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WILLIAMS MULLEN
ENVIRONMENTAL NOTES

TRUMP ISSUES EXECUTIVE ORDERS LIMITING REGULATION BY AGENCY GUIDANCE

BY: PIERCE WERNER

It's well-known that the Trump administration has sought policies of deregulation over the past several years. The administration places emphasis on proper enforcement of existing rules and regulations as a means of achieving compliance rather than promulgating more regulations. In line with these objectives, President Trump recently issued two Executive Orders (EOs) to curtail use of guidance documents. EO 13891, titled "Promoting the Rule of Law Through Improved Agency Guidance Documents," and EO 13892, titled "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication;" both center on limiting the ability of agencies to regulate through guidance and to otherwise avoid the notice and comment rulemaking process.

Of the two, EO 13891 imposes more affirmative obligations on agencies. Among other things, it requires agencies to (i) post all active guidance documents on their website for easier access by the public, (ii) complete public notice and comment before finalizing "significant" guidance (i.e. those with potential impacts on the economy of $100 million or more), (iii) review existing guidance for potential rescission, and (iv) allow the public to petition agencies to amend or withdraw such guidance. Perhaps most importantly, EO 13891 requires all agencies to explicitly indicate on future guidance that it is not "binding."

EO 13892 continues the spirit of its counterpart, but provides more general policy requirements than outright impositions. The EO provides that agencies are not permitted to use guidance documents to impose standards or legal consequences on parties. To this effect, the EO states, "When an agency uses a guidance document to state the legal applicability of a statute or regulation, that document can do no more, with respect to prohibition of conduct, than articulate the agency's understanding of how a statute or regulation applies to particular circumstances." (emphasis added). The EO also requires agencies to adhere to known principles of due process in administrative enforcement actions, which promotes transparency by the agency and avoids unfair surprise.

Practically speaking, EO 13892 may sound like it has a lot of bite, but the actual effect remains to be seen. However, the effect of the duties imposed on agencies by EO 13891 is more than mere theory. The regulated community (and their lawyers) will immediately benefit from a more concentrated and streamlined agency guidance system with improved accessibility and a clearer understanding of what

agency guidance means for them. Furthermore, knowing which principles from past guidance are still considered acceptable by agencies and those that are not will paint a clearer picture of what compliance with ever-changing rules looks like. In addition, while some agencies already state that guidance documents are nonbinding, this statement is now required.

The rub, though, is that these EOs impose more actions on agencies that are already limited in funding. Development of a streamlined system of guidance documents on agency websites while reviewing them for potential rescission may be easier said than done. Furthermore, even if the EOs do have profound beneficial effects for the regulated community, it is important to remember that 2020 is an election year, and EOs can be rescinded freely by a future President.

Promoting the Rule of Law Through Improved Agency Guidance Documents, Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 15, 2019).
Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, Exec. Order No. 13,892, 84 Fed. Reg. 55239 (Oct. 15, 2019).

TRANSPORTATION CLIMATE INITIATIVE SEEKS TO ACHIEVE CO2 REDUCTIONS BY INCREASING COST OF MOTOR FUELS

BY: JAY HOLLOWAY

The Transportation Climate Initiative (TCI) recently issued for public comment a draft memorandum of understanding (MOU) detailing measures to reduce Greenhouse Gas emissions from the transportation sector. TCI is a consortium of 12 Northeast and Mid-Atlantic states – including Virginia – and the District of Columbia. TCI began in 2010 with the goal of reducing CO2 through an allowance program that will raise gasoline and diesel prices.

TCI says its effort to reduce CO2 emissions from the transportation sector "builds on the region's strong leadership and commitment to energy efficiency and clean energy issues, and its programs to reduce carbon emissions in the power sector, which have resulted in the region becoming one of the most energy efficient areas in the nation."

The draft MOU is based on the determination that more than 40% of GHG emissions within TCI states are emitted by the transportation sector. State and district agencies in TCI jurisdictions are directing the effort. The Georgetown Climate Center is facilitating the work. TCI has independent funders including the Barr Foundation, Energy Foundation, Hewlett

Foundation, John D. and Catherine T. MacArthur Foundation, John Merck Fund, New York Community Trust, Town Creek Foundation, and its core funder, Rockefeller Brothers Fund.

TCI claims to be a "cap and invest" program, whereby transportation fuel suppliers must hold allowances to cover resulting reported emissions. TCI projects that CO2 will be reduced by 25% by 2032. Revenue from the sale of allowances is projected to be $7 billion annually. This revenue will be returned to participating jurisdictions for investment in other measures to reduce transportation emissions. TCI modeling also projects that the CO2 reductions from 2022 to 2032 could yield monetized annual public benefits of as much as $10 billion. These purported public health benefits include over 1,000 fewer premature deaths, over 1,300 fewer asthma symptoms and other safety and health benefits.

The MOU specifies that jurisdictions that sign the MOU will:

- Implement a regional cap on CO2 emissions from on-road diesel and gasoline;
- Develop a process to auction CO2 emissions allowances and require fuel suppliers to hold and report off-setting allowances;

- Provide flexibility and ensure market stability, which may include a three-year compliance period, cost-containment and emissions-containment mechanisms, provisions to allow for the banking of allowances, and alternative compliance mechanisms such as offsets.

The MOU will create a CO2 fuel allowance auction among participating jurisdictions that is expected to start in 2022. Very little detail has been provided on the increases in fuel costs that will result from the program.

Shortly after the MOU was released, a coalition of 18 organizations along the East coast, including state chapters of the National Federation of Independent Businesses, Americans for Tax Reform and the Institute for Energy Research, released an open letter opposing the plan and labeling it a regressive "sin tax" on motor fuels. The letter contends that the TCI CO2 allowance auction is nothing more than a motor fuels tax that will force citizens and businesses to use motor vehicles less or pay more for fuel. Driving is essential, particularly for lower income citizens who cannot afford increases in gasoline prices. The letter also contends that consumers will experience increased costs of municipal services, such as garbage collection, snow plowing and school transportation, because of the increased cost of fuel.

After the release of the MOU, New Hampshire Governor Chris Sununu announced that his state is withdrawing from TCI because of additional consumer costs. Businesses and consumers in other TCI states have until February 28, 2020 to file comments. TCI state Governors and legislatures should be aware of the impacts that this program will have on gasoline and diesel prices. While utility and other industry CO2 programs are prominent, the TCI initiative has a low profile. The business community should take the lead in making sure the costs from this hidden tax are well-known.

TCI's anticipated schedule going forward is:

- Spring 2020 – The final MOU will be released, and TCI jurisdictions must decide whether to participate in the program;
- Spring-Fall 2020 – Participating jurisdictions develop a model rule and take any needed legislative steps;
- 2021 – Participating jurisdictions conduct a rulemaking process to adopt the model rule;
- 2022 – The first compliance period of the program begins.

TCI draft Memorandum of Understanding (Dec. 17, 2019).
Open Letter Opposing MOU (Dec. 2019).

EPA REVISES CONTROVERSIAL RMP REGULATIONS

BY: ETHAN WARE

EPA recently issued a final rule containing much-debated revisions to the Clean Air Act 112(r) Risk Management Program ("RMP"). The rule rescinds or modifies a substantial number of existing requirements, including requirements relating to alternatives analyses, third-party audits, incident investigations, information availability and emergency response. The rule reduces the burden imposed on industry under prior RMP regulations.

Procedural History

The RMP regulations found at 40 CFR Part 68 are designed to prevent or minimize the consequences of accidental chemical releases. They apply to stationary sources of air pollution that use, manufacture, or store more than a threshold quantity of a regulated substance in a process. Covered facilities must implement qualifying RMP technologies, procedures, and management practices to minimize risks to the community from accidental chemical releases.

Amendments to the RMP regulations have been controversial, to say the least. The first amendments ("Obama Rules") were issued as a final rule on January 13, 2017, just a few days before the inauguration of President Trump and after a contentious rulemaking process. Before the Obama Rules could take effect, EPA received three petitions for reconsideration. Effective March 14, 2017, the Obama Rules were delayed by a series of Executive Orders to March 21, 2018, June 19, 2018, and then February 19, 2019. A federal court intervened and vacated the delays last year, making the Obama Rules the final RMP regulation. However, on May 20, 2018, the Trump EPA proposed revised RMP regulations that rescinded or modified large portions of the Obama Rules. That proposed rule has now been issued as a final rule ("Trump Rules").

The Trump Rules

The Trump Rules essentially gut the controversial provisions of the Obama Rules. In the preamble to the final rule, EPA said that, after considering the Obama Rules, it determined that "a better approach is to improve the performance of a subset of facilities by achieving greater compliance with RMP regulations instead of imposing additional regulatory requirements on the larger population of facilities that is generally performing well in preventing accidental releases."

The Trump Rules first rescind all new prevention program requirements in the Obama Rules. These are:

- Third-party auditing;
- Safe technology and alternative analysis;
- Review of "Incident Investigation" findings by Hazard Review procedures;
- Statement of "supervisor" roles from covered training (initial and refresher);
- Inclusion of "near miss" and "destroyed processes" in Incident Investigations; and
- Requiring compliance audits to address "each covered process," which prohibited the matrix approach.

The Trump Rules explain that the revisions have been made because EPA is trending toward a compliance-driven, not enforcement-led, approach to all EPA rulemakings.

The Obama Rules required owners and operators to perform emergency response exercises. Those requirements have been modified. Notification Exercises need only be performed as appropriate, with the first one to be conducted by December 19, 2024, and annually thereafter, rather than by March 15, 2021, as proposed. Tabletop Emergency Response Exercises are still required every three years, but the first such exercise in not required to be performed until December 21, 2026. Field Exercises are no longer subject to a minimum frequency of once every ten years, and there is no deadline for consulting with local responders. Companies still have to develop exercise plans and schedules before December 19, 2023, but more flexibility in the scope and enforcement of those plans and schedules is allowed.

Finally, the Trump Rules curtail Information Disclosure in the RMP. Information Disclosure regulations govern procedures and measures for emergency response after an accidental release of a regulated substance. The Trump Rules delete requirements for providing to the public (upon request) chemical hazard information and community emergency preparedness information. The new regulations modify requirements in 40 CFR 68.210(e), requiring a public meeting only after an accidental release covered by the RMP -- not after just any "accident." The obligation to produce confidential business information is also removed.

Recommended Action

In the preamble EPA says the final rule is a "reasonable and practicable" approach to compliance. Companies subject to the RMP regulations should undertake compliance audits to be certain the new requirements are incorporated into their RMP Prevention, Emergency Exercises, and Information Disclosures programs, and the rescinded requirements are deleted.

84 Fed. Reg. 69834 (Dec. 19, 2019)

THE ENDLESS DANCE: DEFINING "WATERS OF THE UNITED STATES"

BY: SPEAKER POLLARD

The two-step regulatory process initiated in 2017 by EPA and the U.S. Army Corps of Engineers (together, the "Agencies") to revise the regulatory definition of "waters of the United States" ("WOTUS") continues its methodical "two-step" through a busy litigation dancehall. As discussed in our October, 2018 edition of *Environmental Notes* (see https://www.williamsmullen.com/news/fate-%E2%80%9Cwaters-united-states%E2%80%9D-rulemaking-now-even-murkier-0#related-articles-anchor), the regulatory process involves (1) rescission of the 2015 Clean Water Rule amendments to the definition of WOTUS, a temporary reversion to the pre-Clean Water Rule definition of WOTUS (circa 1986/1988), and use of 2008 EPA and Corps WOTUS guidance to implement the pre-Clean Water Rule definition; and (2) issuance of a new/replacement WOTUS definition.

As to step 1, the Agencies published this past October a final rule, effective December 23, 2019, repealing the Clean Water Rule and reverting temporarily to the pre-Clean Water Rule definition of WOTUS and using the 2008 WOTUS implementation guidance ("Final CWR Repeal"). For step 2, the Agencies published on February 14, 2019 the proposed new/replacement definition of WOTUS, which, after extensive public comment filings, is still being finalized. These actions come after and amid various legal challenges to the Clean Water Rule and the Agencies' 2017-2018 attempt to push the effective date for the Clean Water Rule into 2020, which also fell to legal challenges. The net result of this mix of legal challenges had been a patchwork of Clean Water Rule applicability in various states.

With the Final CWR Repeal now effective, all of the nation rests on equal regulatory footing for determining what is WOTUS. In addition, the Final CWR Repeal clarifies that any previous Corps-approved jurisdictional determination for WOTUS delineations issued pursuant to the Clean Water Rule will remain valid through its 5-year effective period, though parties may seek a sooner reevaluation of this determination based on the Final CWR Repeal's reversion to the pre-Clean Water Rule regulation implemented through the 2008 WOTUS guidance.

As part of the two-step approach, the Agencies have stated they want a clearer and more functional definition of WOTUS that aligns better with statutory authority. In the Final CWR Repeal, the Agencies examined why they now believe the Clean Water Rule was faulty and warranted repeal and why they believe it is best to revert to the 1986/1988 regulations and the 2008 Guidance until the new WOTUS definition is finalized. On substantive legal grounds, they raise concerns about how the Clean Water Rule expanded the scope of regulated waters in several respects that were inconsistent with the Clean Water Act, underlying authority to regulate "navigable waters" pursuant to the U.S. Constitution's Commerce Clause, and three recent U.S. Supreme Court cases addressing the appropriate scope of regulated waters under the Clean Water Act. On procedural grounds, the Agencies noted that significant changes from the proposed version of the Clean Water Rule were included in the final version

that extended (or limited) jurisdiction over certain water features based on their specific distances from otherwise regulated waters. Because these changes were not subjected to public comment pursuant to the federal Administrative Procedure Act ("APA"), they are procedurally flawed. To buttress these concerns, the Agencies also cite problems with the Clean Water Rule found by the courts as the basis for enjoining implementation of the Clean Water Rule.

Two specific themes of the Agencies' rationale for the Final CWR Repeal are worth exploring, as they seem to offer greater insight into how the Agencies will next approach framing a final WOTUS definition rule reflecting a narrower scope of regulated waters. First, the Agencies argued that the Clean Water Rule exceeded in several respects the scope of the Agencies' legal authority to regulate waters pursuant to the Clean Water Act, particularly as opined by Justice Kennedy in his "significant nexus" test in *Rapanos v. United States* and *Carabell v. United States* (together, *Rapanos*). The Agencies now believe they went too far when extrapolating the significant nexus test from *Rapanos*, relying too heavily on a purely technical analysis of hydrological and ecological connections and failing to recognize the limits of the Commerce Clause and Clean Water Act on their jurisdiction and powers. This is a particularly significant *mea culpa*, because in 2015 the Agencies based the Clean Water Rule framework largely on the significant nexus test. To reverse course in this regard required a substantial amount of explaining by the Agencies and will likely be further justified in the final rule for the planned new/replacement definition of WOTUS as the basis for a narrower scope of regulated waters, particularly as to relatively remote or inactive water features.

Second, by arguably extending federal control over nearly all surface waters, regardless of their remoteness to navigable-in-fact waters, the Clean Water Rule failed to properly preserve states' traditional authority over waters and planning for water resources and land use, as protected by the Clean Water Act, particularly given the lack of clear Constitutional or legislative authority for expanding the reach of such jurisdiction. Therefore, the Agencies can be expected to frame any new WOTUS definition in the context of ensuring that states retain a significant role and powers over water resource and land use planning.

The Agencies explore each of these points extensively in the preamble of the Final CWR Repeal, but it seems that wrestling with the extent of lawfully authorized jurisdiction over tributaries and adjacent and remote water bodies and wetlands remains the biggest concern in shaping a new definition of WOTUS. The Final CWR Repeal also incorporates a somewhat different and lengthier economic analysis of the effects of the repeal. This new economic analysis was not subjected to public notice before issuing the Final CWR Repeal, so whether that poses a procedural problem for the Final CWR Repeal under the APA remains to be seen.

As expected, various environmental, industry and agricultural interest groups have already lodged several challenges to the Final CWR rule based on different grounds. Accordingly, litigation continues to swirl around the WOTUS definition. In the meantime, the simple "two-step" envisioned by the Agencies could become an endless line dance. When and how the music stops, no one knows.

Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019).

CONTAINMENT AREA RELEASES AND THE LIMITS OF CERCLA RELEASE REPORTING OBLIGATIONS

BY: RYAN TRAIL

Manufacturing facilities commonly store various chemical substances in aboveground storage tanks. Most facilities ensure chemical storage areas are equipped with proper secondary containment measures to prevent releases of hazardous substances from entering the environment. In many cases, secondary containment measures consist of sealed concrete structures including flooring and curbing. However, it is not uncommon for tanks to be located within earthen containment areas, in which soils are compacted or clay-lined beneath the tanks and earthen berms are built around the tanks to contain releases.

Although earthen secondary containment may seem rudimentary, EPA guidance suggests releases of hazardous substances within properly constructed

earthen containment units are accorded the same regulatory status as those within a concrete structure. Thus, even when a reportable quantity of hazardous substances is released within an earthen containment area, facilities may not be required to report the release to the National Response Center (NRC) if the release is fully contained.

Upon gaining knowledge of the release of a reportable quantity of a hazardous substance to the environment, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) requires a person in charge at a facility to immediately report the release to the NRC. A "person in charge" is an employee who has responsibility for environmental issues at the facility. This *does not* include every person who might have knowledge. Furthermore, notification by someone other than a person in charge does not satisfy the CERCLA reporting obligation. For instance, an administrative assistant or delivery driver who arrives at a facility early one morning and discovers a release would not qualify as a "person in charge" for purposes of reporting the release to the NRC.

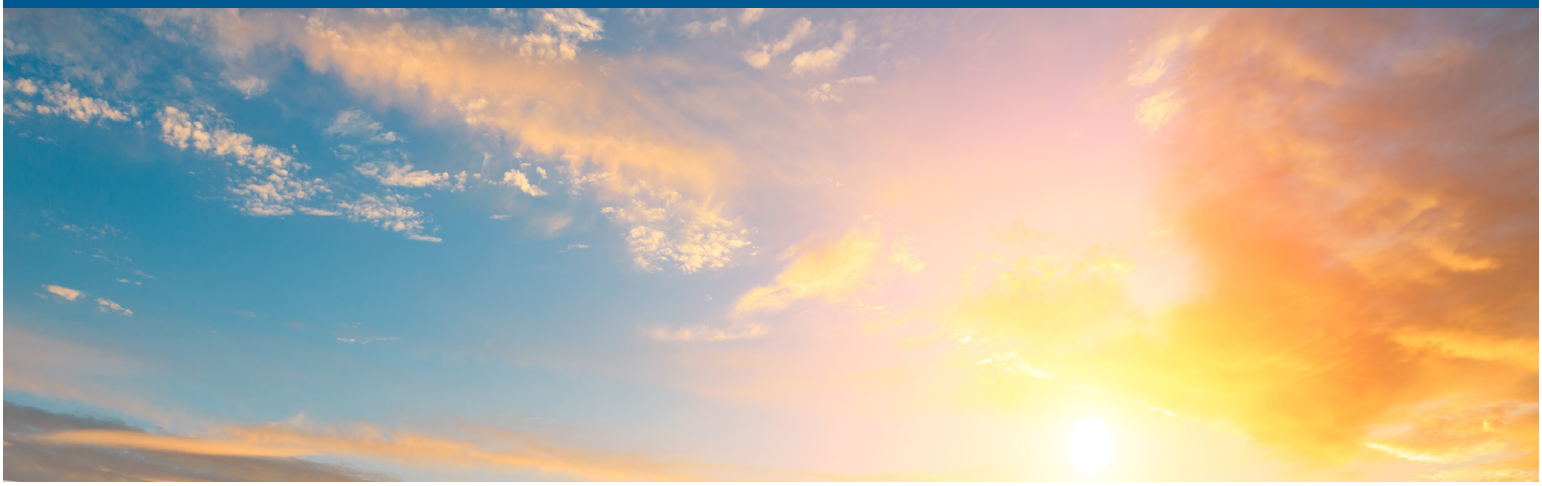
"Knowledge" is interpreted by EPA to include actual knowledge or constructive knowledge, with constructive knowledge being a level of awareness that would lead a reasonable person to investigate further. "Immediate" reporting is interpreted by EPA and the courts to mean within 15 minutes of the person in charge gaining knowledge of the release.

Finally, to be a reportable release, the hazardous substance must have been released "to the environment." CERLCA defines "environment" to include "[t]he navigable waters, the waters of the contiguous zone, and the ocean waters . . . of the United States . . . and any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air . . ." At first glance, an earthen containment area seems to qualify as a "land surface," triggering the CERLCA reporting obligation in the event of a release. However, EPA guidance suggests that, when an earthen containment structure is designed, constructed, and maintained to contain a hazardous substance, and in fact does contain the substance when released, the release is not to the environment. EPA specifically lists several examples of secondary containment that are not considered "the environment." These include concrete pads with provisions to catch any runoff, open tank containment units, clay-lined or synthetically lined disposal facilities, and clay ditches and dikes.

In practice, EPA will consider facts such as the depth of the clay-liner, the volume of constructed soil, and the level of compaction when determining whether an earthen containment structure is "the environment." However, when properly constructed to prevent infiltration of released substances below compacted soils and beyond earthen berms, such a structure may be adequate for a facility to avoid reporting of a release.

Facilities should evaluate the integrity of all secondary containment structures, earthen or otherwise, to ensure they will properly contain any release of hazardous substances and prevent the release from entering the environment. Facilities should also carefully consider internal protocols for release reporting to ensure only required reports are made.

CERCLA Section 103 and EPCRA Section 304 Release Notification Requirements UPDATE, DOE Office of Environmental Guidance, DOE/EH-0447 (January 1995)(update to Guidance for Federal Facilities on Release Notification Requirements under CERCLA and SARA Title III, EPA 9360.7-06 (November 1990)).



VIRGINIA BREAKING BLUE: SPOTLIGHT ON AIR ISSUES

BY: LIZ WILLIAMSON

In November, Democrats won control of the House of Delegates and kept control over the Commonwealth's Senate. Now, Democrats control both the Executive and Legislative branches of government in the Commonwealth of Virginia. Prior to the election, Virginia diverged from federal environmental positions under the Trump Administration, largely due to the influence of the Democrat Governor Northam and his Administration. In addition, Virginia's State Air Pollution Control Board, the body that approves regulations and air permitting actions, has been largely appointed by governors who are Democrats.

EPA sought public comments on a number of proposed Clean Air Act rules in 2019. The Virginia Department of Environmental Quality (DEQ) chose to file comments or otherwise take a position contrary to EPA and the Trump Administration on the following rulemaking efforts:

- **Once In, Always in Permit Policy Rescission for Hazardous Air Pollutants.** The Trump Administration decided to rescind the policy that EPA has had in place since the 1990s. The policy provided that, once a source emits hazardous air pollutants (HAP) in excess of thresholds that require the source to obtain a Title V air permit, the source cannot later leave the Title V program by reducing its HAP emissions. The Trump Administration published a policy memorandum and then a proposed rule to rescind the policy. Virginia commented in the federal docket on September 24, 2019, opposing EPA's rescission of the policy. Federal law allows Virginia to maintain stricter permitting requirements than required on the federal level. Therefore, the Once In, Always In policy is still in effect in Virginia.
- **New Source Review (NSR) Project Emissions Accounting.** EPA revised the emissions calculation approach to allow consideration of emission decreases from a proposed project in Step One of the major NSR applicability determination. Previously, contemporaneous decreases from a project would be taken into consideration during the project netting step. Virginia filed comments opposing this methodology in the federal docket by the due date of October 8, 2019. Therefore, this policy is not in effect in the Commonwealth.
- **EPA NSR Enforcement Policy.** In a 2017 guidance memorandum, EPA stated that it would evaluate whether projects need a Prevention of Significant Deterioration (PSD) permit by reviewing post-project actual emissions as long as the source performed an actual-to-projected-actual emissions analysis before the project commenced that generally adhered to the PSD emissions analysis regulations. This policy departed from EPA enforcement practices under the Obama Administration that used pre-project emissions estimates as the basis for enforcement. On August 19, 2019, the Virginia Secretary of Natural Resources issued a report that reviewed past federal environmental activities since President Trump took office. The

report identifies as a concern: "Allowing polluters, instead of the U.S. Environmental Protection Agency (EPA), to decide when major modifications to pollution sources would trigger the more environmentally protective 'New Source Review' permitting process." Although the report did not address specifics, it appears to oppose this NSR enforcement policy.

Virginia's rulemaking scorecard from 2019 demonstrates that Virginia diverged from federal positions even prior to the shift in legislative power in the General Assembly. We expect to see even more air-related changes in 2020 now that Democrats are fully in charge. Moreover, Governor Northam announced that his proposed budget includes more than $25 million to help DEQ increase efficiency and responsiveness, enhance environmental protection, and improve public engagement.

Several emerging areas to watch in Virginia are:

- **Carbon Regulation.** The Air Board passed the Virginia Cap and Trade Rule, which became effective on June 26, 2019. The Rule provided for Virginia to link to the Regional Greenhouse Gas Initiative (RGGI). However, the General Assembly last year passed a budget restriction that currently prohibits Virginia from working to join or link to RGGI. Governor Northam's 2020 proposed budget lifts this restriction, and we anticipate this restriction will be lifted in the upcoming General Assembly session. The Governor has proposed separate legislation whereby Virginia will become the newest member of RGGI. The General Assembly may also pass legislation to control carbon emissions from other sources and address methane emissions.
- **Executive Order 43 – Expanding Access To Clean Energy And Growing The Clean Energy Jobs Of The Future.** In September, Governor Northam issued an order directing the Director of the Department of Mines, Minerals and Energy (DMME), in consultation with the Secretary of Commerce and Trade, the Secretary of Natural Resources, and the Director of the Department of Environmental Quality, to develop a plan of action to produce thirty percent of Virginia's electricity from renewable energy sources by 2030 and one hundred percent of Virginia's electricity from carbon-free sources by 2050. DMME's final plan is due to the Governor by July 1, 2020. This Executive Order is likely to have significant future air emission impacts.
- **Air Pollution Control Board Public Participation Initiative.** The Air Board created a Public Participation Committee to examine public engagement in air regulatory rulemakings and air permitting. The Committee is evaluating how to change the air permitting and rulemaking process to allow for more public participation. This initiative could result in considerable changes in the logistics and timing of rule and permit development.

In summary, now that Democrats control the Executive and Legislative branches in Virginia, look for significant changes to state air regulations and policies in 2020. Green agendas are more likely to have traction in the 2020 General Assembly, and we expect to see efforts from both the Executive and Legislative branches to promote carbon reductions, renewable energy, and additional public participation in air rulemakings and permitting.

Once In, Always in Policy Rescission, 84 Fed. Reg. 36304 (July 26, 2019).
Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 84 Fed. Reg. 39244 (August 9, 2019).
E. Scott Pruitt, EPA Administrator, Memorandum on New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability, Dec. 7, 2017.
Executive Order 6 Report, Matthew Strickler, Virginia Secretary of Natural Resources, August 19, 2019.
Virginia General Assembly 2019 Session, House Bill 1700, Item 4-5.11 #1c.
Regulation for Emissions Trading Programs, 9 VAC 5-140-6010 et seq.
Executive Order 43 – Expanding Access To Clean Energy And Growing The Clean Energy Jobs Of The Future, September 16, 2019.
Governor Northam to Protect Virginia's Environment, Fight Climate Change, and Grow the Clean Energy Economy, 2019, https://www.governor.virginia.gov/newsroom/all-releases/2019/december/headline-849847-en.html (last visited on December 11, 2019).

THE EMERGENCE OF PFAS RELATED LAWSUITS AGAINST WASTEWATER TREATMENT PLANTS

BY: JESSIE KING

On behalf of Haw River Assembly, the Southern Environmental Law Center recently served a Notice of Intent to Sue ("Notice") on the City of Burlington, North Carolina. Copies of the Notice were delivered to EPA and the North Carolina Department of Environmental Quality ("NCDEQ"). The Notice alleges violations of the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA") for the City's discharge of per- and polyfluoroalkyl substances ("PFAS") and 1,4-dioxane-contaminated wastewater into local waterbodies. These waterbodies are drinking water sources for four North Carolina counties. Targeting local governments and their wastewater treatment utilities is a new trend in the litigation against potential sources of PFAS in drinking water.

Notice of Intent to Sue

The Clean Water Act and RCRA allow citizens to sue alleged violators of those Acts after first providing the alleged violator with notice of intent to sue and an opportunity to cure the alleged, ongoing noncompliance. According to the Notice, the City of Burlington operates two public wastewater treatment plants ("WWTPs") that treat industrial wastewater from at least fifteen industrial facilities, including textile manufacturing facilities, a metal finishing facility, and a manufacturer of polymer emulsions and resins. The City holds National Pollutant Discharge Elimination System ("NPDES") permits issued in 2014 for the two WWTPs, and it recently applied for renewals. The City also holds a Non-Discharge Permit for the land application of wastewater treatment sludges on local farmlands.

Haw River Assembly engaged SELC to serve the Notice after discovering through a Public Records Act request that PFAs and 1,4-dioxane were detected in the industrial wastewater received by the City. The WWTPs had been gathering the industrial wastewater data in response to a NCDEQ request for testing for PFAS and 1,4- dioxane in its influent. Haw River Assembly and nearby universities also conducted sampling in the affected water bodies and allege the sampling results confirm the WWTPs discharge large amounts of PFAS and 1,4 dioxane into the surface waters through their outfalls. Haw River Assembly further alleges sampling from a local drinking water source fed by these waterbodies – a fountain in a nearby public library – proves the WWTP discharge of PFAS and 1,4-dioxane by the WWTPs is contaminating public drinking water and causing an imminent and substantial endangerment of public health.

PFAS and 1,4-Dioxane

PFAS are manmade substances that have been widely used by industry and in consumer products since the 1950s. Examples include nonstick coatings, plating operations, firefighting foams, and stain- and water-resistant treatments for clothing, furniture, and carpeting. Over the past few years, state and federal regulators have been struggling with how to deal with the discovery of PFAS and related contaminants in drinking water. In 2016, EPA established a lifetime health advisory of 70 parts per trillion ("ppt") for the combined concentrations of two types of PFAS (PFOA and PFOS) in drinking water. A drinking water health advisory is not a regulatory standard, but is instead information on the level of a contaminant in drinking water that EPA believes is safe to consume over a lifetime. Some states have already taken steps to regulate PFAS and other similar contaminants. Michigan, New York, New Hampshire, New Jersey, and Vermont have either proposed or finalized drinking water standards for

various PFAS-related substances ranging from 6 ppt to 20 ppt. Massachusetts recommends a level of 70 ppt in drinking water for individual or combined types of PFAS and PFOS.

The chemical 1,4-dioxane was used as a stabilizer in certain chlorinated solvents, paint strippers, greases and waxes. EPA has established a drinking water health advisory with an associated estimated lifetime cancer risk of one in one million at a concentration of 0.35 parts per billion ("ppb"). North Carolina has a calculated human health criterion for 1,4-dioxane of 0.35 ppb in water supplies and 80 ppb in all other waterbodies.

In summary, regulatory standards vary significantly from state to state. This is evidence that, due to public pressure for a response to the presence of these chemicals in drinking water supplies, regulatory action is moving faster than the science. However, now that the contaminants can be detected at such small levels, more research will be done. In the meantime, lawsuits will be filed against the makers of products that once contained PFAS, users of fire-fighting foam such as airports and the Department of Defense, and WWTPs. According to online reports, class-action lawsuits have already been filed in Colorado, Michigan, New York, and Pennsylvania, and more than a dozen lawsuits – including the one filed against the City of Burlington -- have been brought against governments and public utilities seeking reimbursement for the cost of environmental cleanup and removing PFAS from drinking water.

Alleged Violations

In the Notice against the City of Burlington, Haw River Assembly alleges violations of the CWA and RCRA arising from the City's failure to disclose the discharge of PFAS or 1,4-dioxane in its NPDES permit applications and lack of authorization in its permits to discharge those contaminants. The violations are specifically stated as follows:

- Discharging PFAS and 1,4-dioxane into local water bodies without an NPDES permit from point sources, including outfalls, spray devices used to apply sludge onto fields, and ditches and drainage channels that flow from these fields into the local water bodies;
- Discharging PFAS and 1,4-dioxane in violation of its two NPDES permits, including the Removed Substances and Duty to Mitigate provisions;
- Violating its Non-Discharge Permit by not preventing discharges to surface waters and by violating North Carolina's groundwater and surface water standards;
- Failing to properly manage its pretreatment program;
- Causing toxic PFAS and 1,4-dioxane pollution to enter surface waters from the land application of sludge in a manner that may present an imminent and substantial endangerment to health and the environment; and
- Disposing solid waste in a manner that constitutes open dumping under RCRA.

Right to Cure

Citizen suit notices under the CWA and RCRA must give the alleged violator an opportunity to cure. Here, Haw River Assembly alleges the City must immediately cure the "illegal" discharge of PFAS and 1,4-dioxane by:

- Requiring industrial facilities to disclose and remove PFAS and 1,4-dioxane before their industrial wastewater enters Burlington's treatment plants; and/or
- Installing treatment technology at its treatment plants capable of removing PFAS and 1,4-dioxane; and
- Monitoring its wastewater to ensure these chemicals are not present prior to discharge into surface waters; and
- Managing its sludge disposal so that contaminated sludge does not harm human health or the environment.

It remains to be seen what the City's response to the Notice will be. The City may ask its industrial customers to foot the bill for any pretreatment technologies needed to remove PFAS and 1,4-dioxane from their wastewater, or it may refuse to receive wastewater from certain customers. Furthermore, by serving the Notice on NCDEQ, SELC is notifying NCDEQ of its obligation to enforce NPDES permit and legal obligations on the City if the City fails to act.

Things to Come

Local governments and their wastewater treatment utilities seem likely to face more lawsuits by environmental groups for PFAS discharges. If that occurs, it's a sure bet these defendants will seek reimbursement for the costs of any necessary cleanup or pretreatment from their industrial dischargers that have PFAS in their wastewater. Accordingly, any company discharging wastewater to a WWTP that may contain PFAS or 1,4-dioxane is at risk of being named a third-party defendant in any such lawsuit.

What's in your wastewater?

33 U.S.C. § 1365
42 U.S.C. § 6972(b)(2)(A)

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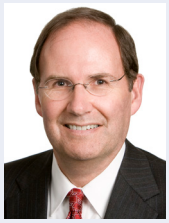
Channing Martin
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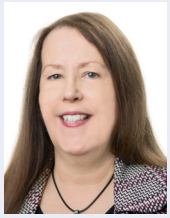
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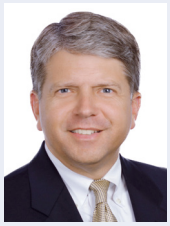
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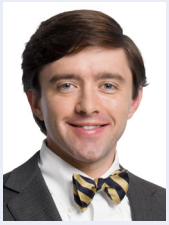
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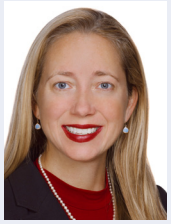
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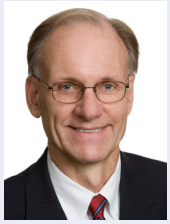
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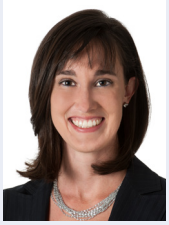
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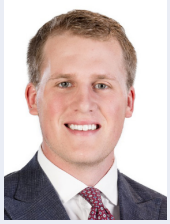
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