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ENVIRONMENTAL NOTES

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EPA ELECTS NOT TO PUBLICIZE CHANGES TO SW-846 GUIDANCE

BY: ETHAN R. WARE

EPA has revised its procedures for making certain changes to its "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," also known as SW-846. The test method and its compendium of guidance documents provide over 200 analytical methods for sampling and analysis of waste and other matrices. Most methods are intended as guidance, but others are required in the RCRA regulations for compliance purposes. Periodically, EPA amends or adds analytical protocols to SW-846 based on public comments or professional developments, and historically the changes have been published in the Federal Register for public review and comment.

The process for updating or publishing analytical methods that are required in the RCRA regulations has not changed. EPA will still publish notice of the same in the Federal Register. However, the process for adding non-regulatory methods and guidance to SW-846 has changed substantially. Now, only those interested parties who sign up for the SW-846 mailing list at https://www.epa.gov/hw-sw846/forms/contact-us-about-hazardous-waste-test-methods will receive notice of these changes.

Effective immediately, EPA will use the following multi-step process in deciding whether to adopt non-regulatory methods and guidance.

> **Step No. 1:** Post new methods on the "Validated Methods" Web page after internal review by EPA working groups;
>
> **Step No. 2:** Notify the "SW-846 Analytical Community" (including those on the SW-846 mailing list) of a 30 day comment period;
>
> **Step No. 3:** Post the new/revised Method on the "Validated Methods" Web page at https://www.epa.gov/hw-sw846/validated-test-methods-recommended-waste-testing;
>
> **Step No. 4:** Email notification of the new/revised Method to those on the SW-846 mailing list.

EPA refers to this change as a "streamlined" process that will allow the agency to respond more efficiently to emerging contaminants and scientific advancements. However, critics complain it is another effort to minimize public participation by the regulated community.

81 Fed. Reg. 66272 (Sept. 27, 2016).

EPA PLAYS DEFENSE IN MINE DISASTER

BY: KEITH "KIP" MCALISTER, JR.

EPA finds itself in unfamiliar territory as the agency defends its involvement in a multi-state environmental disaster. In 2015, a contractor acting under EPA's supervision used an excavator to dig away tons of rock and debris that blocked a portal in a gold mine in southwestern Colorado. Doing so accidentally destroyed the plug holding water trapped inside the mine. More than three million gallons of acidic wastewater and tailings, including heavy metals such as cadmium, lead, copper, mercury, and zinc, spilled out of the mine into the Animas River, turning the water bright orange for miles. The release caused contamination of drinking water in three states, required communities to import

potable water, closed the river to sport fishing, and halted irrigation of agriculture.

Although EPA has accepted some responsibility publicly, it now faces litigation concerning its actions. These lawsuits may shed light as to EPA's position on CERCLA, the Clean Water Act, and common law claims, while providing helpful ammunition and arguments for the regulated community in future actions.

One of the lawsuits was filed by the State of New Mexico against EPA, its contractor, and the mine owners. According to the complaint, the work plan for the project indicated there was wastewater in the mine and recognized a blowout might occur. Accordingly, the work plan required that no excavation occur near the blocked portal without setting up sufficient equipment to handle any accidental discharge. Nevertheless, according to the complaint, the contractor was directed to dig without taking necessary precautions.

New Mexico's suit alleges violations of CERCLA and the Clean Water Act as well as claims of negligence, public nuisance and trespass. The State seeks environmental and economic damages, including but not limited to cleanup costs for the release of the hazardous substances into its waterways and onto adjacent lands. The non-governmental defendants, however, have filed motions to dismiss, claiming they acted in accordance with instructions of EPA and the State of Colorado. Among other things, the mine owners allege bulkheads plugging the mine were installed pursuant to a consent decree with Colorado regulators, and the contractor argues it is not liable because it was acting under the control and direction of EPA when the release accidentally occurred. EPA has opposed the motions to dismiss on the grounds that dismissing the private parties could have collateral consequences for others.

EPA is in the uncomfortable position of seeking to defend itself for environmental damages caused by the negligence of its contractor. This situation is one that many companies have faced, and they often have paid penalties to EPA as a result. Now that the shoe is on the other foot, it will be instructive to see what positions EPA takes as the litigation progresses. Industry may be able to utilize EPA's legal arguments as defenses in future cleanup actions.

New Mexico v. EPA, C.A. 1:16-cv-00465 (D.N.M. 2016).

EPA PROPOSES REVISIONS TO PSD AND TITLE V GREENHOUSE GAS PERMITTING REGULATIONS

BY: PHILLIP L. CONNER

EPA recently proposed revisions to its Prevention of Significant Deterioration ("PSD") and Title V regulations that will impact the permitting of greenhouse gases ("GHGs"). These regulatory changes are being proposed to conform with decisions by the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

In 2007, the U.S. Supreme Court in *Massachusetts V EPA* held that GHGs fall within the definition of the term "air pollutant" under the Clean Air Act. In response, EPA promulgated regulations that made GHGs subject to PSD and Title V permitting if emissions exceeded the applicability thresholds. EPA recognized that the regulation of GHGs under the PSD and Title V programs

would radically increase the number of sources subject to permitting, so EPA promulgated the Greenhouse Gas Tailoring Rule which established a phase-in approach for PSD and Title V applicability based on the amount of GHGs emitted by various sources.

The Greenhouse Gas Tailoring Rule was challenged and upheld by the D.C. Circuit in *Coalition for Responsible Regulation v. EPA*, but was then appealed to the Supreme Court. In *Utility Air Regulatory Group v. EPA*, the Supreme Court held that EPA may not treat GHGs as an air pollutant solely for purposes of determining whether a source is required to obtain a PSD or Title V permit. In other words, a source is not subject to PSD and Title V permitting if it emits GHGs but no other regulated pollutant. The Court also held, however, that EPA could continue to regulate GHGs in PSD and Title V permits issued to sources that exceed applicable thresholds for non-GHG pollutants. The Court sent the case back to the D.C. Circuit to determine which parts of the Greenhouse Gas Tailoring Rule should be struck and which parts should be left in place. The D.C. Circuit then issued an Amended Judgement which, in turn, led to the currently proposed regulatory revisions.

The proposed regulatory changes will remove from the PSD and Title V regulations the requirement to obtain permits for sources based solely on the emission of GHGs. The specific changes being proposed include:

- The addition of an exemption clause to the definitions of "major stationary source" and "major modification" in the PSD regulations to ensure that the rules do not require a source to obtain a permit solely because of the emission or potential emission of GHGs above major source thresholds or significant levels.

- Removal of the definition of the term "greenhouse gases" from within the definition of "subject to regulation" in the PSD regulations and establishment of a standalone definition of "greenhouse gases." The definition identifies carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride as GHGs.

- Amendment of the definitions of "subject to regulation" and "significant" in the PSD regulations so that GHGs will be subject only to Best Available Control Technology review if the source has been classified as a major stationary source or a major modification for a non-GHG pollutant and there is a significant net emissions increase of GHG emissions.

- For sources subject to PSD due to non-GHG pollutants, establishment of a significant emissions rate of 75,000 tons per year of GHGs on a Carbon Dioxide Equivalent basis as a threshold level below which Best Available Control Technology is not required for GHG emissions.

- Removal of the ability of a source that would be major only for GHGs to obtain a Plantwide Applicability Limitation.

- Refining the PSD Plantwide Applicability Limitation provisions so that a source that is major for a non-GHG pollutant could still apply for a GHG Plantwide Applicability Limitation, but only for the purpose of relieving the source from having to address the Best Available Control Technology requirement for GHGs.

- Revision of the definition of "major source" in the Title V regulations to clarify that GHGs are no longer considered in determining whether a stationary source is a major source.

- As with the PSD regulations, removal of the definition of the term "greenhouse gases" from within the definition of "subject to regulation" in the Title V regulations and establishment of a standalone definition of "greenhouse gases."

Comments on the proposed rule must be received by EPA on or before December 2, 2016.

81 Fed. Reg. 68110 (October 3, 2016).

SOUTH CAROLINA DHEC REISSUES THE INDUSTRIAL STORM WATER GENERAL PERMIT

BY: RYAN W. TRAIL

The South Carolina Department of Health and Environmental Control (DHEC) recently reissued its NPDES General Permit for Storm Water Discharges Associated with Industrial Activities (IGP). The IGP regulates discharge of storm water from industrial facilities to waters of the State and the United States

through effluent limitations, monitoring and inspections requirements. The 2016 IGP includes new requirements for certain industrial sectors while expanding and clarifying exemptions for others. Many of the requirements apply statewide, but others apply only to specific industry sectors. The IGP was effective on October 1 and replaces the 2010 IGP which expired in January, 2016.

Major changes in the 2016 IGP include the addition of saltwater-specific benchmark monitoring concentrations for metals in discharges to saline waters. Previously, freshwater metals concentrations applied statewide. The 2016 IGP also includes benchmark monitoring requirements for bacteriological parameters (e.g., E. coli, fecal coliform) in storm water from domestic wastewater treatment plants, meat packing plants, wool scouring plants, and rawhide (leather) plants. These benchmarks vary depending upon the use classification, e.g., freshwater, shellfish harvesting, of the receiving water body at a given site. In contrast, the 2010 IGP applied a statewide freshwater bacteriological standard to these industrial sectors.

In addition to changes affecting discharges to saltwater, the 2016 IGP also includes new provisions related to storm water discharges to impaired water bodies. Previously, the IGP included a monitoring exemption for pollutants determined to be attributable to natural background sources in discharges to impaired water bodies that were not yet subject to a Total Maximum Daily Load (TMDL). The 2016 IGP extends this monitoring exemption to waters where a TMDL for the pollutant is being implemented. For discharges to a TMDL water body, the 2016 IGP also provides an exemption from certain monitoring requirements if the water quality monitoring station immediately downstream of the site meets the water quality standard for the pollutant subject to the TMDL. Finally, in addition to the 2010 IGP's requirement for permittees to review DHEC's list of established TMDLs during each annual comprehensive site inspection, the 2016 IGP requires permittees to review DHEC's 303(d) list of impaired water bodies, including those for which no TMDL is established.

For existing permittees, DHEC will not require submittal of a Notice of Intent in order to maintain coverage under the 2016 IGP. However, permittees should carefully review the 2016 IGP for changes impacting storm water discharges from their facilities, with a particular focus on the water use classification and water quality classification of their receiving water body.

NPDES General Permit for Storm Water Discharges Associated with Industrial Activities

JLARC'S VIRGINIA WATER RESOURCES REPORT CALLS FOR CHANGES

BY: CHANNING J. MARTIN

Virginia's Joint Legislative Audit and Review Commission ("JLARC") is an entity created by the Virginia General Assembly to, among other things, assess the performance of state agencies and the programs they administer. In 2015, the General Assembly directed JLARC to review the process by which state and local agencies manage Virginia's water resources and develop plans to ensure adequate water supplies in the future. The review was prompted by concerns about the sustainability of Virginia's water supply in light of increasing demand, especially in eastern Virginia.

JLARC's recently issued report, entitled "Effectiveness of Virginia's Water Resource Planning and Management," made four key findings. First, there is insufficient groundwater in eastern Virginia to accommodate any major, new applications for groundwater permits. The

report said that “new permit requests (for example, requests by industries seeking to locate in the region) for even a moderate amount of groundwater cannot be accommodated.”

Second, JLARC found that “the state lacks a clear plan for addressing its most pressing sustainability challenges,” and that “state and local water plans are not sufficiently specific or aligned with water location and use.” It also found there was a lack of coordination and regional planning among local governments in developing water resource plans. For example, JLARC pointed out that Richmond, Henrico and Chesterfield all use the James River as their primary source of water, but did not coordinate their planning process.

Third, JLARC pointed the finger at industry as a major source of the problem. It found that “more than 60% of all current permitted groundwater use in eastern Virginia is for industrial purposes,” and said that “[s]ubstantial industrial use of low cost, high quality water has the effect of ‘crowding out’ higher priority use for human consumption.” The report called for changes to the state’s groundwater permitting process to avoid having to develop alternative sources of supply, something it said would result in higher costs to residential customers and businesses.

Fourth, JLARC recommends “[a] more active state role” in developing “a combination of conservation and additional water supply projects” to help address the sustainability issue. It recommends simple conservation measures as well as more complex projects such as fixing leaking water supply infrastructure. It notes that proposed projects, such as an aquifer injection project in eastern Virginia, may be beneficial in the long run, but will take decades to complete and will be costly. That’s why it recommends conservation and fixing leaking water infrastructure first.

After making its findings, JLARC laid out recommendations for legislative and executive actions. The recommended legislative actions are to (i) require more comprehensive state and regional water supply plans, (ii) ensure priority is given to human consumption for groundwater withdrawal permits issued in eastern Virginia, (iii) place restrictions on the amount of groundwater a single permitted groundwater user in eastern Virginia may withdraw, and (iv) require the state to take a more active role in water supply project planning.

The executive actions recommended include that DEQ develop a plan to reduce the amount of groundwater withdrawal capacity awarded to permit applicants so that it more closely reflects the amount they truly need. The report also recommends that DEQ identify the surface water segments in Virginia at the greatest risk of shortfalls.

DEQ has made valiant efforts to conserve groundwater in eastern Virginia through the groundwater permitting program and by persuading industry to take voluntary conservation efforts. But as the report shows, more needs to be done, both to ensure groundwater is available for human consumption and to ensure future industrial development in the Tidewater region. If insufficient groundwater is available for industrial use, industry will not come to the region, and that would be bad for the local economy.

Our expectation is that a number of legislative proposals will be introduced in the 2017 session of the Virginia General Assembly to implement the recommendations in this report. That means DEQ may be provided with more tools in its toolbox to address the problem. We will keep you apprised of developments.

Effectiveness of Virginia’s Water Resource Planning and Management (JLARC Oct. 2016)
http://jlarc.virginia.gov/landing-water.asp

NORTH CAROLINA FEDERAL COURT GIVES GO AHEAD FOR SHOOTING RANGE ON PUBLIC LAND

BY: JESSICA J.O. KING

The U.S. District Court for the Western District of North Carolina recently upheld approval by the U.S. Forest Service ("USFS") of a recreational shooting range in North Carolina's Nantahala National Forest. The case is significant because it confirms the limited role courts play in reviewing agency administrative decisions.

The case concerned the proposed construction of eight shooting lanes, ten parking spaces, and a 1,300 foot gravel road by private parties on five or less acres of public land. USFS approved the proposal, and nearby residents filed suit. Plaintiffs alleged USFS violated its duties under the National Environmental Protection Act ("NEPA") and that its approval violated state contract law. Specifically, plaintiffs alleged USFS:

1. Failed to prepare an Environmental Impact Statement (EIS) as required by NEPA,
2. Failed to rigorously explore and objectively evaluate the full range of reasonable alternatives as required by NEPA,
3. Failed to prepare an EA and decision document in conformance with NEPA, and
4. Approved a contract that was patently invalid under North Carolina state law.

Under the federal Administrative Procedures Act ("APA"), federal courts reviewing agency decisions under NEPA must consider whether the agency weighed relevant factors and whether there was a clear error of judgment. In conducting this review, courts give great deference to the agency. This means that as long as the administrative record shows the agency weighed competing interests and articulated a rational basis for its decision, the decision will be upheld.

The Court rejected all of plaintiffs' allegations as follows:

Failure to prepare an EIS. NEPA requires federal agencies to prepare an EIS only for major federal actions that significantly affect the quality of the human environment. If the agency determines an EIS is not required, then, subject to certain exceptions, it must prepare an EA instead. The court found the agency's decision to prepare an EA followed by issuance of a FONSI was not arbitrary and capricious. Factors considered by the court included the small size of the project and the results of three studies showing little impact on nearby homes. The court stressed the FONSI set out ten specific findings that the proposed project would have no significant environmental impact. The court held this was enough.

Insufficient Consideration of Reasonable Alternatives. NEPA requires federal agencies to review reasonable alternatives when considering a project. Here, plaintiffs argued the existence of a private shooting range in an adjoining Georgia county required USFS to fully consider a "no-build" alternative among the range of alternatives. The court held the EA contained sufficient discussion of reasonable alternatives without having to consider this information.

The EA Was Inadequate. Plaintiffs argued the EA failed to adequately consider the potential impact of the

shooting range on noise levels, traffic, dust, and property values. The court disagreed and found that multiple sound tests, traffic studies and dust analyses showed USFS adequately analyzed these three issues. The court further emphasized that USFS had committed to the installation of buffers, landscaping, speed bumps, and road maintenance to address these concerns. Regarding property values, the court held any reduction was not something that NEPA required to be considered.

Illegal Contract. Finally, plaintiffs argued that USFS' intention to enter into a contract with Clay County Country Club to build and operate the shooting range was an illegal contract under North Carolina law. The court held the USFS decision under appeal was not a contract and that there is no mention of the contract in the EA. Therefore, the court held it had no basis to consider this argument.

In upholding the adequacy of the EA process, the court emphasized its limited role under the APA: "The question before the court was not whether the Forest Service made the right or best decision, but whether the agency took a 'hard look' at the data before it. Review of the decision clearly shows that the USFS took the required hard look." The court found that the extensive administrative record from 2002 through 2015, the multiple scientific tests conducted, and the supporting and opposing comments reviewed all support a finding that USFS took a "hard look" at the potential impact of the project.

This is a favorable ruling for business, and one that is based on a clear reading of the statute. Too often, judges around the country who review agency decisions seek to substitute their own views for the decisions of regulators, permit writers, or land use planners. Here, the Court resisted the temptation to do so and deferred to USFS.

McGuinness v. U.S. Forest Service, CA No. 1:15-cv-00072 (Oct. 13, 2016, W.D.N.C.)

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