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WILLIAMS MULLEN
ENVIRONMENTAL NOTES

BIDEN CLIMATE WORK GROUP REVERTS TO OBAMA SOCIAL COSTS OF CARBON

BY: JAY HOLLOWAY

Arguably, the Social Cost of Carbon (SCC) is one of our society's most important numbers. The SCC is used in all climate decisions and will now be considered in all significant governmental decisions and federal actions. How this number will be recalculated is the subject of fierce debate. Politico recently noted that "A high cost of carbon would make it easier for the administration to justify expensive or restrictive regulations as it works to green the economy—spend this money now, because it will cost a lot more later if we don't. Set the price too high and the economy might not react well. It's classic cost-benefit stuff, but big."

The SCC was the foundation of the Obama Administration's Climate Strategy. These values were calculated to attribute global cost and benefits to each ton of CO2 emissions. These costs and benefits drove efforts like the Clean Power Plan that sought to retire all existing coal-fired electric generating units or force installation of costly and potentially technically probative retrofits like carbon capture and sequestration (CCS). The application of SCC is not limited to rulemaking, it can be applied to almost all government decisions and actions.

The calculation of SCC is not straightforward. In 2016, an Interagency Working Group (IWG) on the Social Cost of Greenhouse Gases (GHGs) issued updated guidance incorporating technical analyses recommended by the National Academy of Sciences, Engineering and Medicine. The result of this additional analysis was the recommendation by the IWG that the SCC to be used in regulatory analyses should comprise a range of estimates of the long-term damage done by one ton of CO2 emissions measured in dollars. The analysis also added cost impacts for methane and nitrous oxide, both of which are also GHGs. This update chose not to conduct a near term update to the SCC but instead opted to analyze the characteristics of uncertainty around the SCC impacts over decades and even centuries and incorporate these "enhancements."

The analyses of impacts from methane and nitrous oxide were conducted using the same methodology as the SCC but factored in the finding that a ton of methane has some 25 times the warming potential as a ton of CO2 and nitrous oxide 300 times the warming potential. These were used to calculate the Social Cost of Methane (SCM) and social cost of nitrous oxide (SCN).

One of the first Executive Orders (EO) signed by President Trump suspended the IWG stating that SCC cost calculations were not representative of government policy (EO 13783). Despite this order,

the basic SCC methodology did not really change. The only changes were to calculate the impacts only to the United States and use a higher discount rate (3 and 7 percent rather than 2.5, 3, and 5 percent). Here are the differences in values:

Prior and Current Federal Estimates of the Social Cost of Carbon, per Metric Ton, at a 3 Percent Discount Rate in 2018 U.S. Dollars

YEAR OF EMISSIONS	PRIOR ESTIMATES *(based on global climate change damages)*	CURRENT ESTIMATES *(based on domestic climate change damages)*
2020	$50	$7
2030	$60	$8
2040	$72	$9
2040	$82	$11

Source: GAO analysis of data from the Interagency Working Group on Social Cost of Greenhouse Gases, EPA, and the United States Gross Domestic Product Price Index from the U.S. Department of Commerce, Bureau of Economic Analysis. | GAO-20-254

Consistent with the Obama Administration, the Trump Administration used the revised lower SCC values to drive policy on CO2 emissions like the Affordable Clean Energy rule.

One of the EOs signed by President Biden on Inauguration Day is entitled "Protecting Public Health and Environment and Restoring Science to Tackle Climate Crisis." This EO recreates the IWG on SCC. The members of the new IWG are high level federal agency appointees. This IWG was tasked to publish interim SCC, SCN and SCM within 30 days of the signing of the order (February 19, 2021) and in final by January 1, 2022. The other task of the new IWG is to recommend internal government processes to which the SCC, SCN and SCM should apply.

Instead of publishing new interim SCC, SCN and SCM values on February 19, 2021, the Council of Environmental Quality (CEQ) published a Notice of recission of draft guidance (Notice). The Notice cites a section of the new EO directing CEQ to rescind the Trump Administration SCC guidance and review, revise and update the Obama Administration SCC guidance, and rescinds the Trump Administration guidance. Going forward the CEQ was to address appropriate updates and revisions to the 2016 guidance in a separate notice and review. In the interim agencies should "consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, including, as appropriate and relevant, the 2016 GHG Guidance."

On February 26, 2021, the White House issued interim SCC per the EO. The new SCC are actually the old Obama values in 2020 dollars.

- SCC $51 at a 3% interest rate
- SCM $1,599 at a 3% interest rate
- SCN $18,000 at a 3% interest rate

Far from taking the kind of step forward on the integration of SCC and the costs of GHGs into all government decision making, the Administration merely removes the Trump Administration roadblock, allowing the Obama values to remain in place. The new IWG will now embark on the process of developing final values by January 1, 2022. The Climate lawyers at Williams Mullen will track this effort and all other aspects of developing climate policy, regulations and federal actions very closely and provide real-time updates and analyses.

These companies need your garbage, Politico (February 23, 2021)
Social Cost of Carbon, Government Accountability Office (June 2020)
Strengthening Tools to Account for Damages from Greenhouse Gas Emissions in Regulatory Analysis, Obama White House (August 26, 2016)
Promoting Energy Independence and Economic Growth, Obama EO 13783 (March 28, 2017)
Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Biden EO (January 20, 2021)

SHORELINE PROTECTION: PROPOSED VIRGINIA REGULATORY AMENDMENTS FOR COASTAL RESILIENCY AND CLIMATE CHANGE ADAPTATION WITHIN CHESAPEAKE BAY PRESERVATION AREAS

BY: HENRY R. ("SPEAKER") POLLARD, V

Recent legislation and just proposed regulatory amendments present a new opportunity, but also potential concerns, for implementing climate change resiliency measures on properties subject to Virginia's Chesapeake Bay Preservation Act ("Bay Act"). HB 504 from the 2020 Virginia General Assembly session, *codified at* Va. Code § 62.1-44.15:72.B(vi), amended the Bay Act as of July 1, 2020 to more clearly authorize such measures and local consideration of climate change for development projects subject to the Bay Act and implementing local ordinances. The Virginia State Water Control Board, staffed by the Department of Environmental Quality ("DEQ"), has recently published for public comment proposed amendments ("Proposed Amendments") to the Chesapeake Bay Preservation Area Designation and Management Regulations ("Bay Regulations") to implement HB 504. However, it is unclear how useful the Proposed Amendments will be for property owners who want to install resiliency and adaptation measures on their properties.

First enacted in 1988, the Bay Act imposes restrictions on certain development and land disturbing activities to help reduce sedimentation and nutrient (nitrogen and phosphorous) and other pollutant loads entering the Chesapeake Bay through stormwater runoff and leaky septic systems. Cities and counties located in "Tidewater" Virginia (generally, east of Interstate 95 and within the Chesapeake Bay watershed, and Eastern Shore localities) are subject to the Bay Act. (Some localities within the Chesapeake Bay watershed west of I-95 have voluntarily adopted such ordinances.) The Bay Act requires these localities, based on related regulatory criteria, to develop land use ordinances that restrict development activity to achieve these purposes.

Among other things, the Bay Act restricts development and land disturbing activities within any designated Resource Protection Area ("RPA") and Resource Management Area ("RMA") (collectively, "Preservation Area"), as more particularly defined by the Bay Regulations. RPAs include perennial streams, tidal waters, and wetlands, and a 100-foot buffer along these features. Except for certain fairly narrow exceptions, new or expanded development, structures and land disturbing activities are restricted or prohibited within an RPA. RMAs include other, non-RPA areas of a locality where less onerous restrictions are imposed. Greater flexibility for development exists within RMAs, subject to certain management practices and controls. Although the Bay Act sets certain criteria to be considered when developing local ordinances, the Bay Regulations provide more specific procedures for local program approval.

Localities and property owners within the Tidewater area of the state – especially along Bay watershed rivers, streams, and wetlands – face rising sea levels, increased stormwater flows, and recurrent flooding. Many property owners seek to conduct activities, sometimes necessarily within an RPA, to protect their properties from and otherwise improve resiliency to such trends and events. In addition, Tidewater localities also are looking for ways to address increasing risks posed by such trends and events. However, the restrictions under the Bay Act and the Bay Regulations may hinder or prevent reasonable steps from being taken, even when they would help further the goals of the Bay Act.

To address this conundrum, HB 504 amended the Bay Act to add "coastal resilience and adaptation to sea-level rise and climate change" to the criteria to be considered for local Bay Act implementation programs. The new statutory criteria in turn allow the Bay Regulations to account for greater flexibility for addressing coastal recurrent flooding, sea level rise, and other climate change impacts as part of the implementing local ordinances. To this end, the Proposed Amendments would create a new section of the Bay Regulations (proposed 9VAC25-830-155) to provide for such new criteria and the requirements for localities to incorporate them into their ordinances.

The first key element of the Proposed Amendments authorizes such climate change resiliency measures by property owners. It states that "[l]and development and adaption measures or activities, including buffer modifications or encroachments necessary to install adaptation measures, mitigation measures, or other actions necessary to address the impacts of climate change, including sea-level rise, recurrent flooding, and storm surge, may be allowed in a Chesapeake Bay Preservation area." 9VAC25-830-155.B (proposed). However, such measures generally must still comply with the other requirements applicable to development activities within the Preservations Areas. *Id*.

Specific criteria for incorporating climate change resiliency measures within RPAs are found in proposed 9VAC25-830-155.E. However, all is not what may have been intended. First, localities are authorized, but apparently not required, to allow such measures by property owners: "[l] ocal governments *may* allow adaption measures or activities within the Resource Protection Area to address climate change, including sea-level rise subject to the following criteria." *Id* (emphasis added). When allowed, such projects are subject to special criteria instead of the general performance criteria or those pertaining to development within the RPA. Such special criteria provide for different tiers of protection of Bay water quality that must still be achieved depending on the degree of existing development or vegetation within the RPA on the property, with more flexibility for land disturbance and structural encroachment allowed where the RPA is already developed or has no natural vegetation. For installation of resiliency or adaptation measures in the RPA where there is no existing development and where natural vegetation exists, additional safeguards and limitation apply. 9VAC25-830-155.E.2 (proposed).

Where a living shoreline is proposed as the resiliency or adaptation measure, the Proposed Amendments would offer some additional flexibility. Indeed, a living shoreline project that "maintains or establishes a vegetative buffer inland of the living shoreline to the maximum extent practicable [and] minimizes land disturbance to the maximum extent practicable" would be exempt from other requirements or criteria, including performance of a Water Quality Impact Assessment, beyond those set as part of any approval or permit issued by the locality or the Virginia Marine Resources Commission ("VMRC"). In "town hall" virtual meetings held by DEQ when drafting the Proposed Amendments, DEQ indicated that it may offer such flexibility in recognition of the new living shoreline mandate for shoreline management projects pursuant to other recent legislation, SB776, *codified at* Va. Code § 28.2-104.1.D.

In addition, the proposed amendments clarify that localities may adopt "requirements or criteria in addition to the requirements of these provisions to address the impacts of climate change and sea-level rise in Chesapeake Bay Preservation areas in the locality, including extension of the Resource Protection Areas, further restrictions on development, or further preservation of existing vegetation." So, while one purpose was to allow implementation of climate change resilience measures by property owners, the Proposed Amendments would allow localities to impose even greater restrictions. *Id*.

Furthermore, in proposed 9VAC25-830-155.C, "[l]ocal governments shall consider the impacts of climate change or sea-level rise on any proposed land development in the Resource Protection Area. Based upon this consideration, local governments may require the installation of additional measures or design features as part of the proposed land development consistent with the requirements of the Act and [these regulations]." In doing so, localities must account for various factors and considerations, including: a 30-year planning horizon; modeling consistent with the assumptions of the 2017 National Oceanographic and Atmospheric Administration Intermediate–High scenario projection curve for sea level rise; "future floodplain, water level, storm surge, or other impacts in altering the Resource Protection Area or diminishing the protection of water quality due to the proposed development from these impacts;" and identification of steps and alterations "to address these impacts as necessary and appropriate based upon site conditions, type of proposed land development, and projected potential impacts." *Id*.

Finally, the Proposed Amendments would seem to curtail certain exemptions and exceptions otherwise available for development or land disturbance activities within the RPA, further limiting development or land disturbances in the RPA. This claw-back of exclusions would even seem to restrict proposed climate change resiliency or adaptation projects presumably contemplated in proposed 9VAC25-830-155 that may have otherwise been excluded. Indeed, without greater site-specific considerations and discretion for the locality, this tightening of exclusions may also have the effect of severely limiting options for potential climate change resiliency or adaptation within the RPA. Such foreclosed options could be the most cost-effective, or even the only feasible or affordable, option for a property owner or may otherwise be best suited to limit the impacts of sea level rise.

Whether the Proposed Amendments, as eventually finalized, strike the proper balance between options for property owners to conduct coastal resiliency and climate change adaptation projects and accounting for climate change as part of development projects within Preservation Areas remains to be seen. However, it seems that new opportunities given with one hand are then subject to rather strenuous restrictions that may not reflect site-specific conditions or factors. In that regard, cost-effective solutions for the property owner may be taken off the table even if they would increase resiliency and further protect Bay waters. The potential tension in this regard may also be difficult to overcome, creating an uncertain outcome for a proposed project.

DEQ seeks public comment on the Proposed Amendments until May 3, 2021, and it will hold a virtual stakeholders meeting to gather additional feedback. (The meeting had not been scheduled at the time this article was issued.) Once these public comment procedures have been completed, the final amendments likely will be presented to the State Water Control Board for consideration at the Board's June 2021 meeting.

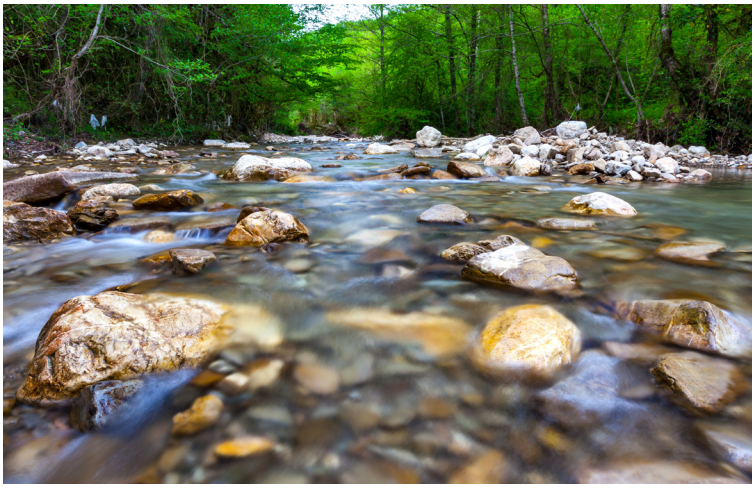
Chesapeake Bay Preservation Area Designation and Management Regulations, 37 Va. Reg. 1209-1211 (February 1, 2021)

CORPS ISSUES NATIONWIDE PERMITS

BY: CHANNING J. MARTIN

The U.S. Army Corps of Engineers published its final rule for the Reissuance and Modification of Nationwide Permits in the waning days of the Trump Administration. The final rule reissues and modifies 12 existing nationwide permits (NWPs) and issues four new NWPs. These 16 NWPs went into effect on March 15, 2021. President Biden's Chief of Staff issued a memorandum to agencies in late January suggesting that they postpone the effective date of any final rule not yet effective for at least 60 days so that other actions could be considered. That did not happen, and the rule is now effective. However, in light of strong opposition to the rule by environmental groups, the final rule still faces headwinds.

Nationwide permits are a streamlined way for the Corps to authorize minimal impacts to wetlands and other Waters of the United States under



Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act. Issuance and reissuance of NWPs normally occurs every five years. The current NWPs will expire March 18, 2022. The Corps issued a proposed rule in September 2020 to reissue all 52 NWPs and to issue five new NWPs. That would have allowed all NWPs to become effective at the same time so they stay on the same five-year review and approval cycle.

The final rule was not what was expected. The 40 NWPs issued in 2017 were left untouched and still have expiration dates of March 22, 2022. The 16 NWPs issued under the final rule have new general conditions and definitions and an expiration date of March 15, 2026. These differences alone will cause confusion. The Corps said the 16 NWPs were issued partly in response to President Trump's Executive Orders on energy independence and promoting American seafood competitiveness, and partly in response to two federal court decisions concerning NWP 12 (utility line activities) and NWP 48 (commercial shellfish maricultural activities).

Among other things, the final rule removes the 300 linear foot stream impact threshold for 10 of the NWPs while retaining the 1/2-acre limit on loss of jurisdictional waters to satisfy the "no more than minimal adverse effects" requirement for NWPs. It also divides the previous NWP 12 – the NWP that has been at the heart of pipeline litigation around the country – into three new permits: NWP 12 for oil and gas pipelines, a new NWP 57 for the construction of electric and telecommunication utility lines, and a new NWP 58 for the construction of water and sewer lines. The Corps said it made this split to account for, among other things, "the differences in how different utility lines projects are constructed [and] the substances they convey…."

With President Biden now in office, environmental groups have taken prompt action. The Center for Biological Diversity, the Sierra Club and others sent the Corps in early February a 60-day notice of intent to sue. The notice alleges that the Corps violated the Endangered Species Act because it failed to conduct formal ESA Section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service before issuing the final rule. We will keep you apprised if litigation ensues.

Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744 (January 13, 2021)
Regulatory Freeze Pending Review (January 20, 2021)
60-day Notice of Intent to Sue (February 8, 2021)

BIDEN DOJ QUICKLY RESCINDS TRUMP ENVIRONMENTAL ENFORCEMENT POLICIES

BY: CARRICK BROOKE-DAVIDSON

Much attention has been devoted to environmental policies of the prior Trump administration that are likely to be reversed or altered by the new Biden administration. *See, e.g., Biden Administration Could Quickly Adopt Many Environmental Enforcement Policy Changes*, Williams Mullen Environmental Notes, January 2021. This prediction has been borne out by a recent memorandum (February 4, 2021) from the Acting Assistant Attorney General of the Environment and Natural Resources Division (ENRD), Jean Williams, withdrawing nine documents relating to environmental enforcement issued by the Trump ENRD.

These withdrawn documents, dating back to January 2018, addressed several issues, but the most significant concerned the use of Supplemental Environmental Projects (SEPs) in settlement of civil environmental enforcement cases. Four of the withdrawn documents addressed SEPs. SEPs are

projects that a defendant agrees to perform that go beyond what is required for compliance with environmental laws and regulations. In return the defendant is given a reduction in penalty based on the cost to perform the SEP.

The Trump ENRD issued a series of policies at first limiting and then entirely prohibiting the use of SEPs in the settlement of civil judicial environmental enforcement cases. This was seen as a significant policy change, as SEPs have been used as a settlement tool under both Democratic and Republican administrations, dating back to the early 1980s. By withdrawing these documents, the Biden DOJ has put projects back on the table as potential components of settlement of environmental enforcement cases.

Another document that was withdrawn concerned the use of mitigation as a remedy. The memorandum states that it is DOJ policy to seek mitigation as a remedy, in appropriate cases, to correct past harm due to environmental violations. This remedy could be imposed in addition to penalties or prospective injunctive relief to correct on-going violations, the typical remedies sought in environmental enforcement cases.

As discussed in the memorandum, the basic principle is that the equitable powers vested in the courts give them the ability to order remedies that are designed to ameliorate past harms, i.e., mitigate the damage already done due to an environmental violation. In doing so the mitigation remedy can legally go beyond what is required to achieve current compliance with an existing law, regulation, or permit, and in this regard looks very much like a Supplemental Environmental Project (SEP), (a project that goes above and beyond that required to achieve compliance in return for a reduced penalty.) Therefore, it is interesting that the Trump DOJ promulgated a policy embracing mitigation, while at the same time prohibiting the use of SEPs in civil environmental enforcement settlements.

The distinction drawn is that SEPs, by reducing the penalty paid in exchange for the SEP project, intrude on Congressional spending authority, while mitigation remedies, which do not necessarily involve such a trade-off, do not. Another important legal distinction is SEPs are entirely creatures of settlements, i.e., SEPs arise out of the agreement of the parties. There is no basis in law for the government to request a SEP project as part of the relief to be unilaterally imposed on a defendant in a judgment handed down by a court. Mitigation, on the other hand, is viewed as an equitable remedy which the government may request and which a court may impose on a defendant, just as it may order penalties to be paid or pollution control equipment to be installed.

The withdrawal of the Trump DOJ mitigation document should not be viewed as a repudiation of mitigation as a remedy, even though it was the first DOJ document to formally embrace mitigation. It should rather be viewed as removing whatever limitations the policy put on the use of mitigation in environmental civil enforcement, so defendants should expect mitigation to be part of the relief sought in environmental civil enforcement cases.

Another significant enforcement policy that was withdrawn concerned limitations on DOJ overfilling, i.e., commencing a federal enforcement case after a state has initiated enforcement of state Clean Water Act enforcement actions. A July 2020 memorandum limited federal overfilling of state enforcement

actions beyond the overfilling limitations already provided in the statute. These policy limitations on federal overfilling are now no longer in effect.

DAAG Williams Memorandum Withdrawing Memoranda and Policy Documents, DOJ, ENRD (February 4, 2021)

EPA ISSUES CLEAN WATER ACT GUIDANCE REGARDING DISCHARGES TO GROUNDWATER

BY: JESSICA J. O. KING

Section 402 of the Clean Water Act (CWA) prohibits the discharge of any pollutant from any point source to navigable waters ("Waters of the United States" or "WOTUS") unless authorized by a permit ("Section 402 NPDES Permits"). EPA recently published a 'Guidance Memorandum' to clarify the applicability of Section 402 NPDES Permits where the discharge occurs through groundwater to WOTUS ("Section 402 Guidance"). However, due to a recent Executive Order from President Biden, it is not clear whether EPA will postpone reliance on the Guidance Memorandum until receiving the green light from the White House.

1. **Biden's Executive Order**

EPA published its Section 402 Guidance in the United States *Federal Register* on January 21, 2021. The Biden Administration issued a memorandum to all federal agency heads one day earlier, on January 20th, putting a "regulatory freeze pending review" on health and environmental rules, regulations and guidance that were still pending. Where a guidance document was sent to the *Federal Register* prior to January 20, 2021, but not yet published, the Biden memorandum directs EPA and other agencies to immediately withdraw it. If a guidance document was already published in the *Federal Register* on January 20, 2021, but "had not yet taken effect", the memorandum directs the agency to "consider" postponing it for 60 days or beyond. EPA did not withdraw the Section 402 Guidance from publication, either because it was too late or by choice. Therefore, it currently remains effective until and unless EPA announces a postponement or withdrawal.

2. **The Maui Seven-Part Functional Equivalent Analysis**

Over the years, there has been disagreement among federal district courts as to whether Congress intended Section 402 NPDES Permits to cover a discharge to groundwater that reaches WOTUS. The Supreme Court was asked to settle the issue and attempted to do so in the *Maui* opinion. The Court did not accept EPA's position that all discharges of pollutants to groundwater are excluded from the NPDES permit program, even where the pollutants are eventually conveyed to WOTUS. However, the Court also rejected the Ninth Circuit's "overly broad" interpretation holding that where pollutants found in WOTUS are "fairly traceable" to a discharge to groundwater, the NPDES permitting program applies.

Instead, the Supreme Court held that Section 402 NPDES permits apply only if the discharge of pollutants to WOTUS via groundwater is "the functional equivalent" of a direct discharge (i.e. through a pipe to the waterway). To make a "functional equivalent" determination, the Court imposed seven factors to be considered: (1) transit time, (2) distance traveled, (3) nature of the material through which the pollutant travels, (4) extent to which the pollutant is diluted or chemically changed as it travels, (5) amount of

pollutant entering the WOTUS, (6) manner by or area in which the pollutant enters navigable waters, and (7) degree to which the pollution (at that point) has maintained its specific identity.

3. **The EPA Section 402 Guidance**

The EPA Section 402 Guidance is short and non-technical and does little to explain how permitting authorities and the regulated community should interpret and use the seven factors in the Functional Equivalent analysis. Rather, the memo explains why the Court's opinion is limited in its application to the Section 402 NPDES Permitting scheme and adds an additional factor to the analysis.

a. **The Functional Equivalent Analysis is not Always Necessary.**

EPA begins the Section 402 Guidance explaining that the Functional Equivalent analysis does not change the overall statutory structure of the Section 402 NPDES permitting scheme. EPA warns regulators not to apply the Functional Equivalent analysis unless they make the threshold determination that there is an actual discharge of pollutants from a point source. Specifically, EPA states that a discharge to groundwater in the vicinity of WOTUS should not be assumed to require a Section 402 permit, stating that the permit program covers "actual discharges—not potential discharges." Second, EPA recommends a strong evaluation of whether the discharge is actually "from a point source" as defined in the CWA. If it is proven through a technical analysis or other evidence that the discharge will not reach WOTUS or that there is no "point source" where the pollutants originate, the review should end prior to a Functional Equivalent analysis. EPA gives spends no time explaining relevant statutory or regulatory history, guidance, circumstances or case law of significance to illuminate what is, or is not, an "actual discharge" versus a potential one, or a "point source" versus another means of discharge, but merely warns that not all circumstances lead to a discharge and not all discharges come from a point source.

b. **The EPA Eighth Factor: Design and Performance**

Where the regulators find there is a discharge of pollutants from a point source that will make it to WOTUS via groundwater, EPA warns that "only a subset" of these discharges are the functional equivalent of a direct discharge. EPA states that, unlike directly discharged pollutants, those discharged to soils and groundwater can change significantly before they make it to WOTUS. EPA suggests that science inform the effect of time, place, and distance traveled and the ways in which pollutant composition or concentration may be materially different as a result of the journey from discharge, to soil, to groundwater, to WOTUS.

Finally, EPA uses its discretion to identify an eighth relevant factor to be considered in making a "functional equivalent" analysis: design and performance of the system or facility from which the pollutant is released. EPA clarifies that the composition and concentration of a pollutants discharged directly from a pipe to WOTUS "differ significantly" from those of pollutants discharged from an engineered system designed to treat, attenuate or retain pollutants (i.e. a wastewater treatment system). Although design and performance will affect the analysis of the other seven factors even without being identified specifically by EPA, EPA adds it in the analysis in an apparent effort to raise its level of importance in the process.

4. **Conclusion**

If the Section 402 Guidance Memorandum remains effective, the regulated community will have to decide whether to model new or existing discharges to prove the absence of an actual or

functionally equivalent discharge of pollutants to WOTUS via groundwater. Decisions will be made on a case-by-case basis, depending on how regulators across the Country and at EPA choose to use and enforce the Guidance Memorandum's directives.

Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program, 86 Fed. Reg. 6321 (January 21, 2021)

NEW DAY AT EPA

BY: ETHAN R. WARE

Since the November presidential election, most trade journals have expressed the same or similar headlines: "The Joe Biden/Kamala Harris administration will elevate enforcement for violation of environmental rules and regulations." This may or may not be true, but there is a simple recipe for protecting industrial plants from increased scrutiny: plan now to perform environmental compliance audits and make the voluntary disclosure decision, if noncompliance is discovered.

Environmental Compliance Audit and Systems

Monitoring environmental compliance can take many forms. Environmental Protection Agency (EPA) policies identify two such programs: routine environmental compliance audits and the environmental compliance management system (CMS). Both require systematic discovery of environmental violations, and both can lead to protection against EPA enforcement.

Routine audits (typically by third parties or roving corporate audit teams) evaluate compliance with key environmental regulations at specific times and dates. To be successful, routine audits require top management support, need to be independent of operations personnel, and must document compliance findings using quality analysis/quality control procedures (51 Fed. Reg. 25009). Easy targets for non-compliance at any facility may include:

- lack of complete records for monitoring bag house pressure ranges and scrubber flow meter readings or untimely stack tests;
- obsolete hazardous waste contingency plans or lack of newly required Quick Reference Guides, open or undated hazardous waste containers, and lack of pictograms for satellite containers; and
- violation of effluent limits for total Kjeldahl nitrogen, biological oxygen demand, chemical oxygen demand, or total suspended solids in the wastewater discharge or, worse, failure to prepare and implement benchmark monitoring and a storm water pollution prevention plan for the facility's storm water runoff

CMSs play a critical role as well. Unlike periodic routine audits, the CMS is an integrated environmental management system that continually reviews and evaluates (daily) environmental compliance metrics. According to EPA, the environmental CMS is designed to "train, motivate, detect, and correct" environmental noncompliance on a day-to-day basis at the plant (65 Fed. Reg. 19621). It necessarily involves a deep dive into compliance through "internal investigations" and requires top-down involvement in environmental compliance decisions. Whatever route a company takes, routine audits or the vigorous CMS will help if the new presidential administration elevates enforcement for environmental non-compliance.

EPA Voluntary Disclosure Policy Requirements

Where routine environmental compliance audits or the environmental CMS discovers environmental noncompliance, the facility must be prepared to act. Failure to respond in a timely manner may lead to knowing or willful violations because there is now a record of the violation.

From 1985 to 2018, EPA developed and refined guidance for facilities discovering unexpected environmental violations, known as the EPA "Incentives for Self-Policing: Discovery, Disclosure, Correction, and Preventions of Violations" ("self-policing policy"). While President Barack Obama's administration declined to recognize the self-

policing policy except in rare circumstances, President Donald Trump's administration dusted the policy off and issued new guidance to "refresh" and expand the program.

Incentives reconstituted by Trump's EPA for self-reporting environmental violations are not inconsequential. The gravity portion of a penalty (as much as $54,000 per day) is eliminated if discovery and reporting of a violation is the result of routine environmental audits or a qualifying CMS, while all other disclosures may reduce gravity fines by 75 percent. In both cases, the audits are protected from use by EPA, and no criminal referrals may follow. Put simply, the stated purpose of the self-policing policy is to encourage regulated entities to "voluntarily discover, promptly disclose, and expediently correct violations" (65 Fed. Reg. 19618).

To fall within the self-policing policy, EPA requires eight elements:

1. Disclosure must be "voluntary" and not the result of permit or regulatory requirements
2. Noncompliance must be reported within 21 days unless there is a "complex circumstance"
3. Discovery must be "independent" of third parties, such as notice by environmentalists or regulators
4. Violations must be corrected and the plant must "remedy any harm" caused by the violations within sixty days
5. Steps to "prevent recurrence" must be taken
6. The violation must not be a repeat of a similar or same violation within three years at that facility
7. Noncompliance must not cause "serious or actual harm" to the public or environment
8. The facility is required to cooperate and implement corrective action

If a company recently purchased a violating facility, the refreshed self-policing policy provides a break on certain provisions. The plant receives up to 45 days to disclose pre-purchase noncompliance, and air permit monitoring and recordkeeping requirements are considered "voluntary" even though they may be listed in the Title V Permit.

E-Disclosure System

All voluntary disclosures must be made electronically (e-disclosure) in accordance with the EPA "central data exchange," or CDX, system. The CDX offers immediate relief for certain violations.

Voluntary disclosure of failure to file annual Emergency Planning and Community Right-to-Know Act (EPCRA) reports are considered Tier I violations and are resolved promptly by the CDX system. Each Tier I report receives an "e-NOD," or electronic Notice of Determination, concluding the matter within just a few days. The facility must correct the EPCRA reports and certify compliance within 60 days. EPA intends to "spot-check" those voluntarily submitting Tier I violations for compliance with EPCRA requirements.

All other voluntarily disclosed non-compliance falls under Tier 2 of the e-disclosure program. Those submitting a Tier 2 e-disclosure receive an automated acknowledgement letter (AL), which is simply a record of receipt committing EPA to make a determination on enforcement within a prescribed time period. The letter may request further information before resolution of the case. The company may request more than 60 days to correct a Tier 2 violation.

Recommended Strategy: Three Step Process

Industry facing uncertain EPA rules and regulations should plan now to avoid a "bet-the-company" enforcement action by a Biden/Harris administration. The tried-and-true EPA self-policing policy may offer an opportunity to manage that risk. Whether it is routine audits or robust CMS, companies should perform internal investigations into environmental compliance within the first quarter 2021.

The following approach will allow facilities to successfully evaluate and disclose environmental violations.

Step 1: Retain counsel to oversee development and implementation of any environmental compliance audit or CMS in order to provide maximum protection from disclosure of the audit results.

Step 2: Evaluate the need for voluntary disclosure of environmental violations promptly after completion of the audit or CMS and timely disclose, thereby managing risks of enforcement.

Step 3: Be certain the voluntary disclosure satisfies all eight elements of the self-policing policy prior to reporting, then follow-through on required corrective measures within the 60-day timeline.

EPA's Audit Policy: Frequently Asked Questions (January 2021)

EPA'S FY 2020 ENVIRONMENTAL ENFORCEMENT REPORT TELLS ANOTHER STORY

BY PIERCE M. WERNER

In a year marked by financial and economic hardship for many businesses and individuals, the United States Environmental Protection Agency is reporting a successful year overall in its enforcement results for fiscal year 2020.

On January 13, 2021, EPA's Office of Enforcement and Compliance Assurance (OECA) published the Annual Enforcement results for FY2020 (the Report). The Report emphasizes multiple areas in which the Agency claims landmark improvements over previous years. These include:

- Commitments to reduce, treat, or eliminate over 426 million pounds of pollution, the most in a single year since 2015;
- Proper treatment, minimization, or disposal of 1.6 billion pounds of hazardous and non-hazardous waste, more than all but two of the past eight years;
- Clean up of 104 million cubic yards of contaminated soil and water, more than in FY 2019;
- Prevention of 18.2 million pounds of air pollutants by preventing, reducing, treating, or eliminating emissions from vehicle and engine air sources through resolution of 31 civil enforcement cases for tampering and aftermarket defeat devices—the most for any one year in the agency's history;
- 247 new criminal cases opened, 77 more than in FY 2019 and the most since 2014; and
- Superfund response and cash-out settlements of over $636 million for cleanup work, $65 million more than FY 2019, as well as $178.4 million for EPA's costs.

Perhaps the most worrying aspect of the Report for regulated industry is the notable increase in criminal cases opened, especially when compared to

relatively low $160 million in total civil enforcement penalties. Some in the industry may interpret this as an Agency shift to criminal over civil enforcement for violations; however, that is not the case. The higher number of criminal cases is the result of the EPA's increased enforcement specifically related to violations of the Federal Insecticide, Fungicide, and Rodenticide Act during the pandemic, not an overall shift in enforcement policy.

When compared to the EPA enforcement during Obama's last year in office (FY2016), EPA during Trump's last year was productive despite the challenges of the year; however, the policy differences are apparent. Obama's EPA claimed, *inter alia*: 324 million pounds of pollution reduced, treated or eliminated, less than Trump's EPA; 61.9 billion pounds of hazardous waste treated, minimized, or properly disposed of, to Trump's 1.6 billion; 191 million cubic yards of soil and contaminated water to be cleaned up to Trump's 104 million; and just over $1 billion in commitments from responsible parties to clean up Superfund sites by Obama's EPA compared to over $636 million for Superfund response and cash-out settlements for cleanup work. Importantly, Obama's EPA claimed $6 billion in combined federal administrative, civil judicial penalties and criminal fines.

In his first days in office, President Biden signed a number of Executive Orders, which implicate EPA. Among these was the Executive Order: "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." The White House published a press release on January 20, 2021, with a list of agency actions that heads of the relevant agencies are to review in accordance with the Executive Order. EPA's list of agency actions for review included 48 actions for review—more than any other Agency. Increased action for EPA will likely mean heightened enforcement will come as well under President Biden.

EPA Enforcement Annual Results FY 2020, U.S. Environmental Protection Agency (January 13, 2021)

CAN YOU RESUSCITATE AN ELDERLY PHASE I?

BY: LIZ WILLIAMSON

As an environmental practitioner, I am often asked to review Phase I environmental site assessments. The majority of Phase Is are prepared by a prospective purchaser or lessee of real property seeking to secure bona fide purchaser protection (BFPP) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The BFPP defense is a carve-out from CERCLA

liability, which otherwise will attach to current landowners and other persons irrespective of fault. As a result, the BFPP defense has significant value to persons seeking to purchase property with a checkered environmental past.

A prospective purchaser must conduct "all appropriate inquiries" regarding environmental conditions of the property to qualify for the BFPP defense. A Phase I assessment legally serves this purpose. ASTM Standard E1527 standardizes the process of evaluating a property's environmental conditions and assessing potential liability for any contamination. As part of these requirements, ASTM E1527 prescribes limits on the age of a qualifying Phase I.

The basic Phase I age rule requires completion of the Phase I within 180 days from the date of the property transaction (typically the closing

or signing of a lease). However, an older Phase I may be rehabilitated as long as the report was prepared no more than one year prior to the date of the transaction. There is an important catch: A prospective purchaser or lessee must update certain portions of the Phase I. Specifically, the following components must be updated to be within 180 days of the transaction:

- Interviews with owners, operators, and occupants;
- Environmental lien search;
- Visual inspection of the property and adjoining properties; and
- Declaration of the environmental professional

In summary, the environmental professional must make another trip to the property, and the lien search, typically performed by a title professional or lawyer, must also be updated. ASTM E1527 is clear that a Phase I that is older than one year cannot be used to satisfy "all appropriate inquiries" for the BFPP defense, although the information contained in it may be useful in subsequent Phase I investigations.

Conspicuously absent from the information to be updated is the User Information regarding knowledge of the property and experience of the User. This can be confusing. Often a party will want to revive a Phase I who did not commission it (i.e., is not the User of the original Phase I). An earlier prospective purchaser, the property owner, or even the updating party's own lender may have commissioned the older Phase I, any of which will be listed as the User. The updating party must be added as a User. In this situation, a reliance letter from the environmental professional will not do. User information must be gathered by the environmental professional and attached to the updated Phase I, typically in the form of an attachment, letter or questionnaire. It is a common pitfall to omit the User information, particularly when one's own lender originally ordered the Phase I for the lender's benefit. To summarize, an elderly Phase I can be resuscitated, with limitations, as long as the select pieces are brought current.

40 CFR § 312.21, Results of inquiry by an environmental professional
ASTM E1527-13, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process

CLOSURE REQUIREMENTS FOR LARGE QUANTITY GENERATORS UNDER THE HAZARDOUS WASTE GENERATOR IMPROVEMENTS RULE

BY: RYAN W. TRAIL

Large quantity generators (LQGs) of hazardous waste who accumulate hazardous waste for no more than 90 days know proper adherence to unit-specific and facility-wide closure requirements is an essential condition for exemption from permitting. For facilities in states where the Hazardous Waste Generator Improvements Rule (HWGIR) has been adopted, closure requirements have changed. These states include South Carolina, North Carolina, Virginia, and 28 others. Changes include more stringent closure requirements for certain types of generators, as well as notification requirements for all LQGs closing individual waste accumulation units or closing the entire facility.

First, EPA identified a loophole in the previous regulations, which allowed LQGs of hazardous waste who accumulated waste in containers only to avoid closure provisions applicable to other generators. A RCRA container is a mobile storage device, whereas a tank is stationary. Previously, if an LQG generated hazardous waste in tanks, drip pads, or containment buildings, they were required to either remove all contaminated soils, groundwater, and equipment ("clean close") or close the units pursuant to the closure performance standards applicable to landfills. LQGs generating hazardous waste solely in containers did not.

EPA identified several Superfund sites whose origin could be traced to this loophole. LQGs with no regulatory closure obligations simply abandoned

RCRA sites, which eventually experienced releases of remaining wastes, resulting in Superfund liability. To avoid this in the future, the HWGIR places LQGs who accumulate hazardous waste in containers on the same regulatory footing as those who accumulate hazardous waste in tanks, drip pads, and containment buildings.

Next, as evidenced by the RCRA facility to Superfund site issue above, EPA saw closure of waste accumulation units or facility closure as a likely point in time for problems to occur. To encourage proper closure oversight and agency involvement, EPA included various notification requirements in the HWGIR for LQGs closing waste accumulation units or an entire facility.

Under the HWGIR, if an LQG is closing a waste accumulation unit, it may either 1) place a written note in the operating record, or 2) comply with closure performance standards applicable to facility-wide closure. An LQG temporarily closing or relocating a waste accumulation unit to another location in the facility may want to avoid the cumbersome standards applicable to facility-wide closure. If so, a written note may be placed in the operating record within thirty (30) days after closure of the unit, specifying where in the facility the unit was located. If the unit is later reopened, the LQG must simply remove the note from the operating record. No notification to the State or EPA is required in this instance.

For LQGs closing an entire facility, notification requirements are a bit more complicated. First, the generator must notify the State, at least 30 days prior to the start of closure, of its intent to close the facility. The notification must be made on EPA Form 8700-12 and must indicate the anticipated date of closure. Within ninety (90) days of the date closure is complete, the LQG must again submit Form 8700-12, this time indicating the date of closure and certifying whether the facility met the closure performance standards.

Although the HWGIR provides a new closure status for certain generators and notification requirements for LQGs, the closure standards themselves remain intact. LQGs must either clean close or close the facility as a landfill. Large Quantity Generators should review the new closure provisions in detail as they look toward any changes in hazardous waste accumulation operations.

Hazardous Waste Generator Improvements Rule, 81 Fed. Reg. 85732 (November 28, 2016)

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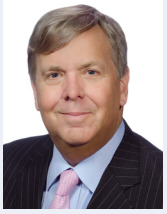

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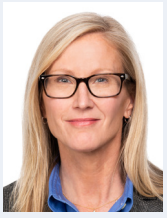

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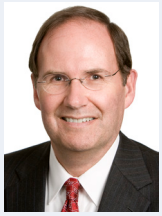

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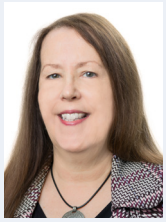

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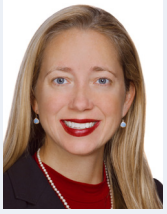

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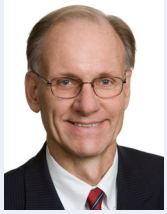

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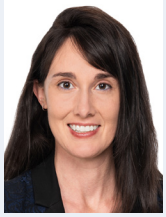

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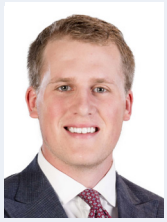

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