McAfee & Taft
# RegLINC
MAY 2011
REGULATED INDUSTRIES LEGAL INFORMATION NEWS & COMMENTARY

## INSIDE THIS ISSUE



EDITOR

**Chris A. Paul**
www.mcafeetaft.com/Chris-Paul

CONTRIBUTING

**Vickie J. Buchanan**
www.mcafeetaft.com/Vickie-Buchanan

**Robert J. Joyce**
www.mcafeetaft.com/Robert-Joyce

**Heidi Slinkard Brasher**
www.mcafeetaft.com/Heidi-Slinkard-Brasher

**Mary Ellen Ternes**
www.mcafeetaft.com/Mary-Ellen-Ternes

# New guidance on identifying waters protected by the Clean Water Act

**BY ROBERT J. JOYCE**

On April 27, EPA issued a draft of its controversial new Guidance on Identifying Waters Protected by the Clean Water Act ("Guidance"). The guidance is the latest effort by EPA and the Army Corps of Engineers (the "Agencies") to put their gloss on recent Supreme Court decisions defining the Clean Water Act's ("CWA") core jurisdictional focus - "waters of the United States." The new guidance would supersede two earlier guidance documents issued in 2002 and 2008 under the Bush Administration, and purportedly embodies "lessons learned since 2008" and "reflects the agencies' understandings with respect to CWA jurisdiction." As expected, the guidance is proving to be extremely controversial.

The controversy has its roots in two Supreme Court cases decided in 2001 and 2006. In the first decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC"),* a divided court ruled that the CWA does not grant the federal government jurisdiction over non-navigable, isolated, intrastate waters. As such, SWANCC removed a significant amount of water from federal jurisdiction. In the more recent decision in *Rapanos et ux. v. United States* ("*Rapanos*"), the justices were even more divided. In the *Rapanos* plurality opinion, Justice Scalia expressed the opinion that jurisdiction extends beyond traditional navigable waters to "relatively permanent, standing or flowing bodies of water." While five of the justices voted to overturn a lower court ruling preventing the destruction of isolated wetlands, the decision of the court was essentially 4 to 4, with the last justice (Kennedy) not fully agreeing with either of the other groups. Justice Kennedy expressed the view that jurisdiction extends to waters that "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical or biological integrity of other covered waters more readily understood as 'navigable.'"

In the new guidance, the agencies reaffirmed their prior position that they have jurisdiction over waters that meets either the *Rapanos* plurality's standard or Justice Kennedy's "significant nexus" standard, but expressed the view that "previous guidance did not make full use of the authority provided by the CWA to include matters within the scope of the Act, as interpreted by the court." Consequently, the clear intent of the agencies is to expand the universe of waters that fall with within limits of federal jurisdiction. The guidance is lengthy and complex, and a

*Continued on next page*

*Continued from previous page*

summary of its specific provisions is beyond the scope of this article. Suffice it to say, however, that the pendulum of federal control over isolated waters has swung in the far opposite direction from SWANCC's movement toward limited federal jurisdiction.

Because of its expansion of federal jurisdiction, the guidance has garnered staunch resistance from industry groups and conservative political leaders. Senator James Inhoff (R-OK), who is the ranking member of the Senate Committee on Environment and Public Works strongly opposes the guidance and is expected play a significant role in crafting legislation to explicitly limit federal CWA jurisdiction. According to Inhofe, "It's long past time for EPA to follow the Supreme Court's ruling that circumscribe its water permitting authority." Organizations representing the oil and gas and agriculture industries have been very active in opposing the guidance. Because the guidance will affect not just wetlands issues, but also the NPDES permitting program, EPA's oil spill program and state water quality certification processes, virtually every industry should examine its impact on their operations.

Public notice regarding the guidance was published in the May 2, 2011 *Federal Register*. The agencies will be accepting public comment on the guidance through July 1, 2011. The agencies have indicated that once the guidance is finalized, they will initiate a formal rulemaking to further define the scope of their CWA jurisdiction.

- **The Guidance (Guidance on Identifying Waters Protected by the Clean Water Act) online**

# Attempt to regulate nondischarging CAFOs rejected again

**BY MARY ELLEN TERNES**

On March 15, 2011, the United States Court of Appeals for the Fifth Circuit, following transfer from the Judicial Panel on Multi-District Litigation (compiling appeals filed in the Fifth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits), issued its decision in the challenge to EPA's 2008 Concentrated Animal Feeding Operation (CAFO) rule revisions by many agricultural associations ("Farm Petitioners" including the Oklahoma Pork Council, American Farm Bureau, Dairy Business Association and National Chicken Council), with environmental association intervenors ("Environmental Intervenors" including the National Resources Defense Council, Sierra Club and Waterkeeper Alliance). The 2008 CAFO rule revisions were adopted by EPA in resolving the mandates of the Second Circuit following *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2n Cir. 2005) (resolving challenges to EPA's 2003 CAFO rule revisions).

With this decision, the Fifth Circuit held that EPA exceeded its authority under the Clean Water Act by requiring all CAFOs to apply for a CWA discharge permit when there is no discharge to navigable waters, and with respect to CAFOs that have not discharged to navigable waters, vacated both the requirement to apply for a CWA permit where there are no discharges, and vacated provisions imposing liability for failing to apply for an NPDES permit. Specifically, the Fifth Circuit stated, "For more than 40 years, the EPA's regulation of CAFOs was limited to CAFOs that discharge." The 2003 rule marked the first time that the EPA sought to regulate CAFOs that do not discharge. This attempt was wholly rejected by the Second Circuit in *Waterkeeper*.

Again, with the 2008 rule, the EPA not only attempts to regulate CAFOs that do not discharge, but also to impose liability that is in excess of its statutory authority. Here, the "duty to apply," as it applies to CAFOs that have not discharged, and the imposition of failure to apply liability is an attempt by the EPA to create from whole cloth new liability provisions. The CWA simply does not authorize this type of supplementation to its comprehensive liability scheme. Nor has Congress been compelled, since the creation of the NPDES permit program, to make any changes to the CWA, requiring a non-discharging CAFO to apply for an NPDES permit or imposing failure to apply liability.

The Fifth Circuit upheld the provisions of the 2008 rule that allow permitting authorities to regulate a permitted CAFO's land application and include these requirements in a CAFO's NPDES permit because challenges were time-barred, and dismissed the poultry petitioners' challenge of the guidance letters for lack of jurisdiction because the letters merely restated the law and had no effect on the party's rights or obligations and thus not reviewable final actions.

- **See *National Pork Producers, et al. v. U.S. EPA*, No. 08-61093 (Fifth Cir., Mar. 15, 2011).**

# U.S. Department of Transportation unveils pipeline safety initiative

BY VICKIE BUCHANAN

Currently, more than 2.5 million miles of pipelines are operating to transport oil and gas across the nation. While incidents resulting in serious injury or death have declined nearly 50% over the past 20 years, a series of recent incidents has resulted in several fatalities. Nine fatalities were reported in 2008, 13 fatalities were reported in 2009, and 22 fatalities were reported in 2010. Because of these incidents, U.S. Transportation Secretary Ray LaHood announced a plan aimed at making the operation of pipelines safer across the nation.

U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA") has inspectors and engineers which oversee the nation's pipelines to ensure that companies are complying with rules and regulations aimed at protecting individuals and the environment. In addition to regular inspections and audits by PHMSA, Secretary LaHood introduced additional safeguards to protect the public and recommended an increase in penalties when companies violate the law. Secretary LaHood has stated, "The safety of the American public is my top priority and I am taking on this critical issue to avoid future tragedies we have seen around the country."

As part of his action plan, Secretary LaHood requested that pipeline owners and operators perform thorough inspections of their pipelines, identify areas of high risk, and accelerate the timeframe to repair and replace these areas. He further announced certain federal legislation in an effort to strengthen pipeline safety. He requested that Congress act to increase the maximum civil penalties for pipeline violations from $100,000 per day to $250,000 per day and from $1 million for a series of violations to $2.5 million for a series of violations.

SIDEBAR

## BP Alaska to pay largest per barrel penalty to date

On May 3, 2011, the Environmental Protection Agency, the Department of Justice and the Department of Transportation's PHMSA announced the penalty assessed against BP Exploration Alaska, Inc. for its crude oil spill in March 2006 on Alaska's North Slope. The initial spill of 5,054 barrels was followed five months later by a 24-barrel spill, both resulting from BP Alaska's failure to properly inspect and maintain the pipeline to prevent corrosion. A PHMSA Corrective Action Order set forth what repairs needed to take place; however, when the company allegedly failed to fully comply, the matter was referred to the DOJ.

Ultimately, $25 million in civil penalties were assessed, and BP Alaska was required to implement a system-wide pipeline integrity program covering 1,600 miles of pipeline. In addition to the $200 million the company has already spent to replace the pipeline following the spills, another $60 million will be expended to pay for the mandated pipeline integrity management program, which requires regular inspections and a risk-based assessment system implemented to address, evaluate and correct threats to the company's oil pipelines. These civil penalties are in addition to the criminal penalties assessed in 2007 following a misdemeanor guilty plea for the same incident, which itself resulted in a $40 million ding. The overall cost: $315 million and a criminal conviction.

The government hopes this sends the message that companies need to act responsibly because they will be held accountable for testing and maintaining their pipelines.

## Large emission sources targeted by EPA

In accordance with the EPA's National Enforcement Initiatives for 2011-2013, the agency is scrutinizing large emission sources to reduce air pollution. The focus of this effort is to improve industry compliance with new source review provisions of the Clean Air Act (CAA). In 2010, the EPA's enforcement efforts led to $1.4 billion in pollution controls and $14 million in civil penalties.

Terra Industries Inc., a nitrogen fertilizer and nitric acid producer, has entered into a consent decree with the EPA and DOJ to settle violations alleged at nine plants in three states. The plants – located in Verdigris and Woodward, OK, Sergeant Bluff, IA, and Yazoo City, MS - allegedly failed to obtain necessary pre-construction and operating permits, install the best available air pollution control technology, comply with air emission limits, and comply with emission monitoring, recordkeeping and reporting requirements. The consent decree for these alleged violations requires the installation of new pollution controls and technologies at a cost of $17 million in addition to civil penalties payable to the United States, Oklahoma, Iowa and Mississippi, totaling $625,000.

# Oklahoma's proposed regional haze SIP revision rejected by EPA

**BY MARY ELLEN TERNES**

On March 22, 2011, EPA published its proposal to approve and disapprove portions of Oklahoma's February 19, 2010, proposal to comply with EPA's regulations implementing the U.S. Clean Air Act's "Visibility Protection" provisions, known as the "Regional Haze Rule." EPA is disapproving Oklahoma's proposed "Best Available Retrofit Technology," "Long-Term Strategy" and "BART Alternative," substituting its own federal implementation plan imposing SO2 emission limits on six Oklahoma SO2 emission sources. Central to the dispute is primarily the timing and manner of compliance.

The Regional Haze Rule originates from Congress' 1977 Clean Air Act addition of Section 169, which declared as a new national goal, "the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from man-made air pollution." EPA initially adopted visibility protection regulations in 1980 addressing discrete emission sources or small groups of emission sources. Then, in 1990, Congress added CAA Section 169B inspired by the decreasing visibility in the Grand Canyon. In 1996, the Grand Canyon Commission provided EPA with strategies to address regional haze created by lots of emission sources, prompting EPA to adopt its "Regional Haze Rule" in 1999. This rule requires review, modeling and control of sources emitting pollution which may cause or contribute to haze within a state's national parks, and also in states downwind from a state. While the regional haze rule may end up improving air quality, the purpose of the regional haze rule is aesthetic.

Oklahoma has one designated "national wilderness area," the Wichita Mountains Wildlife Refuge across Highway 35 from Turner Falls. In its February proposal, the Oklahoma Department of Environmental Quality (ODEQ) included revised state implementation plan (SIP) provisions allowing several Oklahoma power plants to convert from coal to natural gas, switching fuel to avoid burning the higher sulfur coal and prevent creating SO2 that might cloud up our vistas over the Wichita Mountains. On March 22, 2011, EPA proposed to accept a portion of Oklahoma's proposed SIP but reject the portion dealing with the SO2 emissions, and has proposed one of its own (federal implementation plan, or "FIP") to address the rejected portions.

This EPA proposal would mandate compliance with EPA's determination of BART, i.e., an SO2 emission limit met either by installation of scrubber technology to remove the SO2, or fuel switching to natural gas, within three, but up to possibly five, years of FIP adoption. Among other issues, such as fundamental disagreements regarding cost and removal efficiencies, EPA reads ODEQ's SIP as allowing this coal to natural gas fuel transition to last through 2026, which EPA says runs afoul of language in the Clean Air Act itself (and EPA's regulations) requiring that controls need to be installed "as expeditiously as practicable but in no event later than five years" after adoption of the SIP or FIP.

It is not clear whether Oklahoma will succeed in negotiating a SIP revision acceptable to EPA. However, while EPA's rejection of Oklahoma's regional haze SIP for SO2 has been quite controversial, EPA's bases for rejecting this portion of the proposed SIP gets a bit lost in the upcoming rules that will significantly impact the utility industry. Soon, in addition to EPA's upcoming July 2, 2011, "Phase II" greenhouse gas permitting rules for major stationary sources, EPA will be implementing its "Clean Air Transport Rule" (replacing the remanded Clean Air Interstate Rule or CAIR), "Utility Boiler MACT" (replacing the previously vacated Clean Air Mercury Rule or CAMR), new National Ambient Air Quality Standards for SO2, as well as nitrogen oxides (NOx), particulate matter (PM2.5), and ozone, and also new water and waste rules impacting cooling water intake structures (CWA 216(b)) and coal ash disposal, respectively.

- **Read about Oklahoma's regional haze submittal and EPA's response**
- **Review EPA's March 22, 2011, proposal**
- **Read more about EPA's Regional Haze Program**

# Exemptions and enforcement of SPCC regulations

BY HEIDI SLINKARD BRASHER

The Clean Water Act's Spill Prevention, Control and Countermeasure (SPCC) regulations require onshore oil production and bulk storage facilities to provide oil spill prevention, preparedness and response to prevent discharges in an effort to protect water quality. Under SPCC regulations, "oil" includes petroleum, fuel oil, sludge, oil refuse and other oils and greases such as fats, oils or greases of animal, fish or marine mammals, vegetable oils and oils mixed with waste other than dredged spoil.

## Exemption

The SPCC's definition of oil includes milk. However, due to public comment from the dairy industry, the EPA delayed SPCC compliance requirements for milk and milk product containers until November 10, 2011, while it contemplated a final rule exempting the industry. This month the EPA determined that industry construction and sanitation standards applicable to milk and milk product containers adequately addressed spill prevention and there was no need to impose the added burden of compliance with the SPCC.

Milk, milk product containers and associated piping and appurtenances are constructed according to 3-A Sanitary Standards for the industry which satisfy the Pasteurized Milk Ordinance (PMO) model construction requirements, which require operating permits and are subject to state dairy regulatory inspections. The USDA's recommended requirements also consist of quality and sanitation regulations for the production and processing of milk, which the USDA recommends state enforcement agencies adopt. These requirements are similar to those of the PMO and include inspection, certification and licensing provisions.

Because the EPA believed that PMO, USDA or state dairy regulatory requirements applied to all milk or milk product containers, the final rule exempts these from SPCC requirements, and the scope of the exemption was amended to include all milk containers and associated piping and appurtenances because they are also constructed in accordance with 3-A Sanitary Standards and are subject to regulatory and operational requirements including permits, licensing and frequent inspections. Because the final rule adopted the exemption, the November 10, 2011, compliance date has been revoked for the exempted items.

This milk and milk products exemption does not exempt dairy farmers or milk producers from SPCC regulations with respect to containers storing other oils at their facilities. As a result of the exemption, the milk, milk product containers and milk product equipment is not included in the facility's overall total oil storage capacity calculation for SPCC regulation purposes. This may result in some facilities' failure to reach the capacity threshold required for SPCC regulation or may enable other facilities to streamline their SPCC plans.

## SPCC enforcement at non-milk facilities

While the EPA has exempted milk and milk products from SPCC regulation, SPCC inspectors continue enforcing their field manual, fining companies, and utilizing the EPA's new expedited settlement agreement procedure.

Lady Bug Oil Company is a recent example. The EPA fined this Blackwell, OK, company $2,900 for violating SPCC regulations when a recent inspection revealed training records were not maintained for the requisite three-year period (and were not available for inspector review as a result) and certain periodic inspections were not conducted.

Edinger Inc. was recently fined $2,950 for SPCC violations detected during an inspection at their Caddo County, OK, facility. Violations included inadequacies in spill containment, discharge prevention, drainage controls, and oil storage and labeling measures; training inadequacies in the areas of equipment operations and maintenance, discharge protocol and pollution control regulations; and failure to conduct periodic visual inspections for maintenance needs.

Both Lady Bug and Edinger participated in expedited settlement agreements with the EPA, certifying that all deficiencies identified have been corrected.

Martin Operating Partnership of Beaumont, TX, was fined $48,700 for violating SPCC regulations when an inspection revealed the facilities' SPCC plans failed to conform with the federal requirements in that the plans did not describe procedures to manage drainage from diked storage areas, did not describe whether buried piping was present and if such piping was corrosion protected, did not describe truck and rail loading and unloading areas' secondary containment, failed to address security components regarding pump starter controls and master drain and flow valves, and failed to provide adequate secondary means of containment when constructing all bulk storage tanks.

# EPA solicits comment on proposed construction general permit

**BY HEIDI SLINKARD BRASHER**

Stormwater discharge from construction activities regulated under the National Pollutant Discharge Elimination System (NPDES) program, require issuance of an NPDES permit from either the state regulatory agency or the EPA. While some states have permitting authority, the EPA may be the appropriate permitting entity for certain areas within those states, e.g., Indian Country in states including Oklahoma, Texas, Kansas, Louisiana and Michigan. Nearly all permits issued by the EPA are construction general permits (CGP).

On April 25, 2011, the EPA filed a notice proposing extension of the 2008 CGP usage until January 31, 2012. On the same day, the EPA published notice of the proposed CGP. Public comment will be accepted until June 24, 2011. The proposed modifications include enhanced protections and new requirements to implement the new effluent limitations guidelines and source performance standards that became effective on February 1, 2010. This includes restrictions on erosion and sediment control, stabilization and pollution prevention. In addition to reorganizing the structure and appearance of the permit, other proposed changes include:

- Immediate authorization for public emergency response activities
- Increase in the new project waiting period to 30 days to enable endangered species-related reviews required for authorization and to maximize use of eNOI process authorizing discharges
- Implementation of the construction & development (C&D) rule's sediment and erosion control limits, including
  - » Buffer compliance alternatives
  - » Sediment control installation prior to construction
  - » Sediment removal requirements
  - » Stabilization of entrance and exits
  - » Storm drain inlet controls
  - » Sediment discharge reduction with treatment chemicals are subject to use restrictions and design requirements
  - » Dewatering controls and discharge restrictions
- More specific temporary and final stabilization requirements for vegetative and non-vegetative stabilization
- Location restrictions and design standards for pollution prevention requirements including the restriction of fertilizer discharge
- Numeric turbidity limit, applicability, sampling and reporting requirements
- Water quality-based effluent limits
- Requirement that site inspections occurring during discharge-generating rain events include visual assessment of quality of discharge
- Corrective action requirements, including specific triggering conditions, deadlines and documentation
- Additional requirements for termination of permit coverage, including removal of all temporary stormwater controls, construction materials, wastes and waste-handling devices

Following consideration of public comments, the EPA anticipates issuing the final CGP by January 31, 2012.

# Aftershocks

**BY CHRIS PAUL**

The PG&E pipeline explosion of September 9, 2010, has continued to result in scrutiny of and introspection by the pipeline industry. Other incidents prior and subsequent to San Bruno have contributed to the once again renewed focus on pipeline safety that started a decade ago with the Bellingham spill and the Carlsbad explosion, but the impact of San Bruno is, in large part, that activities associated with integrity programs have been accelerated, and public misperceptions may have forced agencies to take positions with respect to enforcement that might be more than necessary given improvements in operations to date and the overall safety record of the pipeline industry. That said, it appears that PHMSA is yet again showing that its personnel understand the industry that they regulate and will provide oversight that has a rational basis and makes sense.

Since San Bruno, we have seen advisory bulletins requiring better communication and coordination with first responders, and requiring pipelines to validate and document integrity (in particular pressure) information. Both initiatives are challenging as they add another layer of issues, and the integrity validation issue will be inherently difficult in cases where systems are older and/or have changed ownership and the records now being sought were not previously retained because there was no obligation (and in most cases no need) to do so. Ultimately, we expect that definitions of what is required to address both of the above will be both workable for the companies and continue to provide high levels of safety for the public in conjunction with reliable and efficient service.

**OKLAHOMA CITY**
TENTH FLOOR
TWO LEADERSHIP SQUARE
211 N. ROBINSON
OKLAHOMA CITY, OK 73102
405.235.9621

**TULSA**
1717 S. BOULDER
SUITE 900
TULSA, OK 74119
918.587.0000

**www.mcafeetaft.com**