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NEW APPROACH: PROPOSED PFAS REGULATION ERODES TSCA EXEMPTIONS

BY: ETHAN WARE

EPA's proposed reporting and recordkeeping requirements for Per- and Polyfluoroalkyl Substances (PFAS) under the Toxic Substances Control Act (TSCA) may be notable for what they do not do. In particular, the proposal does not recognize certain traditional exemptions to TSCA reporting.

Scope of Reporting

The proposed new regulation would require persons that manufacture (including import) or have manufactured PFAS substances in any year since January 1, 2011, to electronically report information regarding PFAS uses, production volumes, disposal, exposures, and hazards. EPA estimates there are 1,364 PFAS compounds that may be potentially covered by the proposed regulation as of April 2021, 669 of which are on the active Inventory (*i.e.*, in U.S. commerce).

If a company does import or manufacture PFAS substances, the following PFAS data would have to be reported to EPA shortly after the regulation becomes final:

A. The covered common or trade name, chemical identity and molecular structure of each chemical substance or mixture;
B. Categories or proposed categories of use for each substance or mixture;
C. Total amount of each substance or mixture manufactured or processed, the amounts manufactured or processed for each category of use, and reasonable estimates of the respective proposed amounts;
D. Descriptions of byproducts resulting from the manufacture, processing, use, or disposal of each substance or mixture;
E. All existing information concerning the environmental and health effects of each substance or mixture;
F. The number of individuals exposed, and reasonable estimates on the number of individuals who will be exposed, to each substance or mixture in their places of work and the duration of their exposure; and
G. The manner or method of disposal of each substance or mixture, and any change in such manner or method.

Potential Exemptions Narrowed

The proposal continues one key exemption to TSCA reporting. Data on imported or manufactured materials excluded from the definition of "chemical substance" in TSCA section 3(2)(B) will not have to be reported. "Those exclusions include, but are not limited to: any pesticide (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act) when manufactured, processed, or distributed in commerce for use as a pesticide; any food, food additive, drug, cosmetic, or device, as defined by the Federal Food, Drug, and Cosmetic Act, when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic or device; tobacco or any tobacco product; any source material, special nuclear material, or byproduct material as such terms are defined in the Atomic Energy Act of 1954; and, any article the sale of which is subject to the tax imposed by Section 4181 of the Internal Revenue Code of 1954. Substances which have been manufactured or imported for intended use as any food, food additive, drug, cosmetic, or device,

regulated by the Food and Drug Administration, are not chemical substances under TSCA." **86 Fed. Reg. 33927**.

Other TSCA exemptions would not apply if the regulation is adopted as proposed. The exemption for "articles" which had been included in previous EPA reporting regulations under TSCA is not included in this proposed regulation. The import of a chemical substance "as part of an article" is not subject to existing Chemical Data Reporting (CDR) requirements for that chemical substance. See 40 CFR § 711.10(b). Chemical substances are considered to be imported "as part of an article" if the substance or mixture is not intended to be removed from that article and has no end use or commercial purposes separate from the article of which it is a part.

The rationale for including information on articles raises concerns about the impact of the proposed regulation:

> For the purposes of this proposed rule, articles containing PFAS, including imported articles containing PFAS (such as articles containing PFAS as part of surface coatings), are included in the scope of reportable chemical substances. TSCA does not define articles, nor does the statute define articles as a category of substances exclusive of chemical substances. EPA therefore considers its ability to regulate chemical substances to encompass authority to regulate articles containing such chemical substances. Additionally, the Agency would benefit from collecting the requested information on PFAS-containing articles (including articles containing PFAS as part of surface coatings) because the information would improve the Agency's knowledge of various products which may contain PFAS, their categories of use, production volumes, and exposure data. Such data are not currently known to EPA. However, EPA acknowledges that some article manufacturers, including article importers, may not have such information known to or reasonably ascertainable by them and may not meet the reporting standard as described in Unit II.C. To this end, information that helps EPA better understand data gaps is useful information for EPA to have. Therefore, articles are within the scope of reportable substances under this proposed rule, though EPA is requesting comments on whether imported articles containing PFAS should be within scope (see Unit IV.1).

86 Fed. Reg. 33930 (emphasis added). As a result, components on equipment imports will have to be included in the data filed at EPA, if equipment coatings or compounds include PFAS.

Facilities manufacturing or importing PFAS compounds as a byproduct do not get to apply the byproducts exemption and are also covered by the proposal. Under TSCA, "byproduct" is defined as "any chemical substance or mixture produced without a separate commercial intent during the manufacture, processing, use, or disposal of another chemical substance or mixture." 40 CFR 712.3(a).

Likewise, TSCA does not carry forward an exemption for "small manufacturers and processors" in the proposal. Virtually any size company involved in the manufacture or import of PFAS compounds would be covered. TSCA Section 8(a)(7).

These changes may increase the universe of covered chemicals by 400% according to some. This reduces the scope of TSCA exclusions recognized for decades.

Reporting Deadline

The proposed regulation would require covered manufacturers and importers to file required PFAS data electronically at EPA "during a six-month submission period, which would begin six months following the effective date of the final rule." Id. Therefore, reporting would be required within one year following the effective date of the final regulation.

This short turn around is based on EPA's anticipation that most operations are now subject to CDR for PFAS. "Since this section 8(a)(7) reporting rule will be collecting similar information

as CDR, EPA anticipates many reporters will be familiar with the types of information requested and how to report. * * * * Since this proposed rule spans a longer time than the four-year CDR reporting cycle, EPA acknowledges additional time may be needed in the PFAS submission period." Id.

Health Effects Information

It is also important to understand the information EPA is requesting. The proposal would require "all existing information concerning the environmental and health effects" of the PFAS chemicals covered by the proposed rule. **86 Fed. Reg. 33928**. It is intended this required information include but is not limited to:

- "Toxicity information (e.g., in silico, in vitro, animal test results, human data);" and
- "Other data relevant to environmental and health effects including range-finding studies, preliminary studies, OSHA medical screening or surveillance standards reports, adverse effects reports."

86 Fed. Reg. 33931.

Potential Changes

A good way to anticipate how a regulation may change when it is finally promulgated is to review the areas for which EPA is seeking definitive public comment. Among others, the areas include the following issues:

1. Refining the list of PFAS substances subject to reporting.
2. Considerations for the Agency's economic analysis.
3. Timing of the Submission period.
4. Scope of environmental and health effects information collected.
5. Additional information or data elements to be reported.
6. Lack of a small manufacturer exemption.

Conclusion and Recommended Action

The Biden EPA is not likely to moderate the proposed PFAS regulation. It will require industry to review purchasing and processing records over the past ten years and submit data on PFAS chemicals imported or manufactured at United States facilities, even if the PFAS are incorporated into articles for sale in commerce.

Facilities may wish to get a head start on the proposed regulation. This can be done by following a simple 3 step program:

- Step No. 1: Perform a chemical inventory on all chemical substances (including articles) manufactured or imported from 2011 to the present, collecting anecdotal information, material data safety sheets (MSDS), and safety data sheets (SDS) for each;
- Step No. 2: From the chemical inventory, identify any chemical substances within the PFAS chain from the MSDS or SDS or manufacturing data; and
- Step No. 3: Prepare a summary of the data required by the new proposal in anticipation of the regulation being passed as written, paying close attention to anecdotal information on health or toxic effects.

86 Fed. Reg. 33926 (June 28, 2021)
TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances

EPA CONTINUES PFAS REGULATORY EFFORTS WITH RCRA RULEMAKING ANNOUNCEMENT

BY: PIERCE WERNER

Fall 2021 was a busy time for the EPA and its regulatory agenda for per- and polyfluoroalkyl substances (PFAS). PFAS has been a focus of the Biden EPA, with around seven actions or news releases as of September 2021, and October saw another three significant announcements from EPA. These announcements include: the release of the agency's comprehensive Strategic Roadmap to confront PFAS contamination nationwide; publication of a final human health toxicity assessment for GenX chemicals; and Administrator Regan's October 26th announcement that EPA will be initiating the rulemaking process for two actions

to address PFAS under the Resource Conservation and Recovery Act (RCRA).

The last of EPA's October PFAS regulatory progression actions marks a substantial step toward more concrete PFAS rules with significant implications. The October 26th announcement comes 124 days after and in response to Governor of New Mexico, Michelle Lujan Grisham's, June 23, 2021, petition to EPA to designate PFAS as hazardous under RCRA as either a class of chemicals or individually. Petitions by state governors to the EPA administrator to identify or list a material as a hazardous waste such as this one are allowed pursuant to 42 U.S.C. § 6921(c) and are required to be acted upon by EPA within 90 days.

Administrator Regan's Response partially grants the Petition by initiating two actions. While EPA does not designate or propose to designate PFAS as hazardous as a class, the first initiated rulemaking proposes to add four specific PFAS chemicals as RCRA Hazardous Constituents under 40 CFR Part 261, Appendix VIII. The PFAS chemicals identified are the usual suspects, and include all PFAS chemicals for which the EPA has published human health toxicity assessments: (1) perfluorooctanoic acid (PFOA); (2) perfluorooctane sulfonic acid (PFOS); (3) perfluorobutane sulfonic acid (PFBS); and (4) GenX (hexafluoropropylene oxide (HFPO) dimer acid and its ammonium salt). EPA published final human health toxicity assessments for PFOA and PFOS in 2016, PFBS in April 2021, and GenX in October 2021. The second action stated in the Response is another initiated rulemaking which purports to modify the regulations of the RCRA Corrective Action Program. The Response states this proposed modification would "clarify" that the Corrective Action Program has the authority to require the investigation and cleanup of wastes that meet the definition of hazardous waste and that emerging contaminants can be addressed through RCRA corrective action.

Each of the initiated rulemaking actions are significant individually, but, together, they represent a considerable EPA action toward PFAS that could affect several industries while also forming the foundation for further major regulation implications. The identification of these chemicals in Appendix VIII is a crucial step needed under section 261.11(a)(3) of the RCRA regulations for listing of solid wastes that contain these chemicals as a hazardous waste, if other specified regulatory factors are met. The listing would also subject these chemicals to RCRA corrective action requirements which, coinciding with the second rulemaking effort, permits EPA to issue administrative orders and other actions pursuant to the RCRA corrective action process. In addition to whatever investigation or cleanup actions related to these chemicals could be required of a facility with contamination, the subjection of these chemicals to the RCRA Corrective Action program could further result in civil judicial actions, criminal prosecutions, and citizen suits for those who violate these RCRA corrective action requirements.

Of course, these announced regulatory actions must go through formal notice and comment rulemaking procedures before they can become enforceable, so the substantive form that new regulations may take is far from settled; however, once promulgated, each delegated state program will have to adopt any RCRA amendments that are at least as stringent as the federal rule. As always, states are also free to adopt more stringent requirements in their authorized RCRA programs.

New Mexico Governor's 42 U.S.C. § 6921(c) Petition to EPA
EPA Response to 42 U.S.C. § 6921(c) Petition

WELCOME ASTM E1527-21: NEW PHASE I GUIDELINES RELEASED

BY: LIZ WILLIAMSON

In November 2021, the ASTM International released a new standard entitled ASTM E1527-21 to govern how environmental professionals prepare Phase I environmental assessments of real estate property. The new standard will replace current ASTM Standard E1527-13. Environmental professionals must comply with ASTM E1527 requirements for a Phase I to convey bona fide prospective purchaser (BFPP) protection to a property buyer. A Phase I that does not cover all of the ASTM standard requirements may not survive a challenge in court. Ultimately, BFPP protection is at risk if a Phase I does not comply with the ASTM standard, with a potentially high cleanup price tag for the innocent purchaser.

ASTM E1527-21 contains the same basic framework that environmental professionals currently follow in ASTM E1527-13. A Phase I still must include the components of User Responsibilities, Records Review, Site Reconnaissance, Interviews, and

Conclusions. ASTM E1527-21 restructures certain areas, which can be most easily identified by the redline available through ASTM. There are changes in the detailed Phase I requirements, such as historic research sources, property identification, physical setting review, historic research on adjoining properties, and the addition of emerging contaminants, e.g. PFAS. This article discusses in more detail the most sweeping change: revisions to the definition of a "recognized environmental condition" or REC.

The fundamental goal of a Phase I is to identify conditions that are RECs. ASTM Standard E1527-21 modifies the definition as follows. New 2021 language is underlined, while deleted language from ASTM E1527-13 is struck-through:

> 1.1.1 *Recognized Environmental Conditions*— ~~In defining a standard of good commercial and customary practice for conducting an~~ The environmental site assessment of a parcel of property, ~~the~~ The goal of the processes established by this practice is to identify *recognized environmental conditions*. The term *recognized environmental* ~~*conditions*~~ *condition* means *(1)* the presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* due to a *release* to the *environment*; *(2)* the likely presence of ~~any~~ *hazardous substances* or *petroleum products* in, on, or at ~~a~~ the *subject property*~~:~~ ~~(~~ due to a ~~*1release*~~~~)~~ ~~due to any~~ or likely *release* to the *environment*; ~~(~~or ~~*2(3))*~~ ~~under conditions indicative of a~~ the presence of ~~*release*~~*hazardous substances* ~~to~~or ~~*the*~~ *petroleum* ~~*environment*~~ *products*; ~~or~~ (in, on, or at the ~~*3*~~*subject property*) under conditions that pose a *material threat* of a future *release* to the *environment*. A ~~*De*~~*de minimis condition* ~~conditions are~~ is not a *recognized environmental* ~~*conditions.*~~*condition.*

The reorganized definition has two key clarifications. First, the definition states that the REC analysis must focus on the "subject" property

and not just a "property." In other words, the environmental professional's analysis should not concentrate on the presence of hazardous substances or petroleum at adjacent or other properties. Second, the new REC definition adds a new explanatory note with respect to "likely" contamination. "Likely" contamination "is neither certain nor proved," but an environmental professional must find that "a reasonable observer" would expect or believe "based on the logic and/or experience and/or available evidence." Therefore, the Phase I should include the logic behind a "likely presence" of contamination but does not have to provide proof. This clarification is a helpful attempt to standardize subjectivity in identifying a REC. Perhaps this revision will reduce the number of Phase Is with a historic use-based REC that lack explanation and are not substantiated by any aspect of the Phase I review process.

ASTM E1527-21 also revised the designations for controlled recognized environmental conditions (CRECs) and historical recognized environmental conditions (HRECs). Designation of a CREC versus a HREC hinges on the level of environmental contamination present. If hazardous substances or petroleum have been addressed to the satisfaction of the regulatory authority to achieve unrestricted use criteria, then a HREC designation is appropriate. Otherwise, properties with hazardous substances or petroleum products addressed to the satisfaction of the regulatory authority subject to required controls are CRECs. A CREC exists when contamination is allowed to stay in place, as indicated by no further action letters or other documentation by the regulatory authority. ASTM E1527-21 adds the definition of "property use limitation," which is used in both the CREC and HREC definitions to set a trigger based on the limitations or restrictions of the applicable regulatory authority.

The new ASTM Standard has not been formally adopted by EPA. ASTM expects EPA approval in 2022. In the interim, ASTM E1527-13 remains in place. Environmental professionals may continue using ASTM E1527-13. However, clients may prefer Phase Is conducted in compliance with both standards.

ASTM Standard E1527-21, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," ASTM International

EPA FINALIZES LIGHT-DUTY VEHICLE GREENHOUSE GAS EMISSIONS STANDARDS

BY: CARRICK DAVIDSON

EPA recently finalized rules under the Clean Air Act (CAA) establishing federal greenhouse gas (GHG) emissions standards for passenger cars and light trucks for Model Years (MY) 2023 through 2026. The standards are designed to achieve

significant GHG emissions reductions along with reductions in other air pollutants. This rule will result in substantial GHG emissions reductions from transportation over the long term. The effective date of the rule is February 28, 2022.

The final rule is structured to prompt automakers to use clean technologies that are available today and to help stimulate production of more electric vehicles. This rule is viewed by EPA as a crucial step in setting the U.S. on a path to a zero-emissions transportation future. The final rule revises current GHG standards beginning in MY 2023 and increases in stringency year over year through MY 2026. The standards finalized for MYs 2025 and 2026 are the most stringent option considered in the proposed rule, and the MY 2026 requirements establish the most stringent GHG standards ever set for the light-duty vehicle sector. The final rule significantly accelerates the rate of stringency increases to between 5 and 10 percent each year from 2023 through 2026. Under the previous standards, stringency increased at a rate of roughly 1.5 percent per year. The final standards are expected to result in average fuel economy label values of 40 mpg, while the standards they replace (the SAFE rule standards) would achieve only 32 mpg in MY 2026.

As with EPA's previous light-duty GHG programs, EPA is finalizing standards expressed as footprint-based curves for both passenger cars and trucks. Under this approach, each manufacturer has a unique standard for the passenger car and truck categories, for each model year, based on the sales-weighted footprint-based CO2 targets of the vehicles produced in each MY. The projected fleet targets under the final rule increase in stringency in MY 2023 by about 10 percent (from the existing standards in MY 2022), followed by a stringency increase of about 5 percent in MY 2024, as proposed. For MYs 2025-2026 EPA is finalizing increases more stringent than those proposed, about 7 and 10 percent year over year, respectively. EPA intends to initiate a subsequent rule to establish standards for MYs 2027 and beyond.

For MY 2026, EPA projects that the CO2 emissions under the new standard will be 161 grams/mile, which is more stringent than the proposed rule projection of 173 grams/mile, and the projection under the previous rule (SAFE2) of 208 grams/mile. EPA estimates that real world fuel economy will increase by MY 2026 to a projected 40 miles per gallon (mpg) compared to an estimated 38 mpg under the proposed rule and 32 mpg under the previous rule. These projections are based on an estimated fleet mix of 47% cars and 53% trucks in MY 2026. This is a value that would be comparable to what a consumer would see on a fuel economy label and reflects real-world impacts on GHG emissions and fuel economy that are not captured by compliance tests, including high speed driving, air conditioning usage, and cold temperatures.

Interestingly, EPA estimates that technology improvements in internal combustion engines and transmissions will account for much of the reductions in CO2 emissions, with lesser contributions from electric battery powered vehicles and hybrids. Even so, the rule is expected to prompt further development of electric powered vehicles.

Transportation is the single largest source of GHG emissions in the United States, making up 29 percent of all emissions. Within the transportation sector, passenger cars and trucks are the largest contributor, at 58 percent of all transportation sources and 17 percent of total U.S. GHG emissions. According to EPA, final standards will contribute toward the goal of holding the increase in the global average temperature to well below 2°C above pre-industrial levels and reducing the probability of severe climate change-related impacts, including heat waves, drought, sea level rise, extreme climate and weather events, coastal flooding, and wildfires.

EPA estimates that the final rule will provide significant benefits with respect to emission reductions, public health, and fuel savings. The projected benefits of the rule exceed costs by $120 billion to $190 billion through 2050. Benefits include reduced impacts of climate change, improved public health from lower pollution, and cost savings for vehicle owners through improved fuel efficiency. Between $8 and $19 billion of the total benefits through 2050 result from improved public health due to reduced emissions of non-GHG

pollutants, including NOx and other pollutants that contribute to fine particulates (PM2.5). American drivers are also projected to save between $210 billion and $420 billion through 2050 in fuel costs. EPA estimates that reduced fuel costs will outweigh the increase in vehicle costs by about $1,080 over the lifetime of a MY 2026 vehicle.

The auto industry supported EPA's proposal for the standards to begin in MY 2023, and the final rule maintains the MY 2023 start date for revised standards. Nearly all major automakers have announced plans to transition their vehicle fleets to zero-emissions, with many electric vehicle launches planned before 2026. The entry of so many new electric vehicle models over the next few years is expected to put the auto industry in a strong position to meet the standards. The program also includes averaging, credit banking and trading provisions to aid the industry in meeting standards through a multi-year planning process, and EPA also is finalizing additional targeted compliance flexibilities to help the industry manage its transition to more stringent standards.

The final rule focuses the available flexibilities in MYs 2023-2024 to help manufacturers manage the transition to more stringent standards in the longer term by providing some additional flexibility in the near-term. The flexibilities that EPA is adopting include the following: a limited extension of credits generated by overcompliance with the MYs 2017 and 2018 standards that can be carried forward for compliance with the MYs 2023-2024 standards, respectively; advanced technology vehicle multiplier credits for MYs 2023-2024 with a cumulative credit cap of 10 grams CO2 per mile, which encourages manufacturers to accelerate introduction of zero and near-zero emissions vehicles; full-size pickup truck incentives for strong hybrids or similar performance-based credit for MYs 2023-2024; "off-cycle" credits of up to 15 g/mile (off-cycle credits recognize and incentivize technologies that provide real-world emissions reductions but that are not captured on EPA's tailpipe emissions compliance tests, including technologies such as high-efficiency headlamps or solar reflective paint that keeps the vehicle cabin cooler to reduce air conditioning needs).

The rule is not expected to affect driving safety. EPA estimates that the risk of fatal and non-fatal injuries will remain virtually unchanged by the final regulation.

As a follow-on to this action, EPA plans to initiate a future rulemaking to establish multi-pollutant emission standards for MY 2027 and beyond. Consistent with the direction of Executive Order 14037, "Strengthening American Leadership in Clean Cars and Trucks," this subsequent rulemaking will set standards through at least MY 2030 and will apply to light-duty vehicles and medium-duty vehicles, which includes commercial pickups and vans.

86 Fed. Reg. 74434 (Dec. 30, 2021)

WETLAND PERMITTING IN VIRGINIA MADE MURKY BY NEW FEDERAL RULES AND CORPS DISTRICT STAFFING SHORTAGES

BY: SPEAKER POLLARD

A combination of federal wetland regulatory actions presents substantial uncertainty for regulated parties as they navigate wetland delineation and permitting processes for their projects. These concerns are compounded in Virginia by a substantial wetland regulatory staffing shortage at the U.S. Corps of Engineers (Corps) Norfolk District Office. That shortage is causing significant delays in the administrative review process as the pace of wetland permit applications has increased with renewed economic activity that is expected to grow even more. Any of these items, on its own, creates significant concerns for developers and industries needing consistent regulatory parameters and timely administrative actions by the Corps, but, collectively, they exacerbate uncertainty and, in Virginia, create additional headaches.

1. Ever-Evolving WOTUS.

Perhaps the most significant recent move by federal regulators is the proposed revised definition of "Waters of the United States" (WOTUS), which

describes the types of surface waters that are regulated for purposes of permitting under the Clean Water Act for a variety of program purposes, including wetland and stream impacts associated with dredge and fill activities. On December 7, 2021, the Corps and EPA issued a proposed rulemaking to redefine WOTUS yet again, and in a manner that unwinds key elements of the Trump Administration's definitional rulemaking of this term under the Navigable Waters Protection Rule (NWPR), which itself substantially amended the previous definition under the Obama era Clean Water Rule. (For more background on these evolving rules, related litigation and resulting differences across the nation as to which definition applied where, see our October 2021 newsletter and May 2020 newsletter.)

Seeking to find a relatively moderate and traditional regulatory safe harbor in the midst of still pending litigation over both the Clean Water Rule and the NWPR, the Corps and EPA state that their proposed new definition reflects "the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the 'waters of the United States' informed by Supreme Court precedent." In doing so, EPA and the Corps propose that "waters of the United States" would include the following: "[t]raditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of 'waters of the United States;' tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments, that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and 'other waters' that meet either the relatively permanent standard or the significant nexus standard." Key to the proposed definition are the so-called relatively permanent standard and the significant nexus standard, both borrowed from *Rapanos v. United States,* the most recent U.S. Supreme Court case addressing the scope of "waters of the United States." This case, however, yielded very muddled results. (See previously cited articles.)

The agencies argue in the preamble of the proposed rulemaking that "the relatively permanent and significant nexus limitations appropriately draw" the distinction between federally regulated waters and those left to be regulated by the states "by ensuring that where upstream waters significantly affect the integrity of the traditional navigable waters, interstate waters, and territorial seas, Clean Water Act programs will apply to ensure that those downstream waters are protected, and where they do not, the agencies will leave regulation to the states and tribes." The result is somewhat of a blend of differing approaches taken by the agencies over the years, though the net approach is that it will include more water features within the definition than under the NWPR and that many of the categorical exclusions from "WOTUS" coverage found in the NWPR are abandoned. Comments on the proposed rulemaking are due by February 7, 2021.

2. Second Batch of NWPs Finally Hatches.

In the midst of the evolving definition of WOTUS, on December 27, 2021, the Corps just reissued and modified 40 nationwide permits (NWPs) and

issued one new NWP for specific wetland impacts. This action built on the Corps final rule published January 13, 2021 reissuing 12 NWPs and issuing four new NWPs, as well as promulgating the general conditions and definitions for all NWPs. NWPs are a form of general permit for specifically authorized activities impacting WOTUS and allow for a much more streamlined permitting process as compared to individual permits for impacts to WOTUS. (See our March 2021 newsletter for an article with background on the earlier actions.) The 41 NWPs just promulgated take effect February 25, 2022 and cover a range of activities and projects. The reissued NWPs pertain to various development, infrastructure, energy, agricultural, mining, habitat restoration and living shorelines, waste cleanup, marinas and boat ramps, navigation, minor discharges and dredging, and other activities. The new NWP-59 addresses water reclamation and reuse projects. Some of these as issued in the final rule were revised from the versions as proposed based on substantial comments received during the public comment period, so careful review of each NWP as finally issued is recommended. As is more often the case, litigation over certain of these final NWPs can be expected.

3. Norfolk District, Norfolk District, Wherefor Art Thou?

In addition to these two major regulatory actions occurring in December, but building to a head well before that, is the now major concern about staffing shortages in the Corps' Norfolk District Office among permit writers. These civilian professional staff members in the Regulatory Branch do the day-to-day work of confirming wetland and stream delineations and issuing jurisdictional determinations needed for project planning and permitting, and they process permit applications and prepare and process permits issued by the Corps pursuant to its authority under the Clean Water Act and attendant regulations. This problem results mainly from budgetary issues for the Norfolk District, so additional appropriations are likely needed for a sustainable fix.

Indeed, the staffing shortage has been building for several years, now reaching an acute level in many local offices serving specific regions of the Commonwealth. The situation is also compounded by the departures of more experienced permit writers due to retirement and other attrition, as well as periodic reassignments of permit writers to Corps headquarters or other locations. The workforce shortage could not come at a worse time, though, as economic and development activity in Virginia has been surging generally and also due to specific drivers such as solar farm development and renewed focus on infrastructure planning and investments. All of this activity has accelerated the number of applications for jurisdictional determinations and permits submitted to the Norfolk District. This personnel shortage is also adversely affecting the Norfolk District's ability to review and process applications for new or expanded wetland and stream mitigation banks that provide the mitigation credits needed to offset impacts to wetlands and streams from the projects for which applications are filed. These delays and the high demand for credits due to the increased number of projects have resulted in shortages of available credits in certain areas of Virginia. So, applicants are facing longer delays in getting permits reviewed and approved while scrambling to locate available credits and then paying much more for them. These delays and increased credit prices are raising the costs of development and infrastructure projects, in addition to the effects of recent inflation on construction expenses generally.

The Norfolk District itself has recently acknowledged that delays in getting jurisdictional determinations reviewed and permit applications processed will be significant. In a CENAO-WRR public notice issued on November 16, 2021, the Norfolk District stated that "[d]ue to increased workload and reduced staffing levels, we are experiencing a backlog of projects, resulting in extended processing delays." The notice provides suggestions for minimizing such delays, which are fairly standard practices even in normal times. It seems that the regulated community and other stakeholders will need to find some new tactics to solve this problem quickly and sustainably. If so, that may at least remove some of the day-to-day uncertainty in getting projects completed. If not, otherwise valuable projects will linger too long and will either wither and be abandoned or be relocated, which is not good for Virginia's economy.

4. Closing Thoughts (Hopes).

One hopes that regulatory uncertainty stemming from the recent rulemakings for the definition of WOTUS and the NWPs can be quelled soon, but recent history suggests litigation of these rulemakings is likely, keeping most parties in limbo. In the meantime, regulated parties both in Virginia generally and in the Norfolk District will have to find ways to muddle through the current staffing shortage at the Norfolk District and, perhaps, find new ways to fund staffing positions that have been squeezed out of existence due to budgetary limitations for that office.

Revised Definition of "Waters of the United States," **86 Fed. Reg. 69372-69450 (December 7, 2021)**
Reissuance and Modification of Nationwide Permits, **86 Fed. Reg. 73522-73583 (December 27, 2021)**
CENAO-WRR Public Notice (November 16, 2021)

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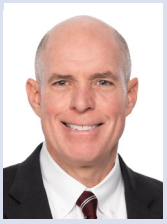

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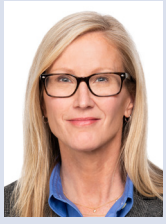

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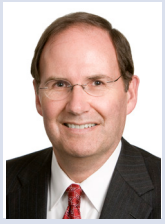

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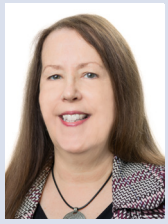

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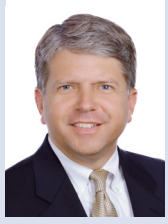

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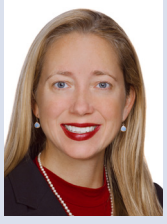

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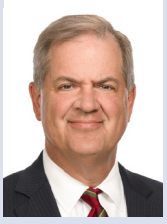

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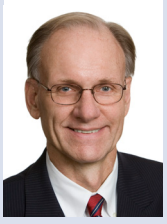

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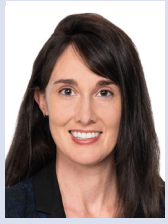

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