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2017 Environmental and Energy Law Forecast

FEDERAL FORECAST

Controversial Rule Defining Reach of Wetlands Permitting Jurisdiction Could Learn Its Fate in 2017

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The Clean Water Rule, as it is known, represents a regulatory change to the definition of "waters of the United States" as that term is used in the federal Clean Water Act ("CWA"). In changing the definition of this term, the Clean Water Rule redefined the limits of federal wetlands permitting jurisdiction on private property pursuant to the CWA Section 404 wetlands permitting program administered by the U.S. Army Corps of Engineers. The Clean Water Rule is the result of a multi-year effort by the U.S. Environmental Protection Agency ("EPA") and the Corps, and is the federal government's response to several U.S. Supreme Court decisions that called into question the Corps' expansive view of its Section 404 permitting jurisdiction.

Once promulgated in 2015, the Clean Water Rule was immediately challenged by a host of states as well as private parties in a number of federal courts, alleging, among other things, that the scope of the Clean Water Rule exceeded the authority of the CWA. Finding that the petitioners had a high likelihood of success, the U.S. Court of Appeals for the Sixth Circuit stayed the Clean Water Rule nationwide pending further action of the court. Among those states challenging the Clean Water Rule was Oklahoma, whose Attorney General, Scott Pruitt, is President Trump's nominee for EPA Administrator. Given the Sixth Circuit's suspension of the Clean Water Rule, and the nomination of Mr. Pruitt for the top job at EPA, it seems unlikely that the Clean Water Rule will survive in its current form. Moreover, on January 13, the U.S. Supreme Court agreed to hear argument on the issue of whether jurisdiction over challenges to the Clean Water Rule should sit with federal appellate or district courts. The Court's grant of review on this jurisdictional issue may allow the Trump Administration and Congress to focus on eliminating or replacing the rule while the contentious legal challenges await the Supreme Court's jurisdictional decision.

TSCA Amendments Promise New Chemical Regulation in 2017

Todd D. Kantorczyk, Esq.

In 2016, President Obama signed the Frank R. Lautenberg Chemical Safety for the 21st Century Act (the "Act"), which fundamentally changes certain aspects of the Toxic Substances Control Act ("TSCA"), a statute that gives the U.S. Environmental Protection Agency ("EPA") broad authority to impose restrictions on the manufacture, processing, distribution, use or disposal of ***any*** chemical substance currently or proposed to be placed in commerce. In accordance with the Act, EPA recently proposed the following

three rules, which are designed to promote more frequent, timely and systematic review and regulation of new and existing chemical substances and must be finalized by June 22, 2017:

- The Risk Evaluation Rule: this rule will establish the process by which EPA will determine whether an existing chemical substance "presents an unreasonable risk of injury to health or the environment;"
- The Prioritization Rule: this rule will allow EPA to divide the universe of existing chemicals into "high priority" substances that must undergo a risk evaluation to determine whether the substance ***may*** pose unreasonable risks, and "low priority" substances for which a risk evaluation is currently unwarranted; and
- The Inventory Reset Rule: this will require manufacturers and importers to confirm by December 17, 2017, which chemicals currently on the TSCA chemical inventory remain active in commerce, even if they previously fulfilled their TSCA data reporting obligations.

In addition, at the end of 2016, EPA published a list of ten chemical substances that will undergo the first risk evaluations under the Act. EPA is required to publish the scopes of the risk evaluations for these substances in March 2017. Finally, EPA will continue in 2017 to pursue TSCA rules for existing chemicals that were already in progress at the time the Act was enacted. For example, in December 2016 and January 2017 EPA proposed to ban the use of trichloroethylene ("TCE") in aerosol degreasing, vapor degreasing and spot cleaning at dry cleaning facilities. In sum, it appears that EPA will be very active in 2017 with respect to chemical regulation under TSCA.

New Requirements to Impact Hazardous Waste Generators in 2017

Rodd W. Bender, Esq.

The rules of the road applicable to facilities generating hazardous waste will change significantly in 2017 due to promulgation by the U.S. Environmental Protection Agency ("EPA") of the final Hazardous Waste Generator Improvements Rule, which was published in the Federal Register on November 28, 2016 (81 *Fed. Reg.* 85372). The rule represents the first major overhaul of the generator regulatory program, which has evolved piecemeal since the 1980s. EPA has reorganized the regulations to make them easier to navigate. Substantively, the final rule contains several important changes. Generator facilities will likely embrace some of these, such as new flexibility for "very small quantity generators" (formerly known as conditionally exempt small quantity generators) to consolidate their hazardous waste at an affiliated large quantity generator facility rather than having to send it directly for disposal. The rule will also allow VSQGs and small quantity generators to maintain their existing generator category subject to certain conditions despite an unusual "episodic" event that would otherwise bump the facility to a higher category.

EPA has also strengthened many of the obligations imposed on hazardous waste generators, which may require increased efforts to ensure compliance. These changes impact areas such as making hazardous waste determinations, managing waste in satellite and central accumulation areas, labeling containers and tanks, and developing emergency planning and preparedness procedures. Further, in the enforcement context, the rule distinguishes between violations of "independent requirements" applicable to facilities simply by virtue of being generators, and failures to satisfy "conditions for exemption" that allow a facility to avoid obtaining a hazardous waste permit. Facilities found to have neglected exemption conditions – many of which (like labeling a drum) appear relatively minor on their face – could experience significant consequences if deemed to be operating without a permit.

The rule becomes effective on May 30, 2017. States authorized to implement the hazardous waste program will be required to adopt changes in the rule that are more stringent than the current federal program, and will have the option of adopting less stringent changes. Facilities should take time over the next few months to become familiar with the rule and be prepared to make any necessary adjustments before regulatory agencies begin enforcing the new requirements.

Trump Administration's Infrastructure Agenda Could Also Push Permitting Reforms

Jonathan E. Rinde, Esq.

As a builder and property developer, President Trump focused on the rebuilding of America's infrastructure as one of his campaign platforms. Whether it be the nation's roads and bridges, public water systems, airports, railways, ports, telecommunication systems or pipelines, the condition of the country's infrastructure has been a source of concern for many. And according to President Trump's campaign website, "[i]nfrastructure projects across the U.S. are routinely delayed for years and years due to endless studies, layer-upon-layer of red-tape, bureaucracy, and lawsuits—with virtually no end in sight. This increases costs on taxpayers and blocks Americans from obtaining the kind of infrastructure that is needed for them to compete economically."

Since President Trump knows all too well the hurdles faced by real estate developers in pursuit of a project, it should come as no surprise that while his administration pursues an increased focus on infrastructure, there may be a tendency to reduce or eliminate the "red-tape" which many associate with environmental regulation. In this regard, his campaign website states that the President would "link increases in spending to reforms that streamline permitting and approvals, improve the project delivery system, and cut wasteful spending on boondoggles." Many will be watching as President Trump moves forward with his agenda on infrastructure.

MATS Litigation Rolls On

Katherine L. Vaccaro, Esq.

In 2017, the District of Columbia Circuit Court of Appeals will hear the latest round of challenges to EPA's Mercury and Air Toxics Standards ("MATS"), a regulation that has attracted considerable attention for being one of the most expensive air pollution control regulations in history. MATS, which regulates emissions of hazardous air pollutants ("HAPs") from electric generating units used at power plants ("EGUs"), was initially challenged in 2012 by a host of industry representatives and environmental groups. The DC Circuit determined that regulation of EGUs by the U.S. Environmental Protection Agency ("EPA") under MATS was reasonable and upheld the rule. Opponents of MATS next appealed to the U.S. Supreme Court, which reached the opposite conclusion that EPA had acted unreasonably by failing to consider the costs of compliance in determining that it is appropriate and necessary to regulate HAPs from EGUs. The Supreme Court therefore directed EPA to fulfill its obligation to consider costs in justifying the regulation, but the Court did not vacate MATS during the interim. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). In response to the Supreme Court's decision, EPA issued its "Supplemental Finding" in April 2016, in which EPA affirmed its earlier determination of the appropriateness of the rule. The Supplemental Finding is now the subject of new challenges before the DC Circuit. Final briefs in this case are due in late March 2017, and the Court is expected to hear oral argument shortly thereafter.

Because MATS remained in effect while EPA undertook to respond to the Supreme Court's directive, certain of the rule's key compliance deadlines have already passed. Therefore, a majority of the sources subject to MATS have had to take action to transition toward compliance, including by making material operational changes and installing significant control system upgrades to satisfy MATS's stringent emission standards. Accordingly, for most sources, it may not matter if MATS is ultimately invalidated. Yet, other facilities continue to seek relief from MATS. The DC Circuit's forthcoming ruling will bring us one step closer to determining MATS's ultimate fate.

EPA Begins New Year by Amending Risk Management Program Rules

Michael Dillon, Esq.

On January 13, 2017, the U.S. Environmental Protection Agency published final amendments to its Risk Management Program ("RMP") regulations at 40 C.F.R. Part 68. The final rule comes in response to Executive Order 13650, which ordered federal agencies to take actions to improve chemical facility safety and security. The amendments to the RMP regulations apply to any facility holding more than a threshold quantity of a "regulated substance" identified in 40 C.F.R. Part 68, including facilities in the chemical manufacturing, oil and gas extraction, manufacturing, agricultural, petroleum manufacturing, and food and beverage sectors. EPA estimates that approximately 12,500 facilities may be impacted by the rule.

Changes finalized as part of the amendments include enhancements to the RMP rule's accident prevention, emergency response, and data availability provisions. Some of the significant updates to the rule include obligations for Program 2 and 3 facilities to conduct root cause analyses in response to certain release events and to perform third-party audits after an RMP reportable accident; enhanced coordination between regulated facilities and local emergency response agencies; and mandatory public meetings with local communities impacted by RMP reportable accidents. The amendments to the RMP rule take effect on March 14, 2017.

States Take Aim at Federal Government's Authority to Designate Critical Habitat for Endangered Species

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On November 29, 2016, eighteen states filed suit against the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the "Services") in federal court in the Southern District of Alabama challenging two controversial rules related to the designation of critical habitat for endangered or threatened species. One of the rules revised the definition of "adverse modification" of critical habitat, and the other rule clarified the criteria used by the Services when designating critical habitat. The two rules had been sharply criticized as a significant expansion of federal power because, as the critics argue, the rule gives the Services authority to designate almost any area as critical habitat and almost any action as an "adverse modification" of that habitat.

The states' primary argument is that the two critical habitat rules unlawfully expand federal regulatory authority over lands and waters beyond the scope of the federal Endangered Species Act. To highlight the expansion of regulatory authority, the states provided the following extreme examples:

> [U]nder the Final Rules, the Services could declare desert land as critical habitat for a fish and then prevent the construction of a highway through those desert

> lands, under the theory that it would prevent the future formation of a stream that might one day support the species. Or the Services could prevent a landowner from planting loblolly pine trees in a barren field if planting longleaf pine trees might one day be more beneficial to an endangered or threatened species.

The Services have not yet answered the complaint filed by the states. The Services, however, have filed a motion to dismiss on the grounds that the states do not have standing to challenge the two critical habitat rules. Environmental groups and industry groups are expected to intervene in the litigation.

As with many federal issues pending during the current changeover in the White House, it remains unclear how or whether the new Trump Administration will seek to influence the defense of the Services' critical habitat rules.

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