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ENVIRONMENTAL NOTES

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SUE AND SETTLE IS GONE: EPA ADMINISTRATOR REVISES EPA LITIGATION POLICY

BY: ETHAN R. WARE

A prominent characteristic of the Obama EPA was its close relationship with national environmental groups. The most controversial EPA rulemakings seemed to be the by-product of litigation settlements when environmental groups sued EPA over discretionary powers given the agency under various environmental statutes. The end result was often a pre-arranged, judicially enforced settlement binding the agency to adopt regulations more stringent than might otherwise be the case. Not only that, but EPA often paid the plaintiff's legal fees and costs. The practice was so abused it earned its own nick-name: "Sue and Settle." Now that Administrator Scott Pruitt is leading the agency, Sue and Settle is officially gone.

Sue and Settle: A Common Practice

The Sue and Settle whirlwind of settlements set key regulatory achievements for EPA Administrators Jackson and McCarthy. For example, in May of 2016, environmental groups sued EPA and alleged it failed to update regulations governing wastes generated from oil and gas production as required by the Resource Conservation and Recovery Act. The Natural Resources Defense Council and other plaintiffs entered into a settlement with EPA just a few months later in which EPA agreed to revise existing regulations and guidelines by March 15, 2019. The controversial Boiler MACT regulations under the Clean Air Act are a direct result of action taken in December 2008 by the American Nurses Association and a host of environmental groups. By count of The Heritage Foundation, EPA under President Obama was responsible for more than 60 Sue and Settle rulemakings.

A New Procedural Directive

In an October 16, 2017 memo that said Sue and Settle is "collusion with outside groups," creates rules "outside the normal administrative process," and excludes "stakeholders" from the rulemaking process, EPA Administrator Pruitt issued a Directive that terminated the Sue and Settle policy. He did not mince words: "EPA will not resolve litigation through backroom deals with any type of special interest group." The Directive makes three major revisions to EPA's procedures for resolving citizen suits under environmental statutes.

First, how EPA handles these cases will be more transparent. The Directive orders any notice of intent to sue received by EPA to be published within fifteen days on EPA's website. In addition, any

complaints or petitions for review filed in federal court concerning a rulemaking must be made available online by EPA within fifteen days of its receipt of the same. The Directive also requires EPA to notify affected states and regulated entities of any of these legal actions and says it will be EPA's policy to "take any and all appropriate steps to achieve the participation of affected states and/or regulated entities in the…negotiation process." Moreover, before entering into any proposed consent decree or other settlement governing agency actions, EPA will post it online for public comment and will seek to gain the concurrence of the states or regulated entities that would be affected by it.

Second, EPA will interpret its settlement authority narrowly. Thus, "EPA shall not enter into a consent decree with terms…[a] court would have lacked authority to order if the parties had not resolved the litigation," or one with the effect of converting an otherwise discretionary duty of EPA into a mandatory one to issue or amend regulations. Under the Directive, if EPA resolves a matter and there is "no prevailing party," EPA will try to preclude payment of legal fees and costs to the plaintiff. Also, any rulemakings agreed to under terms of a settlement must provide sufficient time for "meaningful" public comment and adherence to the rulemaking procedures of the Administrative Procedure Act.

Third, the Directive creates a public notice process for any consent decrees lodged in federal court or draft settlement agreements EPA is considering that resolve claims against the agency. A notice of any such consent decree or settlement agreement will be published in the Federal Register announcing a 30 day notice and comment period. Moreover, EPA may decide to hold a public hearing on whether it should enter into the consent decree or settlement agreement. Based on comments received, the Directive says that EPA reserves the right to "withdraw, modify, or proceed" with the proposed actions.

Closing Statement: Powers Preserved

Administrator Pruitt closes the Directive with this warning: "In no circumstances… will I permit the agency to violate its statutory authority or to upset the constitutional separation of powers." Given the Directive's extensive requirements governing how the agency must handle these cases, it appears the practice of Sue and Settle is at an end. Is it gone forever? Not likely. Sad to say, but a future Administration that maintains cozy relationships with environmental groups could simply junk the Directive and bring Sue and Settle back. Regulated parties should enjoy the hiatus while it lasts.

Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements (October 16, 2017)

DEPUTY ASSISTANT ADMINISTRATOR FOR EPA'S OFFICE OF WATER PROVIDES ENVIRONMENTAL POLICY INSIGHTS

BY: LIZ WILLIAMSON

Lee Forsgren was appointed Deputy Assistant Administrator for EPA's Office of Water in July 2017. We recently had the opportunity to hear him speak to a trade group where he discussed EPA's priorities under the Trump Administration as well as specifics about the agency's water activities. Here is what we gleaned from his presentation.

Top Eight EPA Policy Insights:

1. **Cooperative Relationship Between EPA and States.** EPA wishes to foster a cooperative federalism approach with states. If a state chooses to enact stricter environmental laws than federal environmental laws, EPA will not intercede even if EPA disagrees with the state policy. Forsgren provided an example in which a state decided to enact an environmental law that EPA did not believe was necessary, yet

EPA did not object. Forsgren suggested that states will have more power to follow their own prerogatives as long as they act within the boundaries of the law. No longer will there be a parent-child relationship.

2. **Lawsuits will not drive policy.** EPA will act in accordance with the law and administrative procedures, but the threat of lawsuits will not drive the agency's policy. EPA management recognizes that EPA is likely to be sued no matter what position the agency takes.

3. **Public-Private Partnerships.** Success in the past has come from successful public-private partnerships. Forsgren specifically mentioned this concept in the context of developing more water infrastructure. This Administration will foster ideas that involve leveraging these relationships.

4. **Patience is a virtue.** EPA is engaged in numerous rulemaking activities. For example, the Waters of the United States ("WOTUS") rulemaking to redefine waters of the United States generated more than 200,000 comments. EPA must respond to all substantive comments. That will take time, and it will affect the timeline for rule development.

5. **Zero Tolerance for Deliberate Acts.** EPA will be tough on environmental crimes. Deliberate dischargers of pollution will face harsh consequences. Forsgren suggested that tolerance for environmental crimes would be less than in prior Administrations.

6. **Top Two Substantive Priorities.** Forsgren indicated that EPA is working diligently on repeal and replacement of the WOTUS rule and Clean Power Plan.

7. **Enforcement priorities will change.** In the past, EPA has generated a list of the top industries on which it would focus enforcement efforts. For example, in recent years, electric utilities, glass makers, Portland cement manufacturing, and refiners have been on this industry list. The Trump Administration will depart from this paradigm for enforcement. Industry groups will no longer be targeted. Instead, EPA will target individual companies based on their own merits, focusing on bad actors instead of concentrating on industry groups.

8. **Public participation is welcome.** EPA encourages public input from all sources to help the Administration develop ideas and benefit from additional information.

Specific Water Issues

Forsgren provided an update on activities at the Office of Water. He noted that water infrastructure for public water supply is a significant priority for the Administration. EPA hopes to provide more grants to improve water infrastructure. For example, EPA is considering how to provide more funding to mitigate the health impacts of lead in water supply lines. Forsgren suggested that simply replacing municipal water distribution lines will not necessarily solve the problem because those lines are not always the source of the lead. Forsgren cited as an example a city on the west coast that has high lead levels in its municipal water, but no lead in its distribution lines. The problem is complicated because many people have lead and copper lines in their homes. EPA believes corrosion control helps

to improve water quality, but is not a substitute for replacement.

Forsgren also discussed the WOTUS rule and noted that EPA's proposed rule issued in July 2017 would rescind the definition of "Waters of the United States" promulgated in the 2015 Clean Water Rule. He indicated this is the first step of a two-step process designed to return EPA and the Corps of Engineers' jurisdiction to pre-Obama Administration status and resolve the areas in which jurisdiction is not clear. As the second step, EPA plans to propose a new definition and has begun having discussions with states, municipalities and other stakeholders on this topic. EPA's goal is to promulgate a new definition by the end of 2018.

EPA SEEKS GREATER AUTONOMY FOR STATE ENVIRONMENTAL PROGRAMS

BY: CHANNING J. MARTIN

EPA has released its strategic plan for fiscal years 2018 to 2022 describing its top goals and priorities. One goal is to provide states with greater autonomy in implementing federal environmental laws.

Most states are authorized to implement federal environmental programs within their boundaries in lieu of EPA doing so, so the plan is welcome news to the directors of most state environmental agencies.

The plan calls for greater cooperative federalism, a concept under which the federal government and state governments work cooperatively to solve common problems rather than have the federal government dictate what must be done. In the plan, EPA says that cooperative federalism "is not just about who makes decisions, but about how decisions are made and a sense of shared responsibility to provide positive environmental results." To further this goal, EPA commits to "a series of initiatives to rethink and assess where we are and where we want to be with respect to joint governance. These initiatives will clarify the Agency's statutory roles and responsibilities and tailor state oversight to maximize our return on investment and reduce [the] burden on states, while assuring continued progress in meeting environmental program requirements as established by Congress."

Greater cooperative federalism has long been a goal of the Environmental Council of the States ("ECOS"), a national, nonpartisan association of leaders of

state and territorial environmental agencies. While acknowledging that EPA has a valuable oversight role, ECOS has argued that states should be the primary enforcement authority for programs delegated to the states. It believes EPA should avoid reviewing a state's permitting and enforcement decisions unless programmatic audits identify deficiencies in the state's programs.

EPA says it intends to analyze its statutory responsibilities to determine ways in which to reduce the burden on states while still complying with its oversight responsibilities. Among other things, EPA says it will seek new ways to streamline permit reviews and approve state permitting programs when federal environmental statutes give it the flexibility to do so. EPA also says it will review ways in which to combine separate streams of grant funding for state environmental programs into one multi-program grant with a single budget, all of which is designed to provide states with greater flexibility to maximize environmental protection for their citizens.

EPA's strategic plan also states that one of EPA's goals is ensuring the agency adheres to the rule of law. EPA says the focus and purpose of enforcement should be on ensuring consistency and certainty for the regulated community. Decisions based on science are part of that effort. EPA says that "[t]he rule of law must also be built on the application of robust science that is conducted to help the Agency meet its mission and support the states in achieving their environmental goals. Research, in conjunction with user-friendly applications needed to apply the science to real-world problems, will help move EPA and the states forward in making timely decisions based on sound science."

EPA's new strategic plan is markedly different than EPA's strategic plan for fiscal years 2014 to 2018 issued under the Obama Administration. State environmental agencies will no doubt welcome EPA's intention to work more as an equal partner than has occurred in the past.

Draft FY 2018-2022 EPA Strategic Plan (EPA Oct. 5, 2017).

ENVIRONMENTAL GROUPS ARGUE SHAM RECYCLING RULE SHOULD BE RECYCLED BY EPA RATHER THAN PARTIALLY DISCARDED BY COURT

BY: JESSICA J. O. KING

EPA promulgated a final rule in 2015 redefining "solid waste" under the Resource Conservation and Recovery Act ("RCRA") to curb sham recycling (the "Rule"). In the August 2017 issue of *Environmental Notes*, we reported that the United States Court of Appeals for the District of Columbia Circuit sided with industry in an appeal of portions of the Rule. However, as is common in environmental litigation, the fight is not over. On October 20, 2017, various environmental group petitioners and intervenors requested a rehearing on whether the remedy ordered by the Court was appropriate.

As we previously reported, the opinion at issue scrapped two portions of the Sham Recycling Rule. First, the Rule required that four factors be satisfied by a generator to prove a hazardous secondary material (i.e. spent materials, byproducts and sludges) was being legitimately recycled and not discarded. Factor 4 required the final recycled product to be "comparable to a legitimate product or intermediate" by meeting these requirements: (1) the recycled product cannot exhibit a characteristic not exhibited by a legitimate product; and (2) the recycled product must have levels of hazardous constituents comparable to the legitimate product, or, if higher, studies must show the higher levels are not harmful to health or the environment. The Court did away with Factor 4 completely, stating EPA failed to determine what levels of contaminants would be "significant" in terms of risk to health and the environment.

Second, the opinion threw out the Rule's requirement that third party recyclers of hazardous secondary materials be "Verified Recyclers" who hold a RCRA permit or RCRA variance and meet emergency preparedness standards. The Court held

EPA did not establish the need to "pre-approve" recyclers. Specifically, the Court held EPA failed to prove the low value of materials recycled from hazardous secondary materials caused third-party recyclers to discard rather than recycle them. In so finding, the Court held EPA did not have the authority under RCRA to require "pre-approval" through a rigorous verification process. To remedy the problem, the Court reinstated a more general standard that allows a generator to transfer a material to a third party claimed to be a recycler (the "Transfer-Based Exclusion") so long as the generator makes "reasonable efforts" to ensure proper reclamation by the third party. This more general standard was proposed by EPA in 2008 and never finalized. Rather, the 2008 EPA proposed rule on Sham Recycling was also appealed. In a settlement with The Sierra Club, EPA agreed to withdraw the rule. The 2015 Sham Recycling Rule was the product of that settlement.

In the Petition for Rehearing, environmental groups argue the Court "disrupt[ed] important health and environmental protections and intrude[d] on the rulemaking authority of the executive branch." To remedy this error, they ask the Court to revise its decision and send the two provisions back to EPA to rework or re-justify, without vacating the Rule. Furthermore, since the groups had challenged the 2008 proposed Transfer-Based Exclusion and only settled their challenge when EPA agreed to provide an enhanced system of legitimacy, they argue reinstating it "leaves unaddressed substantial objections that environmental groups . . . raised to that exclusion before EPA eliminated it." The groups state by remanding the Rule to EPA to rewrite the two portions, EPA can address both the Court's concerns with the Verified Recycler exclusion and the environmental groups' concerns with the Transfer-Based Exclusion through the normal rulemaking process. The environmental groups go on to explain that they want the Court to direct EPA to "fully address, consistent with the [Court's] opinion, both provisions" by another round of notice and opportunity for comments from concerned groups. This will start another process subject to appeal and will again result in delay in finalizing the

Rule. In the meantime, industries that intend to use third party recyclers will have to wait a little (or a lot) longer to know what the rules are and to begin implementing processes to comply.

American Petroleum Institute vs. EPA, No. 09-1038 (D.C. Cir. July 7, 2017); 80 Fed. Reg. 1694 (Jan. 13, 2015).

PROMPT REPORTING IS KEY TO THE UPSET DEFENSE

BY: RYAN W. TRAIL

Companies discharging industrial process wastewater often face challenging circumstances at their wastewater treatment facilities. Unexpected equipment malfunctions or system failures can lead to discharges that exceed permitted limits. If such an event occurs, most companies with a pretreatment or NPDES permit are aware that they can avoid being cited for a violation if the event qualifies as an "upset." However, a recent South Carolina case is a reminder that the upset defense is nuanced and difficult to assert successfully.

An upset is an exceptional incident where unintentional and temporary noncompliance with discharge permit limits occurs because of factors beyond the reasonable control of the permittee.

Incidents caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation, are considered within the reasonable control of a permittee and do not qualify as an upset.

If a permittee can prove the event was an upset, it may have a defense to an action brought for noncompliance. To establish the defense, the permittee must identify the cause of the upset, show the facility was being properly operated at the time, give notice to the permitting agency with 24 hours of discovering the incident, and comply with all remedial measures required.

In *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc.*, a recent decision by the U.S. District Court for the District of South Carolina, the court found the owner of a wastewater treatment facility failed to prove it qualified for the defense. Evidence in the case showed that the NPDES permit issued to the permittee required notice to the permitting authority within 24 hours of discovering any noncompliance. After determining notice was not given, the court denied the upset defense without even considering other arguments raised by the permittee.

When facing noncompliance where an upset defense is possible, it's easy for permittees to get caught up in the circumstances of the incident. Thus, permittees often consider these questions: Was the event caused by careless operation or lack of preventative maintenance? Was the event outside our reasonable control? However, *Carolina Water* serves as a reminder that prompt and proper notification of the incident should always be the first thought. Forgetting to give notice likely means your upset defense is gone.

Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc., 2017 WL 1176766 (D.S.C. March 29, 2017).

OSHA SEEKS TO PLUCK POULTRY PROCESSORS

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

Late in 2016, OSHA's Region 4 implemented a Regional Emphasis Program consisting of outreach and enforcement activities designed to reduce injuries, illnesses and fatalities at poultry processing facilities. OSHA's directive indicates that inspections will be conducted at either live-kill or further processing operations, and facilities will be selected at random based on a regional list of establishments. Region 4 covers most of the Southeast including Florida, Georgia, South Carolina, North Carolina, and Tennessee. Although these states manage their own OSHA programs, Emphasis Programs from OSHA are often followed by state regulators. Since OSHA penalties at the federal and state levels nearly doubled beginning in 2017, an inspection and a finding of violations may result in significant penalties for a poultry processor.

According to OSHA, serious injuries in the poultry industry are twice as high as other private industries because workers are exposed to numerous serious hazards, including dangerous equipment, musculoskeletal disorders, infectious pathogens,

high noise levels, and hazardous chemicals. OSHA also claims statistics show an elevated risk for work-related illnesses. As a result, the Emphasis Program indicates that inspections will focus on production operations, sanitation, working conditions, chemical handling and use, and process safety management systems. The inspector will likely request training, medical and other records during the inspection.

To assist in addressing and correcting potential violations, OSHA is conducting outreach activities for employers, such as training sessions and information sharing activities. Because these inspections are ongoing, now is the time for companies to review workplace procedures and protocols to ensure safety programs comply with regulatory standards. Failing to address deficiencies could be a costly mistake.

OSHA Regional Notice, Regional Emphasis Programs for Poultry Processing Facilities, Directive No. CPL 17/09 (Oct. 26, 2016)

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