discharges, such as municipal separate storm sewer systems, real estate development projects, municipal and industrial wastewater treatment plants, confined animal feeding operations, and agricultural operations.

Because industrial stormwater discharges can also include appreciable nutrient and sediment loadings, Virginia has now trained its sights more closely on industrial stormwater dischargers to demonstrate nutrient reductions toward ultimate compliance with the Bay TMDL. One result is the recently renewed and amended General Virginia Pollutant Discharge Elimination System (VPDES) Permit for Discharges of Storm Water Associated with Industrial Activity ("General Permit"), which took effect July 1, 2019. The General Permit includes, among a variety of revisions, new provisions for reducing nutrient runoff from industrial sources of stormwater beyond those that would ordinarily apply to facilities in the specific industrial sector classification. The following revisions are particularly noteworthy:

1. Facilities with Chesapeake Bay TMDL action plans approved during the 2014-2019 term of the General Permit must continue with such plans during the new General Permit term (2019-2024). These facilities must file annual reports with the Virginia Department of Environmental Quality ("DEQ") by June 30 of each year of the new General Permit term discussing progress toward meeting required nutrient reductions. However, as described below, this annual reporting requirement may be waived by DEQ pursuant to a provision of the General Permit.

2. During the 2014-2019 General Permit term, any facility that took four rounds of samples for analysis of total suspended solids ("TSS"), total nitrogen ("TN"), and total phosphorous ("TP") "to characterize the contributions from their facility's specific industrial sector for these parameters" must follow new formulas set out in the new General Permit to determine stormwater loadings for these constituents. However, a facility may use any applicable sampling data collected during the entire 2014-2019 General Permit term to meet some or all of the requirement for the four sampling rounds and to make these calculations. The facility/permittee must then submit to DEQ these calculations and any Chesapeake Bay TMDL action plan as required under the General Permit within 60 days of General Permit coverage for the facility.

3. Any facility that did not take four samples for analysis of TSS, TN, and TP during the 2014-2019 General Permit term must complete four rounds of monitoring for these constituents beginning during the first full monitoring period of General Permit coverage, "to characterize the contributions from their facility's specific industrial sector for these parameters." Calculations of stormwater loads of these constituents must be made, and the results and any required Chesapeake Bay TMDL action plan must be filed with DEQ within 90 days after the fourth monitoring period.

4. If there are changes to the facility's acreage used for industrial purposes for which the General Permit is issued, or if there are changes in the facility's "impervious surface area" (as newly defined), the facility must recalculate its nutrient loading rates and, as needed, modify its existing Chesapeake Bay TMDL action plan or prepare one for the first time. Such recalculations and Chesapeake Bay TMDL action plan must be submitted to DEQ within 90 days of completion of any facility changes leading to these results.

5. Likewise, if for other reasons prior monitoring is no longer representative of the modified facility, the facility must perform new monitoring, new calculations and, as needed, prepare and file an amended or new Chesapeake Bay TMDL action plan within 90 days after the fourth monitoring period.

6. All facility loading calculations and any Chesapeake Bay TMDL action plan shall be maintained as part of the Stormwater Pollution Prevention Plan ("SWPPP").

7. DEQ may grant a waiver for preparation and filing of Chesapeake Bay TMDL action plan annual reports when the permittee demonstrates that all needed nutrient loading reductions to meet applicable load limits have been achieved through implementation of certain allowable mechanisms. Any waiver granted must be kept with the SWPPP. Facilities may pursue several options to reduce nutrient loading to allowable levels to obtain a waiver, including:

    a. Using one or more of the best management practices ("BMPs") from the Virginia Stormwater BMP Clearinghouse listed in 9VAC25-870-65, found on the Virginia Stormwater Clearinghouse website, or

approved by the Chesapeake Bay Program. Such BMPs must be maintained permanently and be incorporated into the SWPPP;

b. Using site-specific BMPs followed by four rounds of confirmation sampling to demonstrate the BMPs' effectiveness in reducing the nutrient loadings to within allowable levels. Such BMPs must be maintained permanently and must be incorporated into the SWPPP; or

c. Acquisition of perpetual nonpoint source nutrient credits.

The great majority of regulated industrial stormwater dischargers rely on the General Permit rather than an individual permit. Therefore, the General Permit's increased requirements for industrial stormwater sources in the Bay watershed will result in additional monitoring and reporting burdens and may require additional nutrient and sediment control measures. Virginia expects these new requirements will improve Bay water quality and help it demonstrate reduced nutrient and sediment loads to meet its obligations under the Bay TMDL. That would be a good result for a host of reasons, but permittees should also expect compliance risks and costs to increase along the way. Permittees should have a strategy in place to comply with these new requirements, some of which must be met soon.

35 Va. Reg. Reg. 2158 (May 13, 2019).

A ROAD MAP TO EFFECTIVE USE OF ENVIRONMENTAL LAWYERS AND CONSULTANTS

BY: LIZ WILLIAMSON

Working with an environmental lawyer and an environmental consultant, often a hydrogeologist or an engineer, does not have to shorten your life span. Both professionals add value to a challenging environmental problem. The trick is to understand how to get the most from their collective knowledge on a project. We have some suggestions:

Back to the Privilege Basics. Take advantage of the lawyer's involvement by considering whether the project should be conducted under the cloak of the attorney-client privilege. To make it clear that the project is under privilege, the lawyer should commission the technical work from the consultant. Starting the project under privilege from the outset may provide a basis to keep all work product confidential, meaning it does not have to be disclosed to the government or third parties. It can be extremely helpful to withhold privileged documents during an environmental inspection, when responding to an information request, or in litigation. Covered documents may include draft reports from the consultant on which the parties may have multiple rounds of comments and strategy discussions. However, the privilege is not a guarantee that the information will remain confidential. There are circumstances where a court can determine that the privilege has been waived and then order disclosure. However, there is a much better chance of maintaining the privilege if the attorney lays out the ground rules at the outset.

Kick-off the project with both lawyer and consultant as a team. The client will receive the most value from a joint project start. All professionals will start with the same information. Consultant and lawyer will have an opportunity to participate in planning discussions and create a timeline for project deliverables.

Maximize the Niches. The attorney and the consultant have different technical niches and educational strengths to add value to a project. For example, the consultant will have expertise advising the client on the science of the project. The lawyer will have advocacy experience to effectively craft the technical message and attempt to avoid

problems that have arisen in similar enforcement cases or lawsuits. There will be overlap between the professionals, which adds value to the project. While the lawyer will provide advice on the nuances of relevant laws, a good consultant will have a working knowledge of what they require. Likewise, the lawyer should have enough scientific knowledge to understand and apply the consultant's technical findings. We find it most effective to keep each professional's primary skill focus in mind when weighing conflicting advice. Overlapping knowledge is helpful as a quality check for the final product.

Cost Saving Advice. A client's scope of work for the lawyer and consultant should be clearly defined at the beginning of the project. Costs may be saved by conducting telephone and video conferences. However, we have also seen site visits skipped that would have allowed the lawyer or consultant to become familiar with key aspects of the site. Sometimes the money is well spent to have all parties attend a kick-off meeting and site tour, depending on the project.

The bottom line is that there is value to be added by the effective use of professionals. Using them wisely is the key to a successful project.

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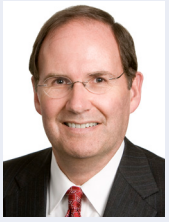

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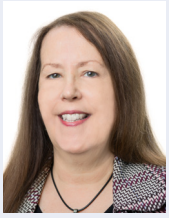

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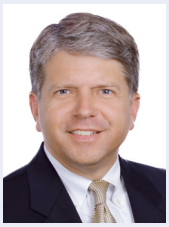

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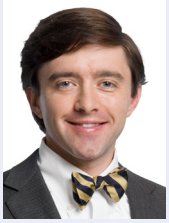

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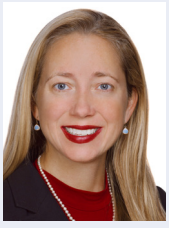

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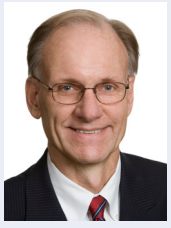

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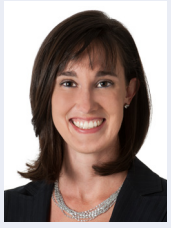

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