NEWS

Two Recent Cases Spotlight Ability of Third Parties to Access Facility Information

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Facility owners and operators and property developers need to meet environmental permit or performance criteria, but they also face significant compliance and logistical challenges in just managing and reporting information about their operations, permit compliance and releases of regulated substances. Much of these data are required by agencies to assess compliance and to ascertain risks to human health or the environment. However, agencies are not the only users of this information. Third parties, such as environmental groups, the media and even competitors, typically can access the information because it is part of the public record. That the information may be available to the public is an important factor in gauging the compliance or litigation risks that can arise from meeting seemingly routine reporting obligations.

Two recent, but very different, cases highlight this point. First, in *Environmental Integrity Project v. Environmental Protection Agency*, the United States Circuit Court of Appeals for the District of Columbia ("D.C. Circuit") reviewed EPA's duties under Clean Water Act ("CWA") § 308 and the federal Freedom of Information Act ("FOIA") concerning the disclosure of information provided to EPA by a company pursuant to the CWA. Specifically, environmental groups sought access to certain power plant commercial and financial information that did not meet the definition of "trade secrets" under either statute. CWA § 308 provides basic authority to EPA to require regulated dischargers of wastewater or stormwater to perform monitoring and recordkeeping and report compliance and other information to EPA. It expressly protects trade secrets from disclosure to the public, but appears to offer no such protection to other information gathered by EPA, even if it is potentially sensitive commercial and financial information. On the other hand, the federal FOIA statute excludes from disclosure not only trade secrets, but also certain other commercial and financial information ("Exemption 4"), among other things. The court resolved these conflicting disclosure standards by relying on an APA provision prohibiting any subsequently enacted statute from overriding a provision of the APA (such as Exemption 4) unless the subsequently enacted statute does so expressly. The court held that CWA § 308 was subsequently enacted to Exemption 4, but that it does not expressly override it, so that Exemption 4 controlled in that case. Accordingly, EPA was not obligated under the FOIA or the CWA to disclose the commercial and financial information sought by the environmental groups.

The second case is *Waterkeeper Alliance v. EPA*, a case we reported on in our May 2017 issue. This case involved a challenge by environmental groups to a 2008 rule by EPA that excluded all animal feeding operations ("AFOs") from hazardous substance release reporting obligations and smaller AFOs from reporting releases of extremely hazardous substances to states and localities. The environmental groups prevailed, and the D.C. Circuit recently denied EPA's and the agricultural industry's request for a

rehearing. As we noted in our earlier article, and barring further appeal to and reversal by the U.S. Supreme Court, agricultural operations have lost an important and cost-saving exclusion from those reporting duties. Environmental groups have been pressuring EPA, the states, and AFOs for years for more information concerning specifics of many AFO operations, particularly as to animal waste management. With the loss of this regulatory exclusion, the release reporting required of AFOs will provide these groups and other third parties with much more information about emissions and other types of releases from AFO operations. This opens more AFOs to the risk of citizen suit enforcement.

These cases prompt several considerations related to third party access to information submitted to agencies, namely that the regulated facility or developer should: (1) understand exactly what information is required to be reported, being careful to note differences among federal, state and local requirements; (2) evaluate, seek and preserve available exemptions from agency disclosure of facility and development information; and (3) craft filings, communications, records and reports submitted to an agency (or that can be obtained by an agency in exercising its compliance authority) based on the assumption that the documentation may be accessed at some point by third parties looking for insights into operations and compliance. Environmental laws require transparency as to many aspects of facility operations to assure regulatory and permit compliance, and agencies are compelled under FOIA laws to disclose much of that information to third parties when requested. Following these pointers will help to control what exists in the agency record, protect sensitive business and operational information, and mitigate the risks of disclosure of that record to third parties.

***Environmental Integrity Project v. EPA,* 2017 WL 2324136, No. 16-5109 (D.C. Cir. May 30, 2017); *Waterkeeper Alliance v. Environmental Protection Agency*, 853 F.3d 527 (D.C. Cir. 2017).**

Related People

- Henry R. "Speaker" Pollard, V – 804.420.6537 – hpollard@williamsmullen.com

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