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ENVIRONMENTAL NOTES

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NEW OZONE STANDARD: BETTER THAN IT COULD HAVE BEEN, BUT CREATES UNCERTAINTY FOR INDUSTRY

BY: CHANNING J. MARTIN

EPA has issued a final rule tightening the primary ozone national ambient air quality standard ("NAAQS") down to 70 ppb from the 75 ppb limit established in 2008. The new NAAQS takes effect on December 28, 2015 (despite the many legal challenges already filed). Once that occurs, applicants for New Source Review or Prevention of Significant Deterioration permits must incorporate the new NAAQS into their applications and demonstrate that their projects will not lead to violations of it. The question is how is that to be done? Industry and states look to EPA to supply the necessary implementation rules and guidance on how to make the demonstration, but EPA often lags in issuing that guidance after the new NAAQS takes effect. A number of states and other commenters urged EPA to issue its implementation rule at the same time as the new NAAQS, but that did not happen. So now what?

EPA issued a memorandum on October 1, 2015 that seeks to allay concerns about implementing the new standard. In it, Acting EPA Air Chief Janet McCabe states that EPA will work with states "to carry out the duties of ozone air quality management in a manner that maximizes common sense, flexibility and cost-effectiveness while achieving improved public health expeditiously and abiding by…legal requirements." The memorandum commits EPA to issuing new designation guidance in early 2016, along with other guidance to follow later. It also points out that the new rule contains a "grandfather" provision that excludes complete or near complete permit applications from having to demonstrate compliance with the new NAAQS. Specifically, grandfathering applies to those applications that the reviewing authority formally determined were complete on or before the signature date of the NAAQS (October 1, 2015) or for which the reviewing authority first published a notice of a draft permit or preliminary determination on or before that date.

As for everyone else that has an application in the pipeline, the memo says, "EPA continues to recommend following its existing permitting guidance pending additional guidance specific to ozone and the revised standards." Translation: Work with your state agencies and keep your fingers crossed you get it right.

What about Virginia, North Carolina and South Carolina?

There is reason for optimism that things may not be as bad as they could have been for industry and businesses in these states. Under the rule, states have one year to recommend cities, counties, or portions thereof that should be designated as not attaining the new standard. Thereafter, EPA will finalize nonattainment designations (likely based on 2014-2106 data) in 2017 or early 2018. Once an area is designated as nonattainment, additional emission requirements for new and expanding businesses are required, as well as additional control technology for existing sources.

The good news is that all cities and counties in South Carolina and all but Mecklenburg County (73 ppb) in North Carolina have 2012-2014 Design Values equal to or less than the new standard. While Virginia has made good progress on reducing ozone in Northern Virginia, heavily-congested Fairfax (72 ppb) and Arlington (74 ppb) have 2012-2014 Design Values that exceed 70 ppb. This does not mean these are the *only* localities in these states that are likely to be designated as nonattainment with the new standard. There are a number of localities that are on the borderline and could go either way.

However, given that progress is being made on reducing ozone year-after-year, the odds are in favor of very few areas in these states being designated as nonattainment. That's a win for the environment and for economic growth.

80 Fed. Reg. 65292 (Oct. 26, 2015)

EPA UPDATES UST RULES

BY: CHANNING J. MARTIN

EPA has issued a final rule applicable to new and existing underground storage tanks ("USTs"). The rule is the first significant amendment to EPA's 1988 UST regulations. Here are some of the highlights.

Previously Deferred USTs

USTs that store fuel for emergency generators, were constructed in the field, or are part of an airport fuel hydrant system were previously exempt from some or all of the UST regulations. Under the new rule, owners and operators of USTs that store fuel for emergency generators will no longer be exempt from the requirement to install release detection equipment on their UST systems. In addition, owners and operators of field constructed tanks and airport fuel hydrant systems now must comply with requirements for release detection, response and investigation; closure; financial responsibility; and notification.

Operator Training

The rules add definitions for Class A, B and C Operators. Class A Operators (e.g., management) have primary responsibility for operating the UST system. Class B Operators (e.g., environmental personnel) have day-to-day responsibility for implementing regulations applicable to the UST system. Class C Operators (e.g., store clerks) have initial responsibility for responding to releases from the UST system. The regulation requires owners and operators of USTs to designate at least one Class A and one Class B Operator. Employees who are involved in day-to-day operation and are responsible for taking response actions as a result of spills or releases must be at least Class C Operators. All Operators must receive training, with the level of training varying by Operator class. In addition, owners and operators of USTs must maintain a list of trained employees, the date the employee assumed certain duties, and the dates of training. (As a condition of continuing to receive federal funds for their UST programs, most states already have incorporated these or similar training requirements in their regulations to comply with the Energy Policy Act of 2005.)

New Construction Requirements

With some exceptions, new and replacement USTs and piping must have secondary containment and interstitial monitoring. This requirement also applies to replacement piping if the repair involves at least 50% of the existing piping. All new dispenser systems must have under-dispenser containment.

Inspections

A trained operator must conduct a walk-through inspection every 30 days. The person conducting the inspection must inspect spill prevention and release detection equipment to ensure it is operating properly. Release detection alarms must be tested annually, and spill prevention equipment must be tested every three years. (Previously, these things were not required to be tested.)

When Do I Have to Comply?

UST owners in states that have EPA-authorized programs – including Virginia, North Carolina and South Carolina – are not yet affected and may continue to comply with their respective state regulations. States are required to incorporate the new requirements into their existing UST programs within three years of the rule's October 13, 2015 effective date, although EPA indicated in the rule's preamble that it would give states more time as long as they were making reasonable progress toward incorporating the new requirements. Once a given state's UST regulations are revised and approved by EPA, owners and operators of USTs in that state will be required to meet the new requirements. Owners and operators of USTs in states without authorized programs must comply with the rule now, although many of the compliance dates in the rule are phased-in over time.

80 Fed. Reg. 41566 (July 15, 2015)

CERCLA DIVISIBILITY: TWO STRIKES AND BASES ARE LOADED

BY: JESSICA J. O. KING

Joint and several liability means one defendant can be liable for all of the damages in a case, even where other defendants are at fault. In the CERCLA arena, this means a potentially responsible party can be forced to pay all of the costs to clean up a site, a reality when other defendants are unable to pay, defunct or otherwise unavailable. While CERCLA does not explicitly impose joint and several liability, the courts have traditionally imposed it. However, some federal courts have recently entertained an exception to the rule of joint and several liability where a defendant can establish "divisibility of harm."

Divisibility of harm was brought to the forefront of potential defenses to CERCLA joint and several liability with the 2009 case of *Burlington Northern & Santa Fe Railway Co. v. United States*. In *Burlington Northern*, the United States Supreme Court upheld a lower court's determination of divisibility among CERCLA defendants relying on a two part test: (1) is the harm to the environment capable of division; and (2) is there a reasonable basis to apportion damages among the defendants. In the six years since *Burlington Northern*, federal trial courts across the country entertained the concept of divisibility, but mostly rejected it on the grounds that the defendant had not met its burden of proof. However, *United States v. NCR Corp.* has resuscitated the divisibility defense and become the case to watch.

In *NCR*, EPA sued multiple parties to recover over a billion dollars spent to remediate PCB contamination in the Fox River. Defendant NCR argued that it should not be held jointly and severally liable because the harm was volumetrically divisible. At trial, NCR's expert testified as to the highest percentage of toxicity in the river that could be attributed to NCR's discharges. NCR then argued that a reasonable basis for apportioning damages was to apportion to NCR only the costs associated with remediating this percentage contribution. In 2013, the trial court found the record did not support NCR's attempt to apportion the environmental harm. Strike one.

NCR appealed, and last year, the U.S. Court of Appeals for the Seventh Circuit remanded the case to the trial court to look again. On remand, the trial court reversed its earlier decision and found that NCR had met its burden of proving it was responsible for only 28% of the remediation costs. But this wasn't a home run. EPA and the other defendants filed motions asking the trial court to reconsider. Late last month, it reversed itself yet again, holding that NCR had not met its burden because the evidence on divisibility was unreliable. Strike two. However, as Yogi Berra said, "It ain't over til it's over." On November 2, 2015, NCR requested that the trial court again reconsider its ruling. On November 9, the court did so, but reaffirmed its prior ruling. Strike three. The case now appears to be headed back to the Seventh Circuit.

Notwithstanding the ultimate outcome in the *NCR* case, the Seventh Circuit has opened the door a bit wider to divisibility and apportionment of damages in CERCLA cases. However, based on the current caselaw, the burden is high, and the outcome is unpredictable. Certainly, where multiple contaminants form one continuous release, divisibility will be difficult to prove. However, when the costs are in the millions, it's often worthwhile for a CERCLA defendant to argue that there is a reasonable basis to divide the harm and apportion the costs.

Burlington Northern & Santa Fe Railway Co. v. U.S., 556 U.S. 599 (2009);
U.S. v. NCR Corp., No. 10-C-910 (E.D. Wis. May 15, 2015)

PREVIOUSLY-EXEMPT RETAILERS NOW SUBJECT TO PSM STANDARD

BY: A. KEITH "KIP" MCALISTER, JR.

To help prevent or minimize unexpected releases of highly hazardous chemicals, OSHA requires employers to implement its process safety management (PSM) standard. Under the PSM standard, employers gather information, analyze and evaluate hazards, and develop operating procedures and an emergency management plan. The PSM standard exempts retail facilities from coverage; however, OSHA recently revised its retail interpretation which exposes approximately 3,800 formerly exempt facilities to enforcement. As a result,

many previously exempt facilities, such as anhydrous ammonia dealers, must now comply.

In 1992, OSHA explained that chemicals in retail facilities are generally sold in small packages or containers (i.e., incidental to the sale of merchandise). Over the years, OSHA also issued a series of guidance letters providing even broader applicability to the retail exemption. For example, a facility that derived more than 50 percent of its income from direct sales of highly hazardous chemicals to an end user were considered exempt, even though such facilities may have distributed chemicals in large quantities.

In July, 2015, OSHA rescinded all prior policy documents, stating that "[o]nly facilities, or the portions of facilities, engaged in retail trade as defined by the current and any future updates to sectors 44 and 45 of the NAICS Manual may be afforded the retail exemption at 29 C.F.R. 1910.119(a)(2)(i)." Therefore, employers with PSM-covered processes formerly exempted under OSHA's 1992 interpretation of "retail facility" must now comply with requirements of 29 CFR 1910.119, unless categorized in one of the NAICS sectors above. For a 12 month period, OSHA will exercise enforcement discretion with respect to facilities that previously were considered retailers.

EPA TIGHTENS WASTEWATER DISCHARGE LIMITS FOR POWER PLANTS

BY: RYAN W. TRAIL

EPA recently issued a final rule setting new Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category. According to EPA, while the electric power industry has made significant improvements in recent years toward reducing air pollutant emissions, one result of the technologies employed to reduce air emissions is that many of the pollutants have been transferred to wastewater.

The rule revises existing technology-based effluent limitations and standards for direct and indirect discharges of wastewater to waters of the United States from steam electric power plants. The rule applies to facilities where generation of electricity is the predominant source of revenue and whose electricity is generated primarily by a process utilizing fossil-type fuel (coal, oil, or gas), fuel derived from fossil fuel (*e.g.* petroleum coke, synthesis gas), or nuclear fuel. It establishes new effluent limitations for both existing and new sources of wastewater discharges at power plants and applies to wastestreams associated with flue gas desulfurization, fly ash, bottom ash, flue gas mercury control, and gasification wastewater. New more stringent effluent limits for arsenic, mercury, selenium, and nitrogen apply to flue gas desulfurization wastestreams. Zero discharge standards are set for ash transport water and flue gas mercury control wastewater. Finally, stringent limits are set for arsenic, mercury, selenium, and total dissolved solids in gasification wastewater.

EPA estimates the rule will require approximately 12% of the existing steam electric power plants to make capital investments, with the "economically achievable" national compliance price tag of $480 million. The rule will become effective on January 4, 2016. The direct discharge limitations in the rule apply only after they are incorporated into the facility's NPDES permit. Moreover, the rule allows the permitting authority flexibility to determine when specific limitations must be complied with at the facility, subject to certain outside compliance dates. In all cases, compliance must be achieved no later than December 31, 2023.

80 Fed. Reg. 67838 (November 3, 2015).

EPA ISSUES FINAL MACT FOR BRICK AND STRUCTURAL CLAY PRODUCTS AND CLAY CERAMICS MANUFACTURING

BY: ETHAN R. WARE

Section 112(d) of the Clean Air Act requires EPA to set emission standards for hazardous air pollutants emitted by sources in certain specified source categories and subcategories. EPA recently published final maximum achievable control technology (MACT) requirements for hazardous air emissions from major sources in the Brick and Structural Clay Products (BSCP) and Clay Ceramic Manufacturing (CCM) categories. It did so after the

original BSCP and CCM MACTs were challenged by industry and environmental groups and were ultimately vacated and remanded to EPA by the D.C. Circuit in 2007.

Major provisions of the BSCP MACT include the following:

- Emission limits for mercury (Hg) and non-Hg HAPs
- as surrogates for particulate matter (PM) emissions;
- Health-based emissions limits for hydrogen fluoride,
- hydrogen chloride, and chlorine;
- Work practices for periods of startup, shutdown, malfunction (SSM) and all dioxins/furans emissions at tunnel kilns;
- Less stringent work practice requirements for periodic kilns; and
- Initial and 5 year stack tests with daily visible emission (VE) readings or bag leak detections provisions.

The CCM MACT includes significant new provisions:

- Final limits for Hg, PM, and dioxins/furans for sanitary ware
- tunnel kilns and tile rollers;
- Final dioxins/furans limits for ceramic tile spray dryers;
- Final Hg and PM limits for glaze lines and PM for
- sanitary ware glaze spray booths;
- Work practices during SSM; and
- Initial and 5 year stack tests, daily VE, and "parameter monitoring."

The rule is effective on December 28, 2015, and existing BSCP and CCM facilities must comply with the applicable MACT by December 28, 2018.

80 Fed. Reg. 65470 (Oct. 26, 2015)

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