

# WILLIAMS MULLEN ENVIRONMENTAL NOTES



## EPA Proposes to Expand TRI Reporting Requirements for PFAS and Other Chemicals of Special Concern

BY: CARRICK BROOKE-DAVIDSON

EPA is proposing to add per- and polyfluoroalkyl substances (“PFAS”) subject to reporting under the Emergency Planning and Community Right-to-Know Act (“EPCRA”) and the Pollution Prevention Act (“PPA”) pursuant to the National Defense Authorization Act for Fiscal Year 2020 (“NDAA”) to the list of Lower Thresholds for Chemicals of Special Concern (“chemicals of special concern”). EPA is also proposing to eliminate the de minimis exemption (as hereafter defined) from supplier notifications for all chemicals of special concern, not just PFAS. EPA published the proposed regulation on December 5, 2022 and is accepting public comment through February 3, 2023.

EPCRA section 313, 42 U.S.C. § 11023 (also known as the Toxics Release Inventory (“TRI”)),

requires certain facilities that manufacture, process, or otherwise use listed toxic chemicals in amounts above reporting threshold levels to report their environmental releases and other waste management quantities of such chemicals annually. These facilities must also report pollution prevention and recycling data for such chemicals, pursuant to PPA section 6607, 42 U.S.C. § 13106. The NDAA expanded the list of chemicals that require reporting under the TRI to include certain PFAS, and the list of PFAS chemicals subject to reporting has increased to approximately 180 compounds for reporting year 2023.

EPA first created the list of chemicals of special concern to increase the utility of TRI data by ensuring that the data collected and shared through TRI are relevant and topical (64 Fed. Reg. 58666, 58668 October 29, 1999). EPA lowered the reporting thresholds for chemicals of special concern because releases of even small quantities of these chemicals can be of concern. The first chemicals that were added to the list of chemicals of special concern were those identified

as persistent, bioaccumulative and toxic (“PBT”) chemicals which, except for the dioxin and dioxin-like compounds category, have reporting thresholds of either 10 or 100 pounds depending on their persistent and bioaccumulative properties (64 Fed. Reg. 58666, October 29, 1999). Chemicals of special concern are also excluded from the de minimis exemption, may not be reported on Form A (as hereafter defined) Alternate Threshold Certification Statement), and have limits on the use of range reporting. The de minimis exemption allows facilities to disregard small concentrations of TRI chemicals not classified as chemicals of special concern in mixtures or other trade name products when making threshold determinations and release and other waste management calculations.

EPA is proposing to add all PFAS included on the TRI pursuant to sections 7321(b) and 7321(c) of the NDAA to the list of chemicals of special concern (40 CFR § 372.28). EPA maintains a [list of PFAS](#) added to the TRI list pursuant to the NDAA. The addition of these PFAS to the list of chemicals of special concern will align reporting requirements for these PFAS with other chemicals of special concern. This will likely result in additional Form R reports being filed for these PFAS due to the removal of the availability of the de minimis exemption and of the option to use Form A. Under the current rules, companies are not required to include in the TRI any chemical in a mixture with a concentration below one percent (the “de minimis exemption”) and companies that handle relatively small amounts of a chemical may file a simplified report (Alternate Threshold Certification Statement) (“Form A”). By reclassifying listed PFAS chemicals as chemicals of special concern, the de minimis exemption and the use of Form A for listed PFAS compounds will no longer be available.

The proposed rule will also limit the use of range reporting, which will capture more specific information for PFAS added pursuant to sections 7321(b) and 7321(c) of the NDAA. Under the current regulations, a company reports the amount of PFAS handled or treated at a location using ranges for

smaller quantities (i.e., 1-10 pounds, 11-499 pounds, or 500-999 pounds). By reclassifying listed PFAS as chemicals of special concern, EPA will eliminate the use of ranges, and companies will need to report to the level of precision supported by the available data. Thresholds for reporting listed PFAS chemicals will not change, however. While chemicals of special concern have lower thresholds for determining if a TRI report is required, PFAS chemicals have a statutory threshold of 100 pounds.

In addition, EPA is proposing to remove the availability of the de minimis exemption under the Supplier Notification Requirements (40 CFR § 372.45) for facilities that manufacture or process any chemicals included on the list of chemicals of special concern. Currently, suppliers do not need to provide information on any chemical, including chemicals of special concern, in a mixture with a concentration below one percent, because of the de minimis exemption discussed above. This elimination will increase reporting for all chemicals of special concern, not just PFAS. In addition, suppliers will need to provide information beyond what they currently include in Safety Data Sheets under Occupational Safety and Health Act requirements.

EPA believes removing the availability of these burden-reduction reporting options will result in a more complete picture of the releases and waste management quantities for these PFAS. In addition, the proposal to remove the availability of the de minimis exemption for purposes of the Supplier Notification Requirements for all chemicals on the list of chemicals of special concern is to help ensure that purchasers of mixtures and trade name products containing such chemicals are informed of their presence in mixtures and products they purchase.

[87 Fed. Reg. 74379 \(December 5, 2022\)](#)



## EPA Adds 12 Chemicals to Annual EPCRA Reporting Requirements

BY: ETHAN R. WARE

In response to a petition filed under the Emergency Planning and Community Right-to-Know Act (“EPCRA”), EPA is adding 12 chemicals to the list of toxic chemicals subject to annual reporting under EPCRA and the Pollution Prevention Act (PPA). 87 Fed. Reg. 73475 (November 30, 2022). The preamble to this final rule states the new toxic chemical listing is the result of an EPA finding that “each of the 12 chemicals meets the EPCRA criteria . . . [and] one chemical should be classified as a persistent, bioaccumulative, and toxic (PBT) chemical and designated as a chemical of special concern with a 100-pound reporting threshold.” *Id.*

### EPCRA Reporting

Section 313 of EPCRA, 42 U.S.C. 11023 (also known as the Toxics Release Inventory (“TRI”), requires owners and operators of certain facilities that manufacture, process, or otherwise use listed toxic chemicals in amounts above reporting threshold levels (25,000 lbs.--manufacturing or processing/10,000 lbs.--otherwise use) to file annual reports with EPA. 40 CFR § 372.25. These facilities also have to report “pollution prevention” and “recycling data” for the covered chemicals under the PPA, 42 U.S.C. §13106. The annual TRI report is due July 1 each year. When the EPCRA program became

effective in 1985, the list of TRI “toxic chemicals” included only 308 individually listed chemicals and 20 chemical categories. 42 U.S.C. § 11023(c).

### Adding Chemicals to the Toxic Chemical List

EPCRA was never intended to establish a static program. Section 313(d)(2) of EPCRA allows EPA to add a chemical to the TRI list when EPA becomes aware a chemical is “known to cause or reasonably can be expected to cause” any of the following health effects:

1. Acute health effects. Significant adverse acute human health effects at concentration levels that are reasonably likely to exist beyond facility site boundaries as a result of continuous or frequently recurring releases;
2. Chronic health effects. Cancer or teratogenic effects or serious or irreversible reproductive dysfunctions, neurological disorders, heritable genetic mutations, or other chronic health effects in humans; or
3. Environmental health effects. Toxicity and persistence in the environment, toxicity and tendency to bioaccumulate in the environment, or significant adverse effect on the environment of sufficient seriousness to warrant reporting under this section at the discretion of EPA.

42 U.S.C. § 1123(d)(2)(A)-(C); 87 Fed. Reg. at 73476.

### New Chemicals Added to the EPCRA TRI Toxic Chemicals List

Using this authority, the Biden EPA expanded the list of covered “toxic chemicals” under EPCRA TRI reporting by 12 chemicals, including one PBT, on November 29, 2022. The newly listed toxic chemicals include the following: Dibutyltin dichloride (CAS 683–18–1); 1,3-Dichloro-2-propanol (CAS 96–23–1); Formamide (CAS

75–12–7); 1,3,4,6,7,8-Hexahydro-4,6,6,7,8,8-hexamethylcyclopenta[g]-2-benzopyran (CAS 1222–05–5); N-Hydroxyethylethylenediamine (CAS 111–41–1); Nitritotriacetic acid trisodium salt (CAS 5064–31–3); p-(1,1,3,3-Tetramethylbutyl)phenol (CAS 140–66–9); 1,2,3-Trichlorobenzene (CAS 87–61–6); Triglycidyl isocyanurate (CAS 2451–62–9); Tris(2-chloroethyl) phosphate (CAS 115–96–8); Tris(1,3-dichloro-2-propyl) phosphate (CAS 13674–87–8); and Tris(dimethylphenol) phosphate (CAS 25155–23–1).

In addition, EPA determined PBT data for 1,3,4,6,7,8-Hexahydro-4,6,6,7,8,8-hexamethylcyclopenta[g]-2-benzopyran (HHCB) support a classification of HHCB as a PBT chemical. “Therefore, consistent with EPA’s established policy for PBT chemicals, EPA is establishing a 100-pound reporting threshold for HHCB and including it under 40 CFR 372.28 Lower thresholds for chemicals of special concern.” 87 Fed. Reg. at 73483.

The petition, which was filed by an environmental organization, originally requested 25 chemicals be added to the toxic chemical list, but EPA declined to include 16 of those included in the petition. Three of the 25 chemicals were added to the TRI list in separate, unrelated actions (1-bromopropane (80 Fed. Reg. 72906, November 23, 2015), nonylphenol (79 Fed. Reg. 58686, September 30, 2014), and 1,2,5,6,9,10-hexabromocyclododecane (81 Fed. Reg. 85440, November 28, 2016). “Of the remaining . . . chemicals, EPA determined that the available data for nine chemicals was not sufficient for EPA to find that the chemicals meet the EPCRA section 313 listing criteria for human health or ecological effects” and another was not currently in use in the United States. 87 Fed. Reg. at 73477. Industry in the United States must consider the 12 new toxic chemicals when evaluating TRI compliance each year going forward.

The final rule does not become effective until January 30, 2023, and, as a result, will apply to the reporting year beginning January 1, 2023. 87 Fed. Reg. at 74477. Consequently, TRI reports for the

newly listed toxic chemicals will first be due July 1, 2024.

## Next Steps for Covered Facilities

Facilities must plan to file annual TRI reports if the facility manufactures, processes, or otherwise uses any of the newly listed chemicals during calendar year 2023 in excess of reporting thresholds. To accomplish this, companies may wish to take the following steps:

**Step No. 1:** Audit chemical inventories and safety data sheets (“SDS”) at manufacturing and import facilities right away for the presence of newly listed TRI toxic chemicals, paying close attention to mixtures, to determine if the lower threshold HHCB or any of the other newly listed toxics are imported, or manufactured, processed, or otherwise used onsite. The attorney-client and attorney work-product privileges may be used to keep information confidential pending a final determination on the inventory at each facility.

**Step No. 2:** If not done already, add those toxic chemicals newly listed by EPA to each facility’s chemical inventory and recordkeeping requirements. This data will be critical in determining if reporting thresholds are exceeded in 2023 and beyond, especially for low threshold chemicals like HHCB; and

**Step No. 3:** Evaluate exemptions and the proper category for each newly listed toxic chemical (manufacture, process, and otherwise use) before filing a TRI form for one of the new chemicals in 2024.

[87 Fed. Reg. 73475 \(November 30, 2022\)](#)

## Environmental Justice 2.0

BY JESSICA J. O. KING

Environmental Justice (“EJ”) is defined by EPA as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” Over the last few months, the Biden administration expanded its EJ program in numerous ways that cut across many areas of environmental policy and programs. Such expansions include the release of a new version of the EPA EJ screening and mapping tool to be used in permitting and enforcement activities, the issuance of a newly updated EJ Action Plan by EPA’s Office of Land and Emergency Management (“OLEM”) to elevate EJ considerations in Superfund cleanups, hazardous waste sites, and Brownfields redevelopment decisions, and the current and future issuance of large grants aimed at protecting and empowering EJ communities. These new actions support the government’s expectation that EJ become a permanent and powerful part of environmental policy considerations and priorities related to monitoring, permitting, cleanup, and enforcement decisions and allocation of federal resources.

### EJ Screen

In support of its “fair treatment” mission, the agency continues to develop and improve its screening tools, including the newly released EJ Screen 2.0 available on the EPA website. EJ Screen 2.0 allows regulators and community members to search an address or geographic area to see how that area ranks state or nationwide percentage wise for certain environmental considerations, and demographic information such as socioeconomic indicators, health disparities, climate change indicators and service gaps. Here is a breakdown of each of these categories:

- > Environmental considerations: PM2.5, diesel particulate matter, ozone, lead paint, air toxics

cancer risks and respiratory hazard index, traffic proximity and volume, wastewater discharges, and proximity to underground storage tanks (“USTs”) and leaking USTs, Superfund and hazardous waste sites, and facilities with risk management plans for chemical accidents;

- > Socioeconomic indicators: people of color, low income, high unemployment rates, limited English speaking, less than high school education, and age (under 5 or over 64);
- > Health disparities: Heart disease, asthma;
- > Climate change indicators: flooding, drought, rising sea levels, and wildfire risks; and
- > Service gaps: lack of broadband internet, food, and medical care.

By looking at how an area ranks in the above indicators, EPA and state regulators will decide whether to issue a new permit or expand an existing one, undertake inspections and commence enforcement, demand cleanups and choose remedies, and issue grants for air monitors or Brownfields redevelopment.

### Updated EJ Action Plan

EPA is also promoting what it considers “fair treatment,” by issuing a newly updated EJ Action Plan when dealing with releases to land. The plan states four main goals:

1. Strengthening compliance and developing a “Good Governance” process and referral list to help address follow-up actions on communities’ environmental concerns.
2. Incorporating environmental justice considerations when developing Office of Land and Emergency Management regulations, and creating tools to identify, track, and consider the implications of potential environmental justice-related factors throughout the Superfund process.
3. Improving community engagement in

rulemakings, permitting decisions, and policies and increasing technical support and risk communication resources for communities through programs and grants.

4. Implementing President Biden’s Justice40 Initiative by providing grants to underserved communities.

Entities dealing with future superfund and RCRA hazardous waste cleanups should expect to see much more scrutiny on the level of cleanup and the time frame to perform such cleanup, as well as resources being given to communities to monitor for themselves constituents of concern in air, water, and land.

### Millions of Dollars in Grants

Finally, the Federal government has allocated \$13 billion dollars towards environmental justice and climate change in the Federal Inflation Reduction Act (“FIR”) Act. This is in addition to the \$50 million for environmental justice and \$50 million for air quality awarded under the American Rescue Plan (“ARP”) Act in 2021. EPA’s website states the \$50 million in ARP funding is allocated as follows toward EJ issues:

### EJ ARP Funding

EJ Grants	\$16.65 Million
DERA	\$7 Million
Enforcement	\$5.13 Million
Brownfields	\$5 Million
Children’s Health	\$4.85 Million
Drinking Water	\$4.70 Million
Community Tech. Assist.	\$2.15 Million
Tribal Engagement Efforts	\$1.6 Million
Administrative Costs	\$1 Million
EJSCREEN	\$0.72 Million
EJ Analytical Projects	\$0.70 Million
Policy Outreach	\$0.5 Million

[Environmental Justice Funding under the ARP | US EPA](#)



Specifically, EPA has recently announced that it will use \$50 million from both the FIR Act and the ARP Act for air monitoring equipment in 132 marginalized communities in 37 states. The following lists a few of the grant recipients located in EPA Regions 3 and 4: Charleston Community Research Action Board (SC), Clean Air Carolina (NC), Blue Ridge Environmental Defense League (NC, GA, TN, SC, VA), Center for Sustainable Communities and Environmental Community Action, Inc. (GA), The Enterprise Center, Inc. (TN), Upper Mattaponi Indian Tribe (VA), Appalachian Voices (KY, PA, TN, VA, WV), National Coalition of 100 Black Women (FL), Southern Research Institute (AL), Community Housing and Empowerment Connections, Inc. (DE), Socially Responsible Agricultural Project (MD, DE), and FracTracker Alliance (PA, OH, WV).

Lastly, in support of its “meaningful involvement” goals, EPA is reaching out to receive public input on how to use some of the \$50 million dollars issued under the FIR Act. On October 31, 2022, EPA reached out via email and announced the White House Environmental Justice Advisory Council (“WHEJAC”) held public meetings on November 30 and December 1, 2022. Those who could not attend can still submit public comments on recommendations on how the WHEJAC should be advising the Council on Environmental Quality to spend money earmarked for EJ programs.

## Conclusion

The federal government is not only stressing environmental justice considerations in current and future permitting and enforcement decisions but is also funding research and data gathering by action groups and non-profits around the country relating to air emissions, water discharges, and other environmental data. Stay tuned to see how this information is gathered and used and how EPA begins to work environmental justice into other policies and programs using new rulemaking and guidance.

### EPA Environmental Justice

EPA OLEM EJ Action Plan, Building Up Environmental Justice in EPA's Land Protections and Cleanup Programs, EPA 502-P-21-001 (September, 2022)

## CERCLA Release Reporting Exemption for Federally Permitted Releases

BY: RYAN W. TRAIL

Seasoned environmental professionals are well-acquainted with the typical hazardous substance release reporting analysis under CERCLA; where a reportable quantity of a hazardous substance is released into the environment within a 24 hour period, CERCLA section 103 requires a person in charge, upon gaining knowledge of the release, to report it immediately to the National Response Center. CERCLA enforcement actions for failure to timely report releases are common and costly. However, when facing potential release reporting obligations,



it is important for environmental professionals not to overlook the broad, but often misconstrued, exemption from CERCLA section 103 reporting for releases that are considered "federally permitted."

An otherwise reportable release that is considered a "federally permitted release" is exempt from section 103 reporting. CERCLA defines "federally permitted release" to include "discharges in compliance with a permit" under the Clean Water Act, "releases in compliance with a legally enforceable final permit" under RCRA, "any injection of fluids authorized under" the Safe Drinking Water Act, "any release ... in compliance with a legally enforceable license, permit, regulation, or order" under the Atomic Energy Act, or "any emission into the air subject to a permit or control regulation under" the Clean Air Act. For many years, EPA's interpretation of this definition has confused industry and environmental professionals.

First, EPA guidance states the agency's position is the exemption applies even where the total amount of hazardous substance released exceeds the reportable quantity ("RQ") for that substance, but the amount released in excess of the permitted limit does not exceed the RQ. For example, where an NPDES permit contains an effluent limitation of 1.0 lb. for ABC chemical and the RQ for ABC is 1.5 lb., a release of 2.0 lbs. of ABC into the environment would be considered a "federally permitted release" and exempt from CERCLA reporting. Although the total amount of ABC released exceed the RQ of 1.5 lb., because the amount of ABC released in excess of the permit limit was only 0.5 lb., EPA guidance suggests the

release is not reportable. Considering such a release “in compliance with” the NPDES permit and thereby an exempt “federally permitted release” allows the NRC to avoid numerous, unnecessary reports of small permit excursions, which are better addressed by the permitting authority.

In addition, historic EPA guidance suggests there is essentially no difference between the phrases “in compliance with” and “subject to” in the statutory definition, stating CERCLA “generally limits the federally permitted release exemption to those release[s] ‘in compliance with’ permitted regulatory requirements.” For many years, EPA’s practice was to ignore CERCLA’s clear distinction between CWA/RCRA (“in compliance with”) releases and Clean Air Act (“subject to”) releases. EPA’s justification for this interpretation was that to hold otherwise would render virtually all air emissions, including dangerous episodic releases, exempt from CERCLA reporting.

Some clarity was gained in 2021, when the U.S. Court of Appeals for the Third Circuit considered a challenge to the above interpretation. The case ([Clean Air Council v. United States Steel Corp.](#), 4 F.4th 204 (3d Cir. 2021)) involved a U.S. Steel facility, which experienced two fires, resulting in the shutdown of certain air quality control equipment and subsequent releases of hydrogen sulfide in excess of permitted limits. The facility reported these releases to the County health department as required by its CAA permit, but did not report the releases to the NRC. The Clean Air Council sued, claiming the releases were not “subject to” the CAA Permit because they violated permit limits, and were therefore not exempt federally permitted releases. The case hinged on the meaning of the phrase “subject to.” The court stated in context, “subject to” cannot mean “obedient to” as suggested by CAC. The only paragraph in the definition of “federally permitted release” that uses the phrase “subject to” is the paragraph addressing CAA releases. The court reasoned, “[w]hen Congress uses a particular phrase in one section of

a law but not in another section of the same law, we presume that it included it in one place and excluded it from the other intentionally.” The court further noted there are several other examples in the CAA and CERCLA where Congress used both phrases (“in compliance with” and “subject to”) in the same provision, and to attribute the same meaning to both phrases would render such provisions redundant or meaningless. Ultimately, the court held the term “subject to” means “governed or affected by.” Releases of hazardous substances into the air in excess of an RQ above permitted limits are still considered “federally permitted” and exempt from CERCLA reporting because they are still “subject to” or are still “governed by” the permit.

Although the precedential value of the *U.S. Steel* decision is limited to the Third Circuit, the case is significant in that it reverses more than 30 years of EPA policy on the issue of federally permitted releases. The decision may also serve as a catalyst for EPA to revisit its guidance on this useful, but often overlooked, exemption from CERCLA reporting requirements.

[Clean Air Council v. United States Steel Corp.](#), 4 F.4th 204 (3d Cir. 2021)

## 4th Circuit Narrows Protections from CWA Citizen Suits

BY PIERCE M. WERNER

By majority decision in *Naturaland Trust v. Dakota Finance, LLC*, the United States Court of Appeals for the Fourth Circuit struck a blow against one of the affirmative defenses a company may use to defend against citizen suits brought under the Clean Water Act (“CWA”).

The CWA allows affected private parties, including citizens groups, to file civil actions in federal





court (“citizen suits”) against violators of the law (*i.e.* polluters of jurisdictional waters) if certain procedural requirements are met. Chief among these procedural requirements, the affected person must give 60-days’ notice to agencies and the alleged violator of its intent to sue. The affected person may file the citizen suit against the alleged polluter after the 60-day notice period elapses; however, the citizen suit is barred if, by the end of the 60 days, either (1) “a State has commenced and is diligently prosecuting an action” through an administrative process for penalties for that same alleged violation; or (2) a State or the EPA is diligently prosecuting a civil or criminal case in court.

The Fourth Circuit in *Naturaland Trust*—by a 2-1 majority—held the preliminary and early enforcement processes and procedures of the South Carolina Department of Health and Environmental Control (“DHEC”), as many understand them, do not constitute the ‘commencing of an action’ for purposes of barring a citizen suit. Specifically, the Fourth Circuit held a “Notice of Alleged Violation/ Notice of Enforcement Conference” (“NOV”) issued by DHEC did not sufficiently ‘commence the action,’ thus overturning the decision of the South Carolina District Court dismissing the citizen suit as barred. The Court’s primary analysis centered around the perceived informality of the NOV, focusing on the lack of public notice and other differences between DHEC’s NOV procedure and actions “brought under federal law.”

Of course, some facts will help here. The Defendants conduct business as Arabella Farm (“Arabella”), and, in 2017, Arabella began clearing around 20 acres of land on its property bordering three bodies of water in South Carolina’s Jocassee Gorges area. Arabella did not obtain any CWA stormwater permits for the land disturbance activity, or install sediment or stormwater control measures, because it believed it fell within an agricultural exemption. The land disturbance activity allegedly resulted in significant stormwater discharges from the property resulting in both erosion and sedimentation for nearby waters and property. Following DHEC National Pollutant Discharge Elimination System (“NPDES”) compliance inspections in April 2019, DHEC notified Arabella it was required to cease and desist all activities on the site and obtain an NPDES Permit. DHEC issued an NOV to Arabella in September 2019, and the Plaintiffs, Naturaland Trust and SC Trout Unlimited, as affected conservation citizens groups, sent their Notice of Intent to Sue under the CWA to Arabella in November 2019. Subsequently the groups filed their citizen suit after the 60-day notice period elapsed, seeking an injunction and civil penalties to be paid to the United States under federal law and injunctive relief and damages under state law. DHEC and Arabella entered into a consent order a month later which imposed \$6,000 in civil penalties and required Arabella to obtain an NPDES Permit, prepare various plans, conduct an assessment study, and implement recommended remedial activities following the conclusion of the study.

The implications are significant. In effect, those with potential administrative enforcement actions looming or pending, be it from DHEC or any other state agency with similar enforcement procedures, may not be protected from a citizen suit until issuance of a consent order or unilateral administrative order—which is generally one of the last stages in the enforcement process from a defendant’s perspective. At a minimum, the issuance of an NOV or comparable notification from a state agency may not be sufficient to constitute

the commencement of an action, as defined in the CWA, to bar a citizen suit. Compounding the potential implications, the Clean Air Act, the Safe Drinking Water Act, the Endangered Species Act, the Surface Mining Control and Reclamation Act, and the Resource Conservation and Recovery Act all have similar citizen suit provisions to the CWA. While the Court's decision is only binding law in courts within the Fourth Circuit, there is a similar trend among other circuits toward being more permissive of citizen suits, and, in fact, the Fourth Circuit cites similar holdings in both the Seventh and Eighth Circuits.

*Naturaland Tr. v. Dakota Fin.*, 41 F.4th 342 (4th Cir. 2022)

## EPA Proposed Rule: Fugitive Emissions Count Toward PSD Significant Emissions Increase Thresholds

BY: ETHAN R. WARE

EPA is proposing revisions to the new source review ("NSR") permit program ("2022 Proposed Fugitive Emissions Rule") under the federal Clean Air Act ("CAA"), which will codify the requirement that modifications account for fugitive air emissions when determining the need for an NSR permit due a significant emissions rate ("SER") increase of certain air pollutants. The public comment period for the rulemaking closed December 13, 2022.

### New Source Review Program

NSR is the federal air permit program reserved for "major sources" of certain regulated air

pollutants. (While mandated by the federal CAA, most NSR permits are issued by the states under authority delegated by EPA.) Where an area is in attainment for all applicable national ambient air quality control standards ("NAAQS"), new construction projects are required to obtain a prevention of significant deterioration ("PSD") permit if the project qualifies as a "major source" emitting 250 tons per year ("TPY") of designated regulated pollutants; twenty eight listed industrial classifications (like chemical manufacturing, fossil fuel fired electrical plants, and Portland cement facilities) trigger PSD permitting at 100 TPY. New construction in an area not attaining NAAQS levels requires a "nonattainment new source review" ("NNSR") permit if it has the potential to emit at least 100 TPY.

Regardless of the attainment status, an existing "major source" will trigger PSD or NSR permitting where any physical change or modification will result in a SER increase of sulfur dioxides, carbon monoxide, particulate matter (10 and/or 2.5 microns), nitrogen oxides, volatile organic compounds ("VOCs"), as well as other regulated pollutants. The emissions potential sufficient to be considered "significant" differs depending on the pollutant. For example, the SER for VOC is 40 TPY but only 10 TPY for PM 10. A change resulting in a significant SER increase is considered a "major modification."

Compliance with requirements for these major source permits can be expensive. PSD sources must install best available control technology ("BACT") for that type of source (considering energy use,



environmental impacts, and costs), while NNSR sources are required to install controls that meet the lowest achievable emissions rate (“LAER”) regardless of cost.

### 2008 Fugitives Emissions Exemption

Under current regulations, fugitive emissions are only counted toward the major source threshold where a new source is planned or an existing major source falls into a set of fugitive heavy emitters. Fugitive emissions are emissions of air pollutants that could not reasonably pass through a stack or vent. In contrast, fugitive emissions have been required for most of the duration of the PSD program to be counted towards the determination of whether a modification was major as result of a SER increase. In 2008, however, EPA adopted a rule that modifications were not required to include fugitive emissions in the SER increase evaluation (“2008 Fugitive Emissions Exemption”). The 2008 Fugitive Emissions Exemption became effective on January 20, 2009, but, due to a series of stays issued by EPA, the Fugitive Emissions Rule only briefly took effect between January 20, 2009, and September 30, 2009. Since late 2009, the regulations that predated the 2008 Fugitive Emissions Rule have been the operative regulations governing the treatment of fugitive emissions in the major modification context.

### 2022 Proposed Fugitive Emissions Rule

After reevaluating the legal and policy bases of the 2008 Fugitive Emissions Exemption, “EPA no longer considers that rule’s treatment of fugitive emissions in the context of major modifications to be appropriate.” 87 Fed. Reg. at 62327. Therefore, EPA has decided to codify the effect of the stay of the 2008 Exemption and is now proposing all major modifications consider fugitive emissions as part of the SER increase evaluation under the 2022 Proposed Fugitive Emissions Rule.

The approach adopted now by EPA is simply to delete references to the 2008 Fugitive Emissions

Exemption throughout the NSR permitting regulations: “The EPA proposes to restore its longest-standing interpretation that CAA section 111(a)(4) requires that all major sources consider increases in all types of emissions (including fugitive emissions) in determining whether a proposed change would constitute a major modification. 87 Fed. Reg. at 62332. The EPA seeks comment on whether this interpretation supports repealing the 2008 Fugitive Emissions Rule, as well as removing the similar “major solely due to the inclusion of fugitive emissions” exemption first established in 1980.” *Id.*

The EPA preamble provides the policy reasons for the change. First, EPA states “[t]hrough this proposal, the EPA seeks to realign its NSR regulations to better reflect the purpose of the NSR program and to end the regulatory uncertainty that has surrounded the EPA’s treatment of fugitive emissions in the major modification context over the past four decades,” *Id.* EPA points out in the preamble that the Fugitive Emissions Rule represented a significant shift in the EPA’s treatment of fugitive emissions and, as noted, had only been effective for a relatively brief period of time before the rule was stayed and the prior regulatory approach reimplemented.

Second, EPA argues the plain language of the Clean Air Act, legislative history, and case law involving these provisions supports requiring all existing major sources include fugitive emissions when determining whether a modification at the source requires a major PSD or NNSR permit. *Id.* Caselaw encourages EPA to apply the plain reading of any statute when drafting regulations (including those governing major modifications under the Clean Air Act), the approach in the proposed regulation is consistent with the Agency’s prior plain reading of the statute. In 1984, EPA concluded that “the plain language of the [CAA] strongly suggests that Congress did not intend the rulemaking requirement in section 302(j) [requiring sources to be identified in rulemaking for fugitive emissions to be included in the calculation of a

major source] to apply to [major] modifications.” 49 Fed. Reg. 43211, 43213 (October 26, 1984). It concluded passages in the relevant House and conference reports that focus on the rulemaking requirement “refer only to major sources, and not to major modifications of these sources. Id (citing H.R. Report No. 95–294, 95th Cong., 1st Sess. 4, 9, 144 (1977); H.S. Rep. No. 95–564, 95th Cong., 1st Sess. 172 (1977).

**Conclusion**

Existing sources planning modifications may be affected by the 2022 Proposed Fugitive Emissions Rule, but, given the fact that the 2008 rule has been stayed since 2009, EPA expects the new rule to have a limited impact.

87 Fed. Reg. 62322 (October 14, 2022)

Williams Mullen is pleased to announce that Carrick Brooke-Davidson has relocated from its office in Richmond, VA, to Raleigh, NC, where he will expand the capabilities and client services of the Environment & Natural Resources practice group in North Carolina.

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