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Significant EPA Actions of 2020

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As we pass the halfway point of 2020, much of the news that has involved the U.S. Environmental Protection Agency (EPA) has focused on its response to the COVID-19 pandemic. EPA has issued important guidance relating to EPA's exercise of enforcement discretion for compliance obligations affected by the pandemic. *See* Enforcement and Compliance Assurance Program Memorandum. EPA has not, however, slowed its rulemaking efforts. EPA's 2020 actions include a change in the manner in which it considers "co-benefits" in its cost benefit analyses in the context of hazardous air pollutants, and a change in its approach to the issuance and management of guidance documents. EPA has also moved closer to establishing national drinking water standards for Perfluorooctanoic acid (PFOA) and Perfluorooctanesulfonic acid (PFOS). And although not initiated by EPA, the agency is expected to conform to new policy issued by the Department of Justice that discontinues the use of Supplemental Environmental Projects (SEPs) in settlement agreements.

The first half of 2020 has also seen rulemaking that has been forecasted in previous years and anticipated by the regulated community. EPA has proposed its newest Multi-Sector General Permit for stormwater discharges associated with industrial activities, and has also finalized both the Navigable Waters Protection Rule and the Clean Water Act Section 401 Certification Rule. Further, EPA has finalized a controversial proposal that will relax fuel economy and emissions standards for automobiles over the next five years. EPA has also made changes to its chemical data reporting requirement under the Toxic Substances and Control Act (TSCA). Below, we review these significant EPA actions in more detail.

Reversal of the Findings Necessitating the Mercury and Air Toxics Standards

EPA published a final rule on May 22, 2020, which reversed its "appropriate and necessary" finding under section 112(n)(1)(A) of the Clean Air Act for its Mercury and Air Toxics Standards (MATS) for coal- and oil-fired electric utility steam generating units (EGUs). Despite the reversal, this latest rulemaking leaves MATS intact, but may have important implications for lawsuits challenging the validity of MATS.

This latest rulemaking stems in part from a 2015 U.S. Supreme Court decision in *Michigan v. EPA*, which determined that EPA's previous appropriate and necessary determination was flawed due to EPA's failure to consider the costs associated with regulating emissions of mercury and other hazardous air pollutants (HAP). The Court in *Michigan*, however, did not tell EPA *how* to determine such costs, and in 2016 EPA promulgated two different approaches to incorporate the costs of regulating mercury and other HAP emissions from coal- and oil-fired EGUs. Its preferred "cost reasonableness" approach analyzed what costs EPA believed the power sector could absorb and continue to operate, and its other "cost benefit" approach compared the costs of regulation with the benefits of such regulation.

EPA concluded in this most recent rulemaking that its 2016 "cost reasonableness" approach did not meaningfully consider the cost of implementing MATS, and that under its "cost benefit" approach, it erred by considering the co-benefits that are generated through the regulation of non-HAP pollutants. Specifically, EPA concluded that although the *total* benefits conferred by MATS were projected to significantly exceed the costs of implementing MATS ($36 billion to $89 billion in benefits versus $9.6 billion in costs), 99.9 percent of the benefits were *co-benefits* not directly related to reducing or regulating mercury emissions (*e.g.*, systems that would reduce mercury emissions would also control particulate matter emissions). Because EPA chose to recognize only the mercury-reduction benefits, the cost of compliance with MATS outweighed the mercury-reduction benefits of MATS, EPA determined that its previous cost benefit determination was flawed. Despite its reversal of the "appropriate and necessary" finding, EPA did not seek to delist the EGU source category under CAA Section 112(c).

Because EPA has left MATS in place, already pending and new challenges to the various MATS rulemakings will likely continue. Indeed, on the same day that EPA published this final rule, Westmoreland Mining Holdings LLC filed a petition challenging the rule.

New Administrative Procedures for the Issuance of Guidance

In May, EPA published a proposed rule that reforms EPA's process for publishing and maintaining agency guidance documents. The proposed rulemaking seeks to implement Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents," which directs federal agencies to develop regulations that set forth processes and procedures for issuing guidance documents. The proposed rulemaking requires EPA to keep a central database of active guidance documents, and establishes procedures for the issuance of new guidance documents. In particular, EPA is required to notify the public when it issues new guidance, and will open public notice and comment opportunities for the issuance of what EPA determines to be significant guidance. The proposed rule also requires certain standardization of guidance documents, such as requiring each guidance document to include a citation to the statutory provision or regulation to which the guidance document applies. Public comment on the proposed rule closed on June 22, 2020. As of this writing, EPA is maintaining its active guidance documents on epa.gov/guidance.

Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities

On March 2, 2020, EPA published notice and requested public comment on its proposed 2020 National Pollution Discharge Elimination System (NPDES) Multi-Sector General Permit (MSGP) for stormwater discharges associated with industrial activity. Once finalized, the proposed 2020 MSGP will replace the existing MSGP that was set to expire on June 4, 2020, but has been administratively continued until finalization of the 2020 MSGP. The MSGP covers stormwater discharges from industrial facilities in 30 business sectors in states where EPA is the NPDES permitting authority. States which have been delegated NPDES permitting authority often incorporate requirements from the MSGP into their own general permits.

Many of the proposed changes in the proposed MSGP stem from the settlement of litigation over the 2015 MSGP, and involve the addition of new stormwater monitoring requirements. These additional monitoring requirements include quarterly universal benchmark monitoring for pH, total suspended solids, and chemical oxygen demand. Repeated benchmark exceedances would be subject to a proposed Additional Implementation Measures protocol, which would involve the implementation of varying stormwater controls dependent on the degree, or tier, of benchmark exceedances. Additionally, the 2020 MSGP includes new benchmark monitoring of certain parameters for additional business sectors, including the Oil and Gas

Extraction sector (Sector I); the Land Transportation and Warehousing sector (Sector P); and the Ship and Boat Building and Repair Yards sector (Sector R).

The 2020 MSGP also includes additional general permit eligibility criteria for which EPA invites comment. A new condition would require dischargers to a Superfund site to ensure that adequate controls will be implemented to protect against recontamination of aquatic media. Operators of facilities in areas that could be impacted by stormwater discharges from major storm events that cause extreme flooding conditions must implement enhanced pollution prevention measures, including reinforcing material storage structures and preventing the floating of semi-stationary structures. The proposed 2020 MSGP would also prohibit stormwater discharges from surfaces paved with coal-tar sealcoat. Now operators who use coal-tar sealcoat to initially seal or re-seal paved surfaces where industrial activities are located, thereby discharging polycyclic aromatic hydrocarbons in stormwater, would either have to eliminate such discharge or obtain an individual NPDES permit.

Chemical Data Reporting Rule Under TSCA

EPA's "TSCA Chemical Data Reporting Revisions under TSCA Section 8(a)" rule (CDR Rule) became effective on May 11, 2020. Manufacturers and importers of chemical substances listed on the TSCA Inventory will likely be impacted by changes featured in the CDR Rule. These changes impact processing and use codes in chemical reporting, confidentiality claims, and reporting on chemical byproducts as well as chemicals removed from waste streams, among other impacts.

Chemical Data Reporting under TSCA requires U.S. manufacturers and importers of certain chemicals listed on the TSCA Inventory to report to EPA every four years certain information about chemical substances manufactured or imported during the prior four years. Generally, manufacturers and importers must report information concerning listed chemical substances whose production volumes are 25,000 pounds or more at a single site during any reportable calendar year, although lower thresholds apply for certain chemicals. Domestic manufacturers and importers of chemical substances are required to report information such as production volumes, chemical-exposure related information associated with manufacturing the chemical, and certain processing and use information. Certain chemical reporting information may also be claimed as confidential.

As noted above, one of the more significant changes implemented by the CDR Rule concerns changes to processing and use codes. The CDR Rule replaces CDR industrial function and commercial/consumer product codes with function, product, and article use codes used by the Organisation for Economic Co-operation and Development (OECD), and adds OECD function categories for commercial/consumer products. EPA believes that using OECD codes will expand the utilization of applicable use and exposure-related information from international sources to support EPA risk evaluation and risk assessment activities for new and existing chemicals. It would also provide industry with international uniformity in use and exposure information reporting.

Another significant change implemented by the CDR Rule concerns the requirements for claiming confidentiality in reporting. The Lautenberg Amendments to TSCA mandated new procedural requirements for the submission and EPA management of confidential business information (CBI) claims. Consistent with those changes, the CDR Rule requires substantiation of all CBI claims at the time of CBI assertion except for information exempt under Section 14(c)(2) of TSCA. The substantiation questions are similar to questions previously posed to CBI claimants, and generally inquire about the impact of disclosure on the

submitter's competitive position, whether information has been made available to others, and the controls used to protect the confidential information.

Other changes to chemical reporting in the CDR Rule include adding a voluntary reporting element for the percent total production volume for a chemical substance that is a byproduct. With this information, EPA believes it will better understand the manufacturing of byproduct chemical substances and the impact of current or potential future exemptions to reporting.

EPA Finalizes the Navigable Waters Protection Rule

On April 21, 2020, EPA and the Department of the Army finalized the "Navigable Waters Protection Rule," which amends and seeks to clarify the scope of "waters of the United States" (WOTUS) regulated under the Clean Water Act ("CWA"). Finalization of the rule comes after the Trump Administration's repeal of the 2015 WOTUS rule took effect on December 23, 2019.

Generally, the new rule defines WOTUS to encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters or that have specific surface water connection to traditional navigable waters. Among other clarifications, the new rule no longer defines ephemeral streams as jurisdictional waters. Tributaries that contribute surface water flow to traditional navigable waters in a typical year either directly or through one or more jurisdictional waters remain as part of the definition of WOTUS. The new rule also narrows the definition of jurisdictional "adjacent wetlands" to those wetlands that have a "direct hydrological surface connection" to traditionally jurisdictional waters. With the new rule, EPA sought to more closely conform to Justice Kennedy's "significant nexus" test in his concurring opinion in *Rapanos v. United States*.

As expected, the new rule has faced legal challenges since its finalization. Most recently, on June 19th the District Court of Colorado stayed the implementation of the Navigable Waters Protection Rule within the state, holding in part that the entire approach of the new rule is contrary to *Rapanos*. The decision in Colorado came on the same day that the District Court of the Northern District of California denied staying the effective date of the new rule.

EPA and DOT Finalize the SAFE Vehicles Rule

On April 30, 2020, EPA and the Department of Transportation issued the final Safer Affordable Fuel-Efficient ("SAFE") Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, which amends and establishes fuel economy and carbon dioxide (CO_2) standards for passenger cars and light trucks. The SAFE Vehicles Rule modifies the standards previously set by the Obama Administration in 2012. The first part of the SAFE Vehicles Rule, which withdrew the waiver previously granted to California for its state greenhouse gas and zero emissions vehicle programs under Section 209 of the Clean Air Act, became final in September 2019.

The SAFE Vehicles Rule establishes the Corporate Average Fuel Economy ("CAFE") efficiency standards and CO_2 emissions for passenger vehicle and light truck fleets through model year 2026. By 2026, CAFE fuel efficiency standards must be 40.4 mpg, and CO_2 emissions must be 199 g/mi. The final rule gradually increases fuel efficiency and CO_2 emissions standards through model year 2026, departing from the proposed rule which sought to freeze fuel efficiency and CO_2 emissions standards through 2026 at the same levels. Under the 2012 standards, CAFE fuel efficiency standards were set to rise to 46.7 mpg, and CO_2 emissions to decline to 175 g/mi, by model year 2026.

EPA and DOT estimate that as a result of the SAFE Vehicles Rule, gasoline consumption and CO_2 emissions will steadily decline over the next three decades, but not quite as swiftly as under the previously-issued standards. In comparison to the standards set by the Obama Administration in 2012, the more relaxed standards in the SAFE Vehicles Rule will add 15 billion gallons of gasoline consumption and 100 million metric tons of CO_2 to the atmosphere by 2050.

The agencies based the relaxation of fuel efficiency standards in the SAFE Vehicles Rule from the 2012 standards in part on a change in the estimated trajectory of gasoline prices. Because gasoline prices have been lower—and are projected to continue being lower—than the estimates on which the 2012 standards were based, the agencies concluded that the benefits of the stricter 2012 standards to consumers were much lower than originally estimated. The value of fuel savings amounted to 80 percent of the total benefits to consumers under the stricter 2012 standards, meaning that changes to the estimated trajectory of gasoline prices would significantly impact the overall benefit to consumers of higher fuel economy and emissions standards.

As further justification for the emissions standards, the SAFE Vehicles Rule limits the estimated value of damage resulting from vehicle CO_2 emissions to the United States and its territories, rather than the estimated global damage from these emissions. The rule implementing the 2012 standards relied on the estimated global cost of carbon emissions, and the reduction in CO_2 emissions through model year 2026 was estimated to confer emissions-reduction benefits of $53 billion. Had the estimated damages from CO_2 emissions been limited to the United States, as asserted in the SAFE Vehicles Rule preamble, the benefits conferred from CO_2 emission reductions would have been only $11 billion, and perhaps would have provided less justification for the stricter CO_2 emissions standards.

The SAFE Vehicles Rule has already come under separate legal challenges by a coalition of states and nonprofit groups. These challenges allege in part that the SAFE Vehicles Rule is arbitrary and capricious because analyses within the rule that show the relaxed standards will result in more harmful health impacts to the public, negative net-savings to consumers, and decreased jobs due to competitive disadvantages in international markets, resulting in an overall negative net-benefit to the public.

DOJ Ends the Use of Supplemental Environmental Projects

On March 12, 2020, the Environment and Natural Resource Division of the Department of Justice (DOJ) issued a Memorandum terminating the use of SEPs in settlements and consent decrees with which DOJ is involved. Assistant Attorney General Jeffrey Bossert Clark concluded that the use of SEPs in settlements and consent decrees for a correlated reduction in civil penalties violates the Miscellaneous Receipts Act, 31 U.S.C. § 3302, which requires federal officers in receipt of funds on behalf of the United States to deposit such funds in the Treasury. This new directive does not apply retroactively to previously adopted SEPs and does not require reopening of existing settlements.

In its new directive, DOJ asserts that the manner in which SEPs have been used violate the Taxing and Spending Clause and the Appropriations Clause of the U.S. Constitution. [Article I, Section 8, Clause 1; Article I, Section 9, Clause 7]. Although the Executive Branch has authority to negotiate settlements, Congress retains exclusive authority to determine how funds deposited in the Treasury are spent. To protect such authority, Congress passed the Miscellaneous Receipts Act, which, as noted above, requires federal officers in receipt of funds on behalf of the United States to deposit such funds in the Treasury. According to the Memorandum, a reduction in civil penalties that corresponds with the resources devoted to the implementation of a SEP—up to 80 percent—diverts "received funds" from the Treasury and gives EPA

appropriation authority over such funds thereby violating the principle of separation of powers between Congress and the Executive Branch.

Despite EPA's most recent update to its SEP Manual and its efforts to avoid violating the Miscellaneous Receipts Act, DOJ has pointed to the "mathematical relationship" between the use of SEPs and reductions in civil penalties as fatal to the legitimacy of SEPs. In short, DOJ has characterized this relationship as trading projects for penalties. By contrast, EPA has emphasized that SEPs are considered as only one factor in civil penalty amounts, along with other overlapping factors such as self-disclosure, cooperation, and good faith efforts to resolve the violations, which are permitted to influence the civil penalty amounts in a settlement. EPA has asserted that the requirement that SEPs have a strong nexus to the violations being resolved preserves EPA's prosecutorial discretion to include SEPs in its calculation of civil penalties. As noted above, however, DOJ believes these factors are not enough to overcome violations of the Miscellaneous Receipt Act.

DOJ acknowledges that SEPs have been favored by the regulated community, EPA, and community beneficiaries for their ability to ease settlements among the parties involved and their positive environmental effects on communities that may have been harmed from violations of environmental requirements. By converting portions of a monetary penalty amount into a project offering tangible environmental benefits, the settling parties can both generate goodwill and advance the environmental goals relevant to the EPA programs involved in the settlement. DOJ argues, however, that these perceived benefits are secondary to whether DOJ or EPA ultimately have legal authority to validate the use of SEPs that take away money from the Treasury.

While DOJ's new directive does not expressly apply to settlements involving only EPA (and not DOJ), EPA is expected to follow DOJ's lead, thereby ending the long history of use of SEPs in resolving environmental matters involving the federal government.

Clean Water Act Section 401 Certification Rule

On June 1, 2020, EPA finalized the "Clean Water Act Section 401 Certification Rule," which implements the water quality certification process required under Section 401 of the Clean Water Act. The rule replaces the EPA's existing certification regulations that were promulgated in 1971 and narrows the scope of the water quality certification rule applied frequently in the past.

Under section 401 of the CWA, a federal agency may not issue a license or permit for an activity that may result in a discharge into waters of the United States, unless the appropriate authority provides a section 401 certification or waives its ability to do so. Section 401 allows States that do not have direct permitting authority over an activity to be involved in the approval process in order to protect the water quality of federally regulated waters. States have the ability to grant the certification request outright, grant the certification with conditions that ensure water quality protection, deny the certification request, or waive certification.

EPA asserts in the preamble that the rule has been applied too broadly and in a manner that strays from the underlying text of Section 401. EPA notes that some certifying authorities previously interpreted the scope of the rule to include non-water quality-considerations into their certification review process, and that a certifying authority could include conditions in its grant that imposed conditions unrelated to the discharges at issue. Additionally, some Section 401 certification reviews considered the impact to water quality from proposed federally licensed or permitted activity as a whole, rather than impacts from

discharges from the proposed activity. These and other similarly broad applications of the Section 401 certification process have impeded a number of infrastructure projects, EPA notes.

The new water qualify certification rule specifies that the scope of Section 401 certification is limited to assuring that discharges from point sources into waters of the United States from a federally licensed or permitted activity will comply with water quality requirements. 40 C.F.R. § 121.3. Notably, the newly-defined scope of the Section 401 certification review is limited only to point-source discharges associated with the proposed activity, and not the entire project proposal. "Water quality requirements" have also been defined to refer to applicable CWA provisions and state or tribal regulatory requirements for point source discharges, which is distinct from water quality standards more generally.

Additionally, EPA has clarified that one year is the limit for certifying authorities to act on requests for water quality certifications. The one-year period of review will begin on an authority's receipt of a certification request, and not on a request being deemed complete. Certifying authorities still must review certification requests in a "reasonable" period of time—EPA notes that Section 401 does not "guarantee" one year, and a "reasonable" period of time could mean a period shorter than one year in some circumstances.

At the time of this writing, the rule had yet to be published in the Federal Register. The rule, once published, would take effect 60 days after its publication.

Preliminary Drinking Water Standards for PFOA and PFOS

On March 10, 2020, EPA moved closer to establishing national drinking water standards for Perfluorooctanoic acid (PFOA) and Perfluorooctanesulfonic acid (PFOS) by publishing its Announcement of Preliminary Regulatory Determinations for Contaminants on the Fourth Drinking Water Contaminant Candidate List. Of the eight contaminants reviewed in the Announcement, only PFOA and PFOS met the relevant criteria for regulation under the Safe Drinking Water Act (SDWA).

EPA's preliminary determination to establish drinking water standards for PFOA and PFOS in a National Primary Drinking Water Regulation (NPDWR) resulted from EPA's review of health, occurrence, and other information against the three relevant SDWA statutory criteria. Specifically, EPA evaluated whether PFOA and PFOS may:

1. have an adverse effect on human health;
2. occur in Public Water Systems (PWS) with a frequency and at levels of public concern; and
3. present a meaningful opportunity for health risk reduction, with regulation, for persons served by PWS.

EPA answered "yes" for all three criteria and therefore moved forward with the preliminary determination to regulate.

If EPA makes a final determination to regulate PFOA and PFOS, EPA would then be required to publish a proposed Maximum Contaminant Level Goal (MCLG) and NPDWR for PFOA and PFOS within 24 months. After proposed MCLGs and NPDWRs are published, EPA would then need to publish a final MCLG and promulgate a final NPDWR within 18 months.

EPA's Announcement also notes that EPA is evaluating PFAS other than PFOA and PFOS to understand whether a national drinking water regulation for a broader class of PFAS should be developed in the future.

EPA is set to propose a nationwide drinking water monitoring program under the next Unregulated Contaminant Monitoring Rule Cycle 5, which will utilize newer test methods to capture more PFAS compounds at lower concentrations than previously measured.

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