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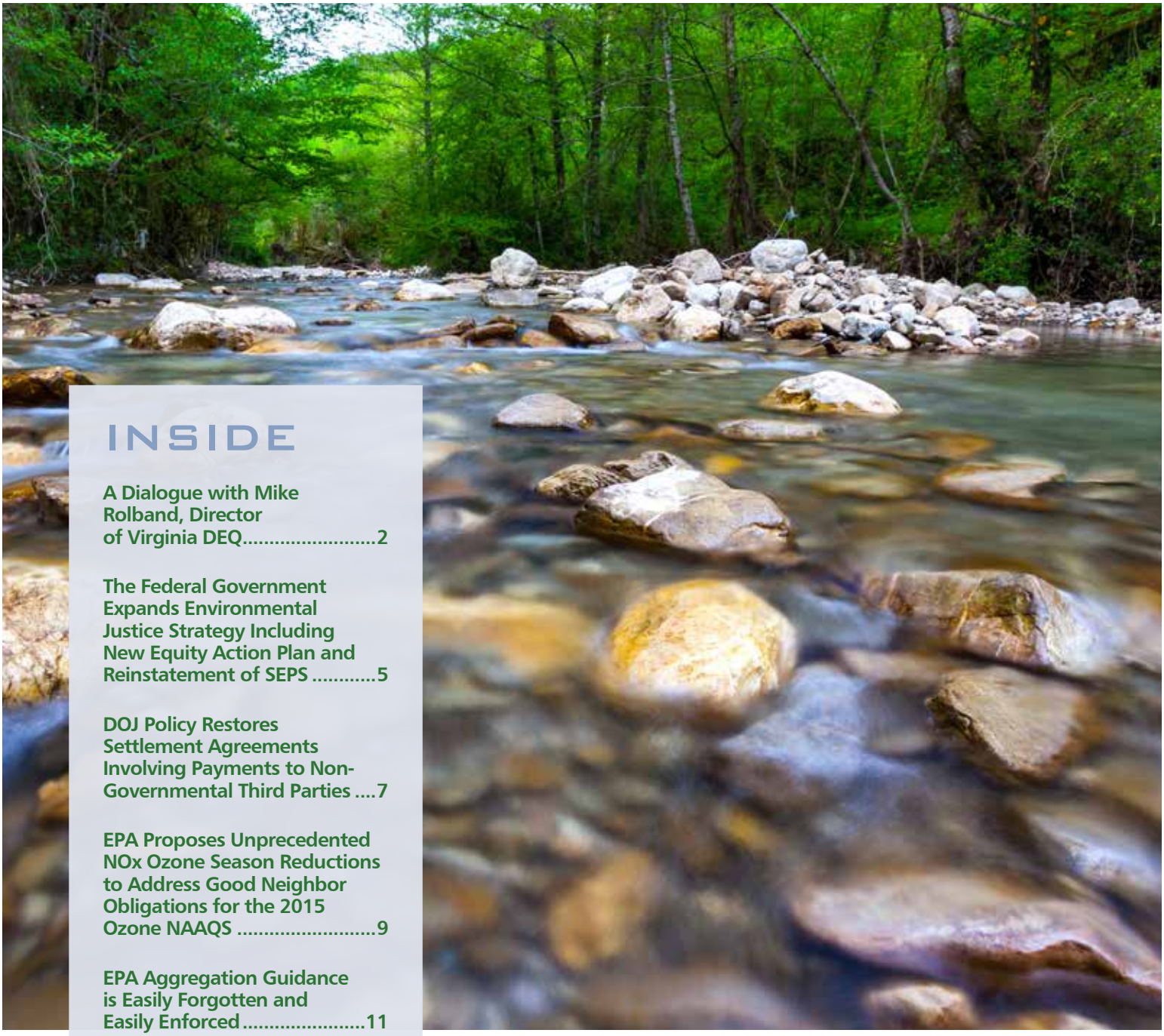
ENVIRONMENTAL NOTES



INSIDE

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A DIALOGUE WITH MIKE ROLBAND, DIRECTOR OF VIRGINIA DEQ

BY: CHANNING J. MARTIN

Mike Rolband was appointed Director of the Virginia Department of Environmental Quality in January 2022. Recently, Channing Martin, a partner in the Environment and Natural Resources Group at Williams Mullen, had the opportunity to interview him about issues important to the regulated community.

Q. ***Mike, you founded Wetland Studies and Solutions in 1991 and grew that company into a natural and cultural resources consulting firm with more than 200 employees. Has that experience helped you in your new role as DEQ Director?***

A. I think it's helped me greatly. I spent most of my career at my own company and before that working for two large developers. That's helped me come to this position with a totally different perspective. DEQ's been the most effective and efficient agency I've worked with, but my record while in the private sector for one project is 14 different approvals, so I've dealt with all sorts of agencies that interact on the same permit or same approval process. I've seen how everyone works, and I think what I bring now to DEQ is the perspective of the applicant.

Q. ***That leads me to a question about permitting. Is DEQ taking any steps to streamline and simplify permitting?***

A. The biggest step we've initiated is a program called PEEP – the Permit Evaluation & Enhancement Program. What we're going to do – and I have two people assigned to it, and we'll be using some outside resources as well – is create a schedule for every permit class that DEQ touches. We'll create the schedule, assign tasks and times, including those applicable to other agencies that must be consulted as part of the permit process. As you know, there are a number of agencies that consult with DEQ and provide comments on many of our permits. These include the Army Corps of Engineers, EPA, and the U.S. Fish & Wildlife Service as well as Virginia agencies, such as DCR, the Marine Resources Commission, and the Departments of Historic Resources, Wildlife Resources, and Forestry. All those tasks will be listed on the online portal so that the permittee, the public and the DEQ manager can view and track them. Another aspect is that when the deadline for a certain aspect of the permit is pending, a notification will automatically be sent to the permit writer. If there are further delays, eventually a notification will be sent to higher levels of management so they can see either whether there is a resource problem, meaning they need to assign more people to it, or whether the delay is simply because someone is sick or has been on vacation. In the past, the permit just sat there and didn't advance. We're going to change that and bring daylight to the process so everyone involved can see where things stand. I think inherently that will speed things up.

Q. ***Let's talk more about the consulting process with multiple agencies. Is there anything that can be done to streamline it, and will that effort be part of PEEP?***

A. There is much we can do to better coordinate with agencies and speed up the process. We're going to be focusing on the water programs first because that's where most of the complaints are. If you combine wetlands and stormwater, that's almost half of our

permit actions and probably 85% of the complaints. That's the number one area to focus on, and it's the one that has the most agencies that are outside of DEQ's control. As an example of how we are trying to improve coordination, I've had two meetings with the Colonel and his top five people at the Norfolk District of the Army Corps of Engineers. I'm going to meet with him every quarter, and I've explained PEEP to him and what we are trying to achieve. He loved the idea.

I understand there are public comment periods and other aspects of the laws and regulations that affect how long it takes to get a permit, and that there is nothing we can do to make that aspect of the process go faster. But my experience has been that permits tend to get stuck somewhere in the process not because of legal requirements, but for other reasons. I think better coordination with agencies and transparency will improve efficiency.

Q. ***To what extent are staffing issues affecting DEQ?***

A. It's a significant issue. In the stormwater program, lack of staff is their number one problem. We have put out an advertisement seeking 12 people to fill positions in that program. We have 21 authorized positions in that program, but only nine people right now. We need to find new people and train them. We can't stop. There's always going to be turnover, promotions, and people retiring. I think roughly 75 people, or 10% of the DEQ workforce, retired last year. We're already short people, and now you have retirements, so we are working hard to fill the vacancies we have.

Q. ***Complying with DEQ's stormwater programs always presents challenges for the regulated community. What is DEQ doing to help make requirements more easily understood?***

A. I agree there is confusion about certain aspects of the programs. For example, there have been a lot of issues around the state concerning the farming and agricultural industry and what stormwater requirements and permits apply to them. There's been confusion for years about stormwater outfalls and lately issues about how the stormwater regulations apply to solar installations. We are in the process of developing guidance documents on outfalls and stormwater management for solar installation and will be developing other stormwater guidance as well.

We've looked at all of the DEQ manuals, guidance and regulations that apply to stormwater. I recently hired Evan Branosky as the Chief Stormwater Policy Advisor at DEQ. The first assignment I asked him to do was find all these regulations, bulletins, guidance documents and manuals and make a copy. He put them on top of each other, and we measured it – it was 23" tall. Some of these documents are not available online, so we're in the process of putting them on our website. We plan to take a hard look at what we have. To do that, we will create a stakeholders' group to help us create a new manual. One reason for complications and confusion in the regulated community is many of the documents we have conflict with each other. The majority of them were published prior to the 2014 regulations. We're still using guidance and a manual from 1988, the green handbook from 1992, the stormwater book from 1999. They all predated the regulations, and they all conflict with each other in places. We need to get one manual that covers everything that we can then update. The idea is to make it a living document that is constantly updated so it doesn't fall out of compliance with the regulations. It's a heavy lift, and one that may not have been attempted before because of the amount of work that will be required to do it. If we can produce a concise document that is easy to follow, I think the review process will go faster and everyone will be happier.

Q. *Regarding the availability of on-line information, I've heard complaints about the new DEQ website to the effect that information that used to be there has disappeared or is hard to find. Have you heard complaints as well?*

A. I've heard them and have experienced difficulty myself in finding information. It's a problem we are trying to solve. The website is an award-winning website. Some people love it, but what I found is that those who do just have a general interest in what DEQ does. The people that don't like it are – I call them power users – attorneys, engineers and environmental consultants that used to know where to go on the website to find information. Some of that information is no longer there. It's going to take some time to fix things, and we're starting to do so program-by-program. Part of the problem is that the communications people don't know what to communicate unless the various divisions give them the information. We've got to get the technical people to provide the information that should be on the website to the communications people. I'd like the process to go faster, but realistically we only have so many people and resources.

Q. *Any time a new director comes in to DEQ, they have strategic goals they want to achieve, and you probably have many. Are there one or two that rise to the top?*

A. Number one is to make the permit process faster and more efficient. I'm not trying to change the rules, I'm just trying to make it a more efficient process. The main initiatives I've focused on are how we can do a better job and be more efficient in getting these permits through the process. The last spreadsheet I received was that between active and existing permits, DEQ is administering about 28,000 permits now. That's a mind-boggling number, and we have roughly 3,000 or more going through the process at the moment. PEEP is a way to make the process more efficient, and I think we also need to figure out a way to classify permittees into groups and make similar groups process in a similar manner.

A second goal is what I call "One DEQ," which is the concept of focusing our resources on where they are most needed. One thing I've noticed is there are often resources in different parts of DEQ that may make sense to re-deploy elsewhere when and as needed. For example, there might be a surge of economic development projects in an area of the state that has limited DEQ resources in the DEQ regional office that can handle the permitting required. In that instance, we need to effectively get other people within the agency to assist with that workload. We have six regional office offices plus the central office. We've got to figure out ways to get everyone to work together. That's another big strategic goal.

Q. *The General Assembly just made a change in the permitting authority. Previously, the State Water Control Board and Air Board had permitting authority, but they're not going to have it going forward. Is that a good thing or a bad thing from your perspective?*

A. From my perspective it's a good thing because none of the other states in the mid-Atlantic region do it that way. All permitting in other states is done by the state environmental agencies. We're eliminating a step that has a lot of uncertainty and risk not faced by those who apply for permits in states we're competing against for economic development. In addition, I don't believe that eliminating board review will result in less protection of the environment. During the debate on the bill, I learned that only once or twice in the last two or three decades have the boards overturned what the Department recommended. That fact convinced me that having the boards issue permits is an unnecessary step because the Department takes all necessary steps to ensure the environment is protected.

Q. ***Tell me about the steps DEQ is taking to implement its Environmental Justice program and incorporate the Virginia Environmental Justice Act into permitting and regulatory actions.***

A. We have to make more progress on Environmental Justice than we have to date. Renee Hoyos is the new Director of the Office of Environmental Justice, and she and her staff are in the early stages of drafting a guidance document to help us develop and implement the Virginia Environmental Justice Act across all DEQ programs. An important aspect of that guidance will be to focus on Environmental Justice and permitting. Right now there is no consistent application of the Virginia Environmental Justice Act to permit applications. I've asked that the guidance determine what types and classes of permits need a detailed review for Environmental Justice issues, and which ones don't. I've also asked that the guidance address what types of projects and activities require Environmental Justice review and that the guidance list them. It's more difficult than you might think to put in writing exactly what must be done and how. We also need to engage the community on Environmental Justice issues as we develop the guidance, which is what we are going to do. This document is in the early stages of development and much more work remains to be done. When the draft is ready, we'll initially vet it with stakeholders and interested parties and then put it out for public comment and review. When the guidance is complete after public comment, we will integrate it into our PEEP process so that there will be a task in our critical task schedule for Environmental Justice issues.

Q. ***A lot of consultants and environmental attorneys around the state are involved with VRP sites and Brownfields redevelopment. A previous attribute of DEQ's Brownfields Program was that you could submit a Phase I to the Brownfields Program and obtain a DEQ comfort letter. The letter would state that, based on a review of the Phase I, DEQ believes the owner or developer qualifies as a bona fide prospective purchaser protected from CERCLA liability and liability under state law. The letter wasn't binding on DEQ, but it was helpful in facilitating transactions and loans. That program went away about six months ago because of funding and personnel issues. Will it ever come back?***

A. That DEQ stopped issuing these letters is something I heard about even before I became DEQ Director. This is an important tool to facilitate economic development of Brownfield sites, so the answer to your question is yes. We will be hiring more people for the Brownfields Program later this year and issuing these letters will be one of the duties assigned to one of the people we hire.

THE FEDERAL GOVERNMENT EXPANDS ENVIRONMENTAL JUSTICE STRATEGY INCLUDING NEW EQUITY ACTION PLAN AND REINSTATEMENT OF SEPS

BY: JESSIE J.O. KING

The Biden Administration and EPA continue to strengthen and expand the federal Environmental Justice (EJ) strategy as evidenced by the President's April 2022 Equity Action Plan (Plan) and the United States DOJ's May 2022 "Comprehensive Environmental Justice Strategy" and related revised policy on Supplemental Environmental Projects (SEPs). These two recent steps further illustrate that EJ is becoming an effective tool for groups to stop or delay environmental permits and to make those accused of pollution pay for community improvements. What this means for clients is new projects will be harder to get done, and the costs of siting and operating manufacturing plants, landfills, quarries, farms, power plants, and other like facilities in America are going up.

Biden's Equity Action Plan

On April 14, 2022, President Biden announced his Equity Action Plan which sets forth specific actions to ensure EPA is inserting itself into state and local environmental permitting and enforcement programs to prevent disparate impacts on disadvantaged communities. These specific actions include:

- Cumulative Impacts: Requiring EPA and states to consider cumulative impacts in regulatory decision-making processes;
- Community Aid & Projects: Build the capacity of underserved communities to provide their experience to EPA and implement community-led projects.
- EPA's EJ Office: Develop EPA's internal capacity to engage underserved communities and implement clear and accountable processes to act based on communities' input.
- Title VI of the Civil Rights Act: Strengthen EPA's external civil rights compliance program and ensure that civil rights compliance is an agency-wide responsibility.
- Community Science: Integrate participatory (community) science into EPA's research and program implementation.
- Procurement: Make EPA's procurement and contracting more equitable.

All of six of the above-listed required actions are part of the 2022-2026 EPA Strategic Plan. In fact, in the Strategic Plan, EPA discusses specific metrics it will use to ensure it is implementing the actions listed above, as well as others. Among the most important to watch will be how EPA requires states and local environmental regulatory authorities to review "cumulative impacts" and to put in place extensive environmental justice considerations in state and local permitting and enforcement programs. What this means for the regulated community is two major changes to what your state permitting agency will be required to consider (or be threatened with losing federal funding for its air, water, and land programs). First, your state agency will be required to review not just your company's impact on air, water and land resources if you are given a new or modified permit, but the impacts of operations around you over which you have no control. Second, your state agency will be required to have a review process in place for each permitting program, whereby it considers whether the community around the proposed project could be considered "disadvantaged" and, if so, whether that community will be disparately impacted by the project as compared to other, less disadvantaged, communities. What this means is that your state and local regulators are going to have to add two more layers to the permitting and enforcement programs which gives those opposing your project or unhappy with your facility more tools to fight them. With vague terms like "cumulative" and "disparate" impacts, it will be hard to know how your specific project could be viewed in the permitting or enforcement arena.

Supplemental Environmental Projects

On May 5, 2022, DOJ announced a series of actions to secure environmental justice by launching a new Office of Environmental Justice within the Justice Department, publishing a "Comprehensive Environmental Justice Enforcement Strategy" Memorandum prioritizing enforcement for "polluters" affecting "overburdened and underserved communities," and reinstating the use of SEPs in DOJ settlements.

In its Memorandum, DOJ emphasizes it and other federal agencies, including EPA, should increase public participation, provide training on EJ to its partners, implement tools in all environmental

and health statutes to bring justice to penalize "polluters," look at using Title VI of the Civil Rights Act to ensure state and local agencies that receive federal grant money do not create a disparate impact on minority and underserved populations, and "mitigate" pollution by providing temporary and permanent resources to these communities by considering Supplemental Environmental Projects (SEPs) as a requirement for settlement.

What are SEPs? SEPs are projects that are not required by applicable laws or regulations. Some projects deemed to benefit the local community are offered by EPA to regulated entities to mitigate portions of civil penalties. The DOJ under Trump abolished their use in most cases, but, with the new emphasis on EJ, on May 5, 2022, the US DOJ announced that SEPs are an important part of its EJ strategy. This is consistent with EPA's Strategic Plan and Biden's Equity Action Plan in that SEPs are projects that benefit local communities, some of which may be considered disadvantaged populations. In the past, there has been concern that SEPs and other settlements that provide for payments to non-governmental third parties violate certain federal laws that require accountability by any federal agency receiving money as part of enforcement. However, DOJ believes this is not a concern and is giving guidance to its attorneys as to what must be in these SEPs including the following: payments to third parties must define with particularity the nature and scope of the specific project, have a strong connection to the underlying violation, be consistent with the underlying statute being enforced and advance at least one of the objectives of that statute, and reduce the detrimental effects of the underlying violation and the likelihood of similar violations in the future. The policy also states DOJ is prohibited from identifying any particular third party to receive payments or to implement or benefit from a payment and must not retain post-settlement control over the disposition or management of project funds "except for ensuring that the parties comply with the settlement." Finally, no third party payment can "require payments to non-governmental third parties solely for general public educational or awareness projects; solely in the form of contributions to generalized research, including at a college or university; or in the form of unrestricted cash donations." These restrictions are meant to protect DOJ against claims they violate federal law by having the government control money that has not been appropriated.

Conclusion

Facilities and companies regulated by environmental laws should expect to see their state and local regulators feeling the pressure from EPA and DOJ to put environmental justice at the top of their permitting and enforcement strategies. Things are evolving quickly, and there will be more changes to come. For now, if you need a new or modified permit to expand your company's capabilities or you are in the middle of an enforcement action, don't be surprised to see a different approach with an emphasis on "justice" for those who live around your facility.

EPA Equity Action Plan (April 2022).

DOJ Comprehensive Environmental Justice Enforcement Strategy (May 5, 2022).

DOJ Guidelines and Limitations for Settlement Agreements Involving Payments To Non-Governmental Third Parties (May 5, 2022).

DOJ POLICY RESTORES SETTLEMENT AGREEMENTS INVOLVING PAYMENTS TO NON-GOVERNMENTAL THIRD PARTIES

BY: CARRICK C. BROOKE-DAVIDSON

Settlement agreements regarding payments to non-governmental third parties were sharply curtailed by the Trump administration. *See* "Last Minute Trump Administration Regulation Limits Environmental Justice Settlements," Williams Mullen Environmental Notes July 2021. A recent DOJ policy and rulemaking restores the authority for DOJ to enter into settlements involving third parties, including Supplemental Environmental Projects (SEPs).

As discussed in the previous article, the Trump Administration regulation on third-party settlement payments had specific prohibitions on SEPs. While the Biden administration restored the ability to enter into settlements that included SEPs, the regulatory prohibition on third-party payments remained. This was viewed as a significant limitation on environmental justice settlements, as those settlements frequently entail payments to third parties.

The Biden administration has now taken steps to address this issue. A May 5, 2022 Memorandum from the Attorney General sets forth Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties. While the policy is of general applicability, the policy discusses environmental violations as ones that may be particularly susceptible to redress through payments to third parties and was announced in conjunction with the announcement of the administration's overall environmental justice enforcement policy, also issued on May 5. *See* Memorandum from the Associate Attorney General on Comprehensive Environmental Justice Enforcement Strategy. A new Office of Environmental Justice was announced in conjunction with these two policy pronouncements.

The third-party payment policy has the following guidelines and limitations:

- Any such settlement agreement shall define with particularity the nature and scope of the specific project or projects that the defendant has agreed to fund.

- All such projects must have a strong connection to the underlying violation or violations of federal law at issue in the enforcement action. In meeting this requirement, the project must be consistent with the underlying statute being enforced and advance at least one of the objectives of that statute. The project should also be designed to reduce the detrimental effects of the underlying violation or violations at issue to the extent feasible and reduce the likelihood of similar violations in the future.

- The Justice Department and its client agencies shall not propose the selection of any particular third party to receive payments to implement any project carried out under any such settlement. Similarly, the Justice Department and its client agencies shall not propose a specific entity to be the beneficiary of any projects carried out under any such settlement, although the Department and its client agencies may specify the type of entity. The Department and its client agencies may also disapprove of any third-party implementer or beneficiary that the defendant proposes for consideration, provided that the disapproval is based upon objective criteria for assessing qualifications and fitness outlined in the settlement agreement.

- Any such settlement must be executed before an admission or finding of liability in favor of the United States, and the Justice Department and its client agencies must not retain post-settlement control over the disposition or management of the funds or any projects carried out under any such settlement, except for ensuring that the parties comply with the settlement.

- No such settlement shall be used to satisfy the statutory obligation of the Justice Department

or any other federal agency to perform a particular activity. Nor shall any such settlement provide the Justice Department or any other federal agency with additional resources to perform a particular activity for which the Justice Department or any other federal agency, respectively, receives a specific appropriation.

> No such settlement shall require payments to non-governmental third parties solely for general public educational or awareness projects; solely in the form of contributions to generalized research, including at a college or university; or in the form of unrestricted cash donations.

In addition to the policy announcement, the memorandum also directed that the Trump DOJ regulation limiting third-party settlement payments and specifically prohibiting payments as part of SEP projects be revoked. That was accomplished on May 10, 2022. 87 Fed. Reg. 27936. Although not required, the revocation requests public comment on the revocation of the regulation as well as the overall policy. Any comments are due by July 11, 2022.

Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties, **87 Fed. Reg. 27936 (May 10, 2022).**

EPA PROPOSES UNPRECEDENTED NOX OZONE SEASON REDUCTIONS TO ADDRESS GOOD NEIGHBOR OBLIGATIONS FOR THE 2015 OZONE NAAQS

BY: LIZ C. WILLIAMSON

Background.

EPA proposed a transformative rule to address the obligations of 26 states for the 2015 Ozone National Ambient Air Quality Standards (2015 Ozone NAAQS). The rule is a federal implementation plan (FIP) rooted in the Clean Air Act (CAA) Good Neighbor provisions (the Proposed FIP). The Proposed FIP provides for ozone season (May 1-September 30) NOx reductions from electric generating units (EGUs) beginning in 2023 and industrial stationary sources (non-EGUs) by 2026. The timeline is aligned with the August 3, 2024 ozone attainment date for areas classified as Moderate nonattainment, with further NOx reductions prior to the August 3, 2027 ozone attainment date for areas classified as Serious nonattainment for the 2015 Ozone NAAQS.

The FIP impacts two categories of states. Upwind states are included for which EPA determined interstate transport of ozone precursor emissions is significantly contributing to nonattainment or maintenance of the 2015 ozone NAAQS in downwind states. The second category of states includes those that do not have an approved ozone transport SIP for the 2015 ozone NAAQS, including states that did not submit a SIP. Delaware is also included based on updated air quality modeling changes even though it is in neither category. Some states are in both categories.

The Proposed Rule used the traditional multi-factor transport framework for identifying upwind emissions that constitute significant contributions for downwind states. The steps are: (1) identifying downwind receptors projected to be in future nonattainment; (2) determining the upwind states to link as contributors to downwind air quality issues; (3) identifying upwind emissions in linked states that significantly contribute to downwind nonattainment; and (4) implementing emissions reductions for states with emissions that significantly contribute to downwind nonattainment. The Proposed FIP describes ozone transport modeling from upwind states and applies an upwind contribution threshold of 0.70 ppb. States below the contribution threshold were not included in the FIP (Alaska, Arizona, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Massachusetts, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Rhode Island, South Carolina, South

Dakota, Vermont, and Washington). States not on this list were found to be upwind contributors subject to this rule.

For EGUs, EPA evaluated NOx emission control technologies. EPA evaluated selective catalytic reduction (SCR) (including optimization and turning on idled SCRs), state-of-the-art NOx combustion technologies, selective non-catalytic reduction (SNCR) (including optimizing and turning on idled SNCRs), new SCRs, new SNCRs, and generation shifting. For non-EGUs, impacted industries include cement, glass, iron and steel, pipeline transportation of natural gas, and high emitting equipment from Tier 2 industries (Basic Chemical Manufacturing, Petroleum and Coal Products Manufacturing, Metal Ore Mining, Lime and Gypsum Product Manufacturing, and Pulp, Paper, and Paperboard Mills). Non-EGUs are not subject to CSAPR trading, but EPA proposes various industry-specific NOx emissions limitations.

Why is this Rulemaking so Unique?

- It impacts both EGUs and non-EGUs.
- It is a FIP, not a SIP Call or a rule "update" of the current CSAPR program. This mechanism is different than the prior tools EPA has used to address multi-state obligations.
- EGU NOx rate assumptions for 2026 are lower than ever proposed. EPA identifies a rate of 0.05 lb/mmBTU based on controls performance (SCR). The last CSAPR rule relied on a 0.08 lb/mmBTU rate, just last year. EPA acknowledges, "[t]hese controls represent greater stringency in upwind EGU controls than in EPA's most recent ozone transport rulemakings, such as the CSAPR Update and the Revised CSAPR Update."
- EPA adds an EGU daily NOx emissions rate for larger coal-fired EGUs during the ozone season (May-September) beginning in 2024 and 2027, depending on whether the EGU currently controls NOx with a SCR. This is a belt and suspenders approach that EPA justifies because "CSAPR trading programs [have] revealed instances where EGUs have reduced their SCRs' performance on a given day, or across the entire ozone seasons in some cases, including high ozone days."
- For EGUs, EPA introduces new features that will likely rachet down available allocations as a result of EGU retirements or repower scenarios, changes in heat input, modeled generation shifting, and excess banked allowances. These concepts are called dynamic budgeting and bank recalibration. EPA is transparent that it intends to force EGU control technology installation.
- Reductions for non-EGUs are the first of their type using the Good Neighbor provision.

What are We likely to See in Comments?

We expect to see a large number of comments from a variety of industries and environmental organizations. Several likely EGU and non-EGU comment topics may include:

- Whether the source datasets and modeling EPA used to determine which states are upwind contributors are accurate and sound. Technical experts will dig into the data and assumptions EPA used;
- EPA rejects the higher 1 ppb upwind to downwind contribution screening value in favor of a 1% (0.70 ppb) value. This value defines which states are upwind contributors and is used in EPA's over control analysis. In a prior 2018 Memorandum, EPA proposed higher contribution threshold alternatives;

- Some NOx control technology emission rate assumptions are not technically achievable and certain costs of control installations are underestimated;
- EPA's chosen EGU daily emission rate is too low because it does not take control equipment operational constraints into consideration;
- Generation shifting, which is factored into EGU state budgets, is not an appropriate emission reduction tool; and
- Dynamic budget setting and bank recalibration concepts from EGU budgets remove market incentives for EGUs to reduce emissions.

Finally, states may opt out of the FIP for EGUs and non-EGUs. EPA lays out SIP approach options. EPA has requested comment on all aspects of the Proposed FIP. Comments are due on June 6.

Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard, **87 Fed. Reg. 20036 (April 6, 2022).**

EPA Memorandum from P. Tsirigotis to Regional Air Division Directors, Regions 1-10, "Analysis of Contribution Thresholds for use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards," August 31, 2018.

CAA Section 110(a)(2)(D)(i)(I)

EPA AGGREGATION GUIDANCE IS EASILY FORGOTTEN AND EASILY ENFORCED

BY: ETHAN R. WARE

Four years ago, EPA published its "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration" (New Source Review (NSR) Aggregation Action). 83 Fed. Reg. 57324 (November 15, 2018). It is an important policy for existing stationary sources to understand. Combined, the PSD and NNSR permitting program is known as "NSR Permitting" and applies to major sources.

NSR Permitting Program

For purposes of the NSR Permitting program, a "major source" for most facilities located in attainment areas is a new source, or modification to an existing source, with a potential to emit 250 tons per year (tpy) of a regulated air pollutant. For certain facilities included on a list of twenty-eight (28) industries, a major source (either new or modified) for NSR Permitting is 100 tpy. This 100 tpy is generally also the threshold for sources in nonattainment areas, although lower standards can apply in certain circumstances.

An existing major stationary source may trigger NSR permitting requirements at a much lower level. A major modification occurs when an existing source undertakes a physical change or change in method of operation (i.e., a "project") that would result in (1) a significant emissions increase from that project, and (2) a significant net emissions increase from the source (i.e. a source-wide "netting" analysis that considers creditable emission increases and decreases occurring at the source as a result of other projects over a 5-year contemporaneous period). See, e.g., 40 CFR 52.21(b)(2)(i) and 40 CFR 52.21(b)(52). For this two-step process, the NSR regulations define what emissions rate constitutes "significant" for each NSR pollutant, which are often as low as 10 tpy for PM and 40 tpy for VOCs. See 40 CFR 51.165(a)(1)(x), 40 CFR 51.166(b)(23), and 40 CFR 52.21(b)(23).

Problem: Phase Project to Avoid NSR Permitting

According to EPA, the NSR Aggregation Action is necessary to preclude a source from "carv[ing] up a higher-emitting project into two or more lower-emitting "projects" and avoid triggering major NSR requirements." 83 Fed. Reg. at 57326. "Project aggregation," therefore, ensures that nominally separate projects occurring at a source are treated as a single project for NSR applicability purposes

where it is unreasonable not to consider them a single project. *Id.*

Aggregation Policy Factors

Determining what constitutes the "project" is a case-by-case decision, which is both "site-specific and fact-driven." EPA recognizes there is no predetermined list of activities that should be aggregated for a given industry or industries. EPA published the NSR Aggregation Action to provide industry with those criteria necessary for determining when nominally-separate activities are considered one project under NSR. *Id.*

Evaluating potential for aggregation at existing sources should consider the following criteria to determine whether a series of plant upgrades are a "substantially related" single project:

1. **Timing.** Filing of more than one minor source or minor modification application associated with emissions increases at a single plant within a short period of time. Recent guidance indicates EPA allows a "rebuttable presumption" against aggregation where more than three years lapses between the construction projects.

2. **Application of Funding**. This criterion looks at whether the source has characterized the project as one modification for financial purposes.

3. **Consumer Demand.** Here, EPA evaluates planned product development or changes to determine if separate production phases are really related to the same overall project.

4. **Statements of Authorized Representatives.** The published statements by industry representatives may be reviewed, as well. In one example, EPA found illegal aggregation after finding prior permit applications, board meeting minutes, and production notes indicated key objectives for two separately permitted modifications were actually to (1) increase the overall production capacity of the operations; and (2) replace equipment that is near the end of its useful life.

5. **EPA Analysis of Economic Realities.** This criterion is one exclusively within the scope of EPA authority. "Based on information available to the EPA," the following may be evaluated for singleness of purpose of the project: shared resources and equipment, common use of products, coordination of production schedules, and interdependence of one phase upon another.

Recommended Strategy

Any series of changes and modifications to a facility can look like an improper aggregation when viewed after-the-fact. After all, "hindsight is 20/20." However, it remains EPA's position that projects that are "substantially related" should be permitted as a single source, and the agency will review the timing, funding, consumer demand, statements by the company, and other economic realities to test the relationship of separate projects.

In order to minimize your company's exposure to liability for improperly aggregated projects, we recommend that a facility undergoing a series of modifications take the following steps as part of an internal investigation:

Step No. 1: Phased construction projects should be evaluated for aggregation factors. Where improper aggregation has occurred,

the company should consider voluntary disclosure under the EPA or state self-policing policies available to them.

Step No. 2: Develop an internal team to work on modifications together to prevent the projects from becoming problematic. Lack of communication among planners is often the missing link.

Step No. 3: Manage the message about plant development projects and product demand to prevent unwarranted inspection by EPA. If a project is not related to another, the company should not claim it is just for publicity.

Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration, **83 Fed. Reg. 57324 (November 15, 2018).**

EPA PROPOSES RULE TO BAN CHRYSOTILE ASBESTOS USING TSCA RISK MANAGEMENT RULE

BY: PIERCE M. WERNER

EPA has again taken action to ban certain asbestos-containing products in the United States under the Toxic Substances Control Act (TSCA) section 6(a) by a proposed rule published in the Federal Register April 12, 2022.

The proposed rule would prohibit the manufacture (defined under TSCA to include import), processing, distribution in commerce and commercial use of chrysotile asbestos (CAS Number: 132207-32-0) for chrysotile asbestos diaphragms for use in the chlor-alkali industry, chrysotile asbestos-containing sheet gaskets used in chemical production, chrysotile asbestos-containing brake blocks used in the oil industry, aftermarket automotive chrysotile asbestos-containing brakes/linings, other chrysotile asbestos-containing vehicle friction products, and other chrysotile asbestos-containing gaskets.

This is not the first time EPA has promulgated a ban on asbestos products under TSCA section 6(a). Put all too briefly and skipping plenty of highlights: In 1989, the EPA issued a final rule prohibiting the manufacture, importation, processing, and distribution in commerce of most asbestos-containing products after nearly 10 years of rulemaking proceedings "to reduce the risk of human health posed by exposure to asbestos" using TSCA. Ultimately, EPA found asbestos constituted an unreasonable risk to health and the environment and promulgated a staged ban of most commercial uses of asbestos. This was contested by industry (including foreign entities) under TSCA section 19(a) and appealed directly to the U.S. 5th Circuit Court of Appeals. The 5th Circuit ultimately invalidated the rule and remanded it to EPA, based on findings that EPA did not present sufficient evidence to justify the comprehensive ban. The court held the proposed rule was not the least burdensome regulation to achieve its goal of minimum reasonable risk.

TSCA section 6(a) requires EPA to take action to reduce the risk a chemical substance presents if it determines through a risk evaluation process that such chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other nonrisk factors. The risk analysis includes a consideration of an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use. Such a risk evaluation, pursuant to TSCA section 6(b)(4)(A), was issued in December 2020 for chrysotile asbestos whereby EPA determined chrysotile asbestos presents unreasonable risk of injury to health under certain conditions of use evaluated, thus leading to the currently proposed rule.

Admittedly, this may not be as significant as it seems on its face. EPA identifies one industry—chlor-alkali producers—consisting of around 10 plants nationwide, as the only known industry in the United States to fabricate products from raw chrysotile asbestos, and even this use is relatively low as use of asbestos diaphragm cells to produce

chlorine and sodium hydroxide has been declining over time with the increased use of non-asbestos membrane cells. As to the other products proposed to be banned by the rule, EPA reports that most products that historically contained chrysotile asbestos have been discontinued with non-asbestos alternatives readily available, so few entities have been identified that would be impacted by this rule. EPA is specifically requesting comments to gain more information on the potential impact.

The deadline for comments to the proposed rule is June 13, 2022. The proposed disposal and recordkeeping requirements would take effect 180 days after the effective date of the final rule; the proposed prohibitions relating to oilfield brake blocks, aftermarket automotive brakes and linings, other vehicle friction products, and other gaskets for commercial use are also proposed to take effect 180 days after the effective date of the final rule; and the prohibitions relating to asbestos diaphragms and sheet gaskets for commercial use are proposed to take effect two years after the effective date of the final rule.

Asbestos Part 1: Chrysotile Asbestos; Regulation of Certain Conditions of Use Under Section 6(a) of TSCA, Proposed Rule, **87 Fed. Reg. 21706 (April 12, 2022).**

Corrosion Proof Fittings, et al. v. EPA, 947 F. 2d 1201 (5th Cir. 1991)

LIMITATIONS BAR SUPERFUND CONTRIBUTION ACTION

BY: ETHAN R. WARE

As a general rule, the law will not allow plaintiffs to sit on legal rights indefinitely. Superfund actions are no exception. The 6th Circuit recently applied this principle, finding a declaratory judgment of liability asserted in a counterclaim could start the three year clock to initiate action, and if the company seeking contribution costs from other potentially responsible parties (PRP) did not act, the action may be barred by a statute of limitations.

In 2010, Georgia Pacific, LLC (GP) initiated legal action against International Paper, LLC (IP), NCR Corporation (NCR), and Weyerhaeuser to recover costs for cleanup of the Kalamazoo River, which had been contaminated with PCBs for decades. A federal district court allowed the case to go forward despite protests from IP and the other defendants, who argued the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) statute of limitations had expired, citing a number of possible events that may have caused the limitations period to begin running. The 6th Circuit Court of Appeals reversed, finding a simple declaratory judgment action is enough to trigger the three year statute of limitations.

Section 113 of CERCLA provides a separate statute of limitations for cost recovery actions and actions for contribution. According to the statute, the statute of limitations bars a CERCLA contribution action if the case is not commenced within three (3) years after a party receives a judgment in a CERCLA cost recovery action or enters an administrative settlement. As a result of a variety of cost recovery actions that started in 1995, the federal district court in this case found GP and other companies liable for remediation costs three separate times: in 1998, 2000, and 2003. IP was not implicated in those cases.

Before the 6th Circuit, GP asserted the 1998 declaratory judgment, as well as two others issued in 2000 and 2003, did not impose recoverable

costs or damages, and as a result could not trigger the three (3) year statute of limitations. GP argued declaratory judgments do not cause the statute of limitations period to commence under CERCLA section 113; instead, GP suggested actions for allocation of costs under section 113 do not commence until a judgment, administrative order or consent decree assigns specific costs to the plaintiff.

The 6th Circuit disagreed. First, the court addressed the much-debated differences between CERCLA cost recovery actions under § 107(a) of CERCLA and those under CERCLA § 113 (f). "These two statutory rights under §§ 107 and 113(f) are mutually exclusive, providing causes of action 'to persons in different procedural circumstances.' The Supreme Court explained the difference: 'costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f).'" *Id.* at 8 (internal citations omitted).

Next, the 6th Circuit noted these different remedies have separate and distinct statutes of limitations. "Not only do §§ 107 and 113(f) provide different avenues of recovery, but also they provide different statutes of limitations for their different types of actions." *Id.* at 8. Quoting in part from the CERCLA statute, the court found:

> [C]ost-recovery actions under § 107(a)(4) must be brought within three years "after completion of the removal action" or "for a remedial action, within [six] years after initiation of physical on-site construction." Actions for contribution under § 113(f), however, must be filed within three years of "(A) the date of judgment in any action under [CERCLA] for recovery of such costs or damages, or (B) the date of an administrative order under [§ 122(g)] (relating to de minimis settlements) or [§ 122(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages."
>
> *Id*. at 9 (internal citations omitted).

Finally, the court evaluated the nature of each underlying action commenced against the plaintiffs in the case. The 6th Circuit agreed with IP's argument that the 1998 judgment "h[eld] GP liable for past and future response costs pursuant to the defendants' §§ 107 and 113 counterclaims." *Id.* at 15. As a result, the court concluded the 1998 judgment caused the statute of limitations to begin to run for two reasons:

1. The 1998 order provides that "judgment as to liability is entered . . . against Plaintiff GP (and other parties) on Defendants' counterclaims." *Id.* at 16. This decision "fixed liability" for GP. At that point in time, a judgment was entered against GP as required by the statute of limitations provisions of § 113(f) of CERCLA.

2. In addition, the 1998 judgment "assigned liability." *Kalamazoo River Study Grp. v. Rockwell Int'l*, 274 F.3d at 1046 ("At the liability stage [in 1998] . . . [t]he district court determined that the KRSG and Rockwell had both released a sufficient amount of PCBs to face liability...."). *Id*. Therefore, there was no confusion on what contribution GP may seek from IP.

Thus, the 6th Circuit held the Section 113 claims against IP were barred by the 3-year statute of limitations: "[b]ecause the 1998 KRSG judgment caused the statute of limitations to begin to run, the three-year statute-of-limitations period concluded before GP filed its 2010 action, and we must dismiss GP's action on limitations grounds." *Id.*

GP attempted to save its case by also claiming that, even if its § 113 CERCLA contribution claims were barred by the 1998 judgment, it could still prevail on some of its other claims, which it had brought under § 107. The court rejected the argument, because GP did not have the option of a § 107(a) CERCLA case: "As discussed above, *Hobart* analyzed the interplay between §§ 107 and 113 [of CERCLA], concluding that 'if a party is able to bring a contribution action, it must do so under § 113(f), rather than § 107(a).'" *Id.* at 18 (internal citations omitted). The court went on to comment that section 107(a) of CERCLA provides the avenue for parties who "incur costs on their own," while § 113(f) is the statutory tool to recover contribution for costs imposed via settlement or judgment, which is the case before the court. *Id.*

Georgia-Pacific Consumer Products LP v. NCR Corp., No. 18-1806, 2022 WL 1209013 (6th Cir. Apr. 25, 2022)

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