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ENVIRONMENTAL NOTES

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VIRGINIA FEDERAL COURT HOLDS GROUNDWATER CONTAMINATION TRIGGERS CLEAN WATER ACT JURISDICTION

BY: JESSICA J.O. KING

Dominion Virginia Power (Dominion) operates a coal-fired power plant in Chesapeake, Virginia. It maintains permits for its operations, including a Virginia solid waste management permit and a Virginia Pollutant Discharge Elimination System (VPDES) permit. The solid waste permit allows Dominion to dispose of its coal ash in an on-site industrial landfill. Because coal ash contains arsenic and other heavy metals, Dominion is required by its solid waste permit to conduct monitoring to determine whether these constituents are impacting groundwater. The VPDES permit allows the company to discharge wastewater from the site into surface water, including the Southern Branch of the Elizabeth River. It does not authorize the discharge of coal ash contaminants.

On March 19, 2015, Sierra Club sued Dominion under the citizen suit provision of the Clean Water Act (CWA). The complaint alleged that the pollutants in the coal ash had contaminated groundwater, and that the groundwater under the plant was discharging to surface water. Sierra Club said a discharge of pollutants to surface waters via hydraulically-connected groundwater is subject to the CWA, and that Dominion was therefore violating both the Act and its VPDES Permit. Dominion moved to dismiss on several grounds, but its primary argument was that the CWA regulates discharges of pollutants from a point source to surface waters, not discharges of pollutants to groundwater.

Dominion's argument may sound like a slam dunk to many, but not to the federal district court judge who heard Dominion's motion. After examining other cases on the issue, he held Sierra Club's argument was sufficiently plausible to survive a motion to dismiss. This case follows in the footsteps of a similar case in North Carolina decided just two months earlier. There a federal judge also denied a power company's motion to dismiss a claim that its discharge of pollutants to surface water via groundwater was a violation of the CWA.

Now what? The defendant in the North Carolina case has already filed a motion asking the trial judge to allow an immediate appeal of this issue to the Fourth Circuit. We expect Dominion will do the same in its case. If the judges do not allow an immediate appeal, then the cases will go to trial. Only after the trial would the cases then reach the Fourth Circuit.

However these cases turn out in the district courts, it's certain the Fourth Circuit will weigh in. The First, Fifth and Seventh Circuits have already ruled on this issue, and all of them refused to extend CWA jurisdiction to groundwater conduit cases. Our expectation is that the Fourth Circuit will do the same. In the meantime, it's a safe bet that environmental groups in Virginia, North Carolina, South Carolina and other states within the Fourth Circuit will be emboldened by these rulings and file more CWA citizen suits based on this legal theory. We'll keep you apprised of the outcome.

Sierra Club v. Va. Elec. & Power Co., No. 15-CV-00112 (E.D. Va. Nov. 6, 2015).
Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC, No. 14-cv-00753 (M.D.N.C. Oct. 10, 2015).

OSHA EXTENDS PROCESS SAFETY MANAGEMENT STANDARD COMPLIANCE DATE FOR BULK CHEMICAL DISTRIBUTORS

BY: ETHAN R. WARE

OSHA has come full circle…almost. In a December, 2015 revised interim enforcement memorandum, the agency indicated it will not enforce the Process Safety Management (PSM) Standard for "highly hazardous chemicals" (HHC) against sellers or distributors of large,

bulk quantities of HHCs until September 30, 2016. The extension came after intense lobbying by those sellers and distributors who complained they had been whip-sawed by the agency's inconsistent interpretation of its own regulations.

Under OSHA's PSM Standard at 29 CFR 1910.119, a facility storing or using in process vessels more than a threshold amount of certain "highly hazardous chemicals" must comply with a rigorous set of management and emergency response requirements in the event of a sudden, catastrophic release. Covered operations must also develop risk management plans to respond in the event of an emergency. Most HHCs are reactive or flammable substances, so fires or explosions are a genuine concern.

The PSM Standard contains an exemption for retail operations, such as gas stations and propane suppliers (Retail Exemption). The rationale for the Retail Exemption is not complicated: OSHA did not believe the PSM Standard was necessary for those small businesses only retailing small quantities of an HHC for use by the general public. The problem is the term "retail facility" is not defined in the regulations. To address this discrepancy, OSHA adopted a policy to allow any facility to meet the Retail Exemption as long as it derived at least 50% of its income from direct sales of HHCs to an "end user." *OSHA Compliance Directive No. CPL-02-02-045* (50% Test).

The 50% Test lost favor at OSHA shortly after it was announced because it allowed distributors selling bulk quantities of a covered HHC to avoid the PSM requirements. They were able to do so by claiming commercial purchasers of bulk quantities were "end users" under the policy. OSHA believed this was contrary to the intent of the agency, so this past July it invalidated the 50% Test and introduced a revised approach for bulk distributors. The revised approach limited the Retail Exemption to "those facilities involved in retail trade [listed in] sections 44 and 45 of the North American Industry Classification System (NAICS)." Neither of these sections includes bulk distribution facilities. *Memorandum: Glassi to Regional Administrators* (July 22, 2015).

In October, 2015, OSHA provided a grace period until July 22, 2016 for companies that distribute large, bulk quantities of HHCs to come into compliance with the PSM Standard. *PSM Retail Exemption Interim Enforcement Policy* (October 20, 2015). The only exception to this policy was if OSHA discovered conditions at a facility that exposed workers to an immediate and severe danger, and OSHA determined that the employer had not made a reasonable good faith effort to eliminate or substantially control the hazard.

After intense lobbying, the grace period for companies that sell or distribute large, bulk quantities of HHCs to meet the PSM Standard has been changed again, and OSHA discretion has been curtailed severely. Under *Interim Enforcement Policy, Rev. 1* (December 23, 2015), OSHA extended the date to September 30, 2016. Of more concern, however, this new policy removed the discretion OSHA gave itself for those facilities found to have exposed workers to an immediate and severe danger, but that made a good faith reasonable effort to eliminate it. Thus, the Interim Policy says:

> Through September 30, 2016, OSHA will not cite employers for violations of the PSM Standard at facilities that it would not have cited applying the interpretation of "retail" that was in place prior to July 22, 2015.

The revised Interim Policy provides a window of opportunity for bulk distribution firms to come into compliance with a very tough PSM Standard. Covered companies may want to take the following approach to be sure OSHA does find PSM deficiencies:

Step No. 1: Audit bulk distribution terminals to determine if the terminals may be covered by the Retail Exemption, evaluating whether the goods it sells are in "small quantities" suitable for retail and whether the purchasers are more like the general public or commercial employers.

Step No. 2: If the customers have characteristics of a business rather than the general public and the goods moved through the terminal are packaged in bulk rather than small quantities, the terminal should comply with the PSM Standard if the threshold quantity of an HHC is exceeded.

Step No. 3: If a bulk distribution facility is covered by the PSM Standard, the facility should "make a reasonable good faith effort" between now and September 30, 2016 to eliminate elevated risks to all employees from exposure to HHCs.

WATER BOARD PROPOSES AMENDMENTS TO VIRGINIA'S BAY WATERSHED GENERAL PERMIT

BY: HENRY R. "SPEAKER" POLLARD, V

The Virginia State Water Control Board has proposed to reissue and amend the *General VPDES Watershed Permit for Total Nitrogen and Total Phosphorous Discharges and Nutrient Trading in the Chesapeake Bay Watershed in Virginia* (General Permit). The regulation applies to certain facilities that discharge nutrients to the Bay, many of which are publicly-owned treatment works and large industrial facilities. It also applies to certain new or expanding smaller dischargers of nutrients to the Bay.

EPA's Chesapeake Bay Total Maximum Daily Load (Bay TMDL) sets aggregate limits on nutrient (nitrogen and phosphorous) and sediment loadings into the Bay and its tributaries. The General Permit is a key component of Virginia's Watershed Implementation Plan (WIP) to meet the Bay TMDL. The General Permit serves this purpose in two key ways: (i) setting nutrient wasteload allocations for certain facilities discharging into the Bay watershed, and (ii) providing a nutrient trading program option for dischargers to comply with ever-tightening nutrient wasteload allocations and related nutrient discharge limits in their permits.

The proposed amendments to the General Permit reflect the WIP's phase-in of stricter Bay TMDL requirements and other Bay-related water quality program changes for Virginia. However, they also provide clarity and flexibility for demonstrating and achieving compliance. Among other things, the proposed amendments would do the following:

- Reduce the total nitrogen (TN) wasteload allocations for the facilities owned by the Hampton Roads Sanitation District and the total phosphorus (TP) wasteload allocation for all but two of the significant dischargers to the James River Basin. These reductions are deemed necessary to meet the Bay TMDL;
- Set new schedule of compliance deadlines for such discharging facilities to meet the associated lower permit nutrient discharge limits, although the permit registration list will contain individual compliance dates for each facility to meet its reduced wasteload allocation.
- Increase the frequency of compliance monitoring sampling for dischargers with design flows between 5.0 and 19.999 million gallons per day (MGD) and dischargers with design flows between 0.5 and 0.999 MGD, though each group may composite certain samples to reduce laboratory costs;
- Add new maximum quantification level ("QL") requirements for compliance monitoring results to ensure greater clarity and consistency in compliance reporting, but allowing for variances from the new QLs in certain circumstances;
- Allow in certain situations a less than 2:1 trading ratio (but not less than 1:1) when using nonpoint source nutrient credits to offset new or increased point source nutrient loads to enhance existing credit trading options;
- Reduce the cost of TN and TP credits that can be obtained (in certain circumstances) from the Nutrient Offset Fund;
- Reorganize the terms and conditions applicable to all permittees; and
- Reorient many obligations (such as compliance plan submissions) specifically toward the facility *owner*, and remove many express or implied references to compliance by the facility *operator*.

Although this action has been taken now to ensure the General Permit is reissued before the existing permit expires on December 31, 2016, the next "shoe to drop" is the outcome of DEQ's chlorophyll-a study. The General Permit requires significant dischargers (37 large facilities that discharge to the James River) to meet an aggregate discharged TN wasteload allocation of approximately 9 million lbs./yr. by 2023, down from 13.3 million lbs./yr. discharged now. However, it's been widely questioned whether that large a TN reduction is required to attain the Bay TMDL's water quality objectives. The chlorophyll-a study has been undertaken to make that determination. After the results of the study are known and EPA and DEQ make any appropriate adjustments, reduced TN wasteload allocations are expected to be incorporated into the General Permit in 2017. Whether implementing these TN reductions will require a large expense by significant dischargers or will be more manageable than expected remains to be seen.

Comments on the proposed reissued and amended General Permit may be submitted to Virginia DEQ no later than February 12, 2016. A public hearing is scheduled for 2:00 p.m. on January 21, 2016 at DEQ's Piedmont Regional Office.

32 Va. Reg. 1353 (December 14, 2015).

HOW SHOULD YOU RESPOND TO EPA INFORMATION REQUESTS? VERY CAREFULLY.

BY: CHANNING J. MARTIN

You're looking through your mail one morning when you see it: a certified letter from EPA. The letter requests information about your company's operations over the last 20 years. It includes paragraph-after-paragraph of information about EPA's authority and the penalties that can be imposed if you don't comply. How do you respond?

EPA has broad authority under federal law to seek information from persons and companies to assist it in enforcing federal environmental laws. For example, CERCLA Section 104(e) allows EPA to obtain information that may link the person or company to a Superfund site. Many companies respond to the request without seeking advice from an attorney. That's a mistake, and an example indicates why.

ABC Company (not its real name) received a CERCLA Section 104(e) request from EPA. In its response, the company admitted that it sent waste to the site at issue, but "guessed" when it answered a question about how the waste was generated. Later, EPA used this information to determine the waste ABC sent was a listed hazardous waste. That meant the soil and groundwater at the site was itself a listed waste under the "contained in" rule, something that guaranteed any remediation of the site would be a very expensive proposition indeed. The only reason EPA made this determination was because the particular method of generation described by the company necessarily required the waste to be classified as a listed waste.

The company was wrong. The truth was that the waste was not generated in the manner described, and it wasn't a listed waste. In fact, because the waste did not exhibit a characteristic of hazardous waste, it wasn't a hazardous waste at all. After more than a year of effort, EPA was persuaded the company made a mistake. That saved the company from being required to pay significant cleanup costs.

The lesson here is that it is extremely important to be accurate in answering EPA's questions. An environmental attorney could have recognized the fine distinctions the company needed to make in responding to EPA, but the company decided to "go it alone."

What happens if you answer an EPA information request and later determine that your answer was not accurate? Should you tell EPA or keep silent? You know the answer, but another example proves that not everyone does.

A well-known company received an information request from EPA asking whether it sent hazardous substances to a site in Troy, Ohio that EPA recently had listed as a Superfund site. Soon after advising EPA that it had not, the company realized its response was inaccurate, but it did not inform EPA for nearly three years. EPA did not look kindly upon this and filed suit to recover penalties. The company settled the case by agreeing to pay $1.2 million. That amount was more than $1,000 for each day the company failed to provide the correct information.

Companies that receive an EPA information request should respond in a timely manner and with care. Accurate information is essential, and the wording of the response should be reviewed by an environmental attorney. The worst thing you can do is treat the request lightly.

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