

ENVIRONMENTAL NOTES

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VDEQ CHANGES APPROACH TO NO FURTHER ACTION LETTERS AND OFFICIALLY LAUNCHES VURAM

BY: HENRY R. "SPEAKER" POLLARD, V

The Virginia Department of Environmental Quality ("DEQ") has clarified its approach to issuing "no further action" letters ("NFAs") for sites with both petroleum and non-petroleum contamination. This clarified approach will ensure that non-petroleum contaminated sites are reviewed only through the Virginia Voluntary Remediation Program ("VRP") screening process. In addition, DEQ has launched its updated technical approach to risk assessments, the Virginia Unified Risk Assessment Model ("VURAM"). The combined effect of these developments is a more universal and definitive process for determining whether cleanup obligations exist for non-petroleum contaminated sites and, if so, the applicable risk-based cleanup levels.

Parties that discover non-petroleum contamination on properties are often faced with a conundrum: even though reporting such contamination is actually not required in many cases, there can be uncertainty as to whether the nature or level of contamination triggers the need for remediation based on the current or potential land use or lender requirements. DEQ often has encouraged property owners or prospective property owners to use the VRP for review of non-petroleum contamination. However, when presented with sampling results indicating both petroleum and non-petroleum contamination, some DEQ regional offices have issued petroleum program "no further action" ("NFA") form letters that, on their face, arguably covered both kinds of contamination. While reading too much into any NFA

letter is ill-advised, DEQ's new NFA policy forecloses this argument altogether, requiring that determinations of remediation duties for non-petroleum contamination must occur through the VRP review process. The first step will be to see if the site is eligible for the VRP. If remediation is clearly mandated by law or agency or court decision, the site is ineligible and must be remediated pursuant to the applicable regulatory program. If the site is VRP-eligible, then evaluation of risk-based cleanup measures or controls follows. Consistent with this new approach, DEQ has revised petroleum program form letters used when it is presented with evidence of both types of contamination. By example, the new NFA letter states that non-petroleum contamination must undergo VRP review separately from the normal petroleum program review. Note that the VRP involves tiered fees that progress from initial registration and eligibility determination to ultimate completion.

This change in how sites are reviewed comes amid implementation of VURAM. As we reported in our August 2016 newsletter, VURAM is designed to streamline the risk assessment process across several non-petroleum risk-based cleanup programs, doing so in part by removing many of the negotiable risk assessment exposure assumptions and replacing them with default assumptions. This effectively consolidates and formally unifies risk assessment approaches for the VRP, other DEQ brownfields programs, the Resource Conservation and Recovery Act Corrective Action program, and solid waste facilities under the Virginia Solid Waste Management Regulations. While VURAM may streamline the risk assessment process, the loss of negotiable risk assessment exposure assumptions may eliminate site-specific arguments for appropriate alternative risk scenarios for some sites.



hands of existing utilities, meaning it was difficult for independent solar companies to compete. Now, regulatory responsibility has passed to the Office of Regulatory Staff (ORS). By transitioning oversight to ORS, the legislature hopes to diversify the mix of energy resources, while helping the State catch up with North Carolina and Georgia in efforts to encourage solar power. In addition to solar implementation, the State's Definitive Energy Resource (DER) program has identified goals for landfill, wind, and hydroelectric power generation.

Going forward, and with perhaps limited exceptions, landowners, prospective purchasers, lenders and current or prospective tenants will need to use the VRP (and pay relevant VRP fees) to gain DEQ's determination of whether remediation of non-petroleum contamination is required by law or otherwise is needed to meet risk-based cleanup criteria. VURAM will then control the determination of appropriate remedial endpoints for most sites; so familiarity with the new default risk assessment factors in VURAM will be essential.

For additional information on DEQ's VURAM, click on this link: <http://www.deq.virginia.gov/Programs/LandProtectionRevitalization/RemediationProgram/RiskAssessment.aspx>

SOLAR ENERGY CONTINUES TO SHINE IN SOUTH CAROLINA

BY: KEITH "KIP" MCALISTER, JR.

Donald Trump's election as our next President throws the long-term outlook for President Obama's Clean Power Plan into disarray. Nevertheless, South Carolina, a state historically reliant upon coal-fired power plants, continues to explore alternative energy sources for its citizens. In 2014, the State enacted legislation intended to ease restrictions on energy companies. For example, the Distributed Energy Resource Program Act allows independent solar companies to lease solar panels to customers without being regulated as a public utility. Prior to the Act, solar regulation was largely left in the

Showing signs of progress, EPA, along with DHEC, the City of Spartanburg and others, hosted the nation's first Clean Energy Savings for All Summit this past August. The ceremony marked the kickoff of a solar farm constructed at the Arkwright landfill in Spartanburg, a former Superfund site. According to EPA, the installation of 12,000 solar panels will bring jobs to the community and a source of clean energy to almost 500 nearby homes. Similar projects, such as the Colleton Solar Farm, have utilized former farmland and become more prevalent in the State.

As the market expands and the State moves away from coal, it is inevitable that solar companies, electric power utilities, and regulators will encounter some difficulties when trying to establish rates, address demand, and determine bill credits or other offsets. However, expansion of available resources in South Carolina provides a unique opportunity for industry and manufacturers looking for alternatives to traditional power sources. It also may create a way to offset rising energy costs. Although the Obama Administration's energy legacy is murky, signs indicate South Carolina will continue to explore emerging renewable markets that provide realistic benefits to its growing consumers, including industry and manufacturers.

[Distributed Energy Resource Program Act, S.C. Code Ann. § 58-39-110, et seq.](#)

NORTH CAROLINA BEGINS USING RISK-BASED CORRECTIVE ACTION AT HIGH RISK UST SITES

BY: JESSICA J.O. KING

The North Carolina Department of Environmental Quality (NCDEQ) has issued guidance for remediation of petroleum groundwater contamination from leaking underground storage tanks (USTs). Its *North Carolina Petroleum UST Release Corrective Action Phase Project Management: A Calibrated Risk-Based Corrective Action Decision & Implementation Guide* (Guidance) follows NCDEQ's historic risk-based approach to low and intermediate risk sites and recognizes that requiring universal strict remediation goals is not always necessary or advisable at high risk sites.

Why the change?

Petroleum contamination in groundwater naturally degrades and attenuates over time. Under current state law, groundwater contamination at high risk UST sites must generally be remediated to state groundwater quality standards to the extent feasible. 15A NCAC 2L.0407(b). As a result, some UST owners attempting to achieve these strict numeric remediation standards have had to monitor concentrations for decades, unable to reach "no further action" status even when concentrations are stable or slowly decreasing.

According to the Guidance, current state law and EPA guidance also require use of monitored natural attenuation (MNA) to the maximum extent possible in any corrective action plan. However, EPA guidance states that if MNA is expected to take more than 10 years to achieve the cleanup goals at a site, then using groundwater quality standards as the cleanup goal may not be a viable option. As a result, the Guidance states that for future project planning, this 10 year period will be one of the design parameters NCDEQ uses in determining what cleanup goals should apply at a given site.

While environmentalists may argue NCDEQ should not concern itself with the time it takes to reach groundwater quality standards at high risk sites, NCDEQ justifies a different approach due to negative direct and indirect consequences, including:

- > Virtually unending costs with lackluster results -

- often paid by state or federal funding;
- > Lack of money to cover all sites through the NC Commercial Trust Fund;
- > 'Stigma' to the property, thereby potentially deterring redevelopment;
- > Administrative burdens on the state; and
- > Little to no benefit to the environment.

NCDEQ believes current law supports its move towards a more holistic and cost-benefit approach to high risk sites.

When does the guidance apply?

The Guidance applies to persons cleaning up petroleum releases from USTs at all sites, including "high risk sites." Current NC UST regulations classify petroleum release sites as high, intermediate or low risk based on certain factors. These factors include the distance from a drinking water supply well, future availability of alternative water supply sources in the area, risk of explosion due to vapors, and whether the release poses an imminent threat to human health and the environment. 15A NCAC .0406. Once a site is classified based on risk, it is assigned a cleanup standard as follows:

- > High risk sites – if feasible, remediation required to achieve NC groundwater protection standards for unrestricted use of groundwater;
- > Intermediate risk sites - remediation to "Gross Contaminant Levels" (GCLs), meaning concentrations up to 1000 times the groundwater protection standards; and
- > Low risk sites – possibly no remediation even where levels exceed groundwater protection standards.

Under the Guidance, high risk sites can now meet the intermediate risk site standard of GCLs if certain criteria are met.

How is the Guidance to be used?

The Guidance requires reevaluation of a site's classification and a cost-benefit analysis when proposing cleanup measures. First, pursuant to current law, a release is to be classified using the listed factors at the time of discovery. However, the agency recognizes a problem with this approach – site conditions change over time, and older sites once deemed high risk may not meet that classification today. Therefore, NCDEQ's

new approach uses the existing statutory classification framework, but acknowledges that site risk “is a dynamic variable that will change over time.” Thus, NCDEQ indicates in the Guidance that State law and regulations “provide for obtaining information during assessment, monitoring, and corrective action to allow for ongoing risk reclassification at Trust Fund-eligible sites.”

Second, in addition to reclassification, the Guidance requires a cost-benefit analysis when choosing a remedy. If MNA is expected to take more than 10 years with limited results, cost will be a factor in determining whether lower goals and an earlier site closure is the best option.

The Guidance requires the following systematic approach:

1. Determine the release stage: is the release expanding, stable or contracting?
2. Use a dynamic risk analysis process: require notification by owners of changes in release and site conditions.
3. Establish a groundwater cleanup level directly related to an up-to-date risk, ranking and abatement score.
4. Set measurable performance goals for the clean-up levels and the time required for each task.
5. Analyze the costs and weigh the benefits.

NCDEQ recognizes in its Guidance that use of a declining risk trend approach to high risk sites logically leads to establishment of a default cleanup standard of GCLs. Nevertheless, it justifies this approach as supported by logic and state law.

What does NCDEQ hope to achieve?

NCDEQ expects the Guidance will allow for closure of sites that otherwise would stay in MNA for undefinable periods of time. It also expects other benefits, including: (1) reducing per-site expenditures and redirecting available funds to a larger number of sites; (2) maximizing efficient use of funds; (3) a more streamlined, collaborative process; (4) increasing the ratio of reimbursement dollars paid to claims made; (5) improving communication among the UST owners, environmental consultants, and the agency; and (6) increasing transparency to the public.

Of course, some environmentalists worry the Guidance will result in closure of sites too soon and, thus, leave more pollution in place. However, perpetual monitoring of contamination levels that did not require active

remediation prior to the new guidance did not result in less pollution – just more proof that the levels were stable. The Guidance makes a lot of sense.

North Carolina Petroleum UST Release Corrective Action Phase Project Management: A Calibrated Risk-Based Corrective Action Decision & Implementation Guide (June 1, 2016)

[NCGS 143-215.94A\(2a\), -.94V\(a\)-\(c\), and \(e2\)](#)
[15A NCAC 2L .0402, .0406, and .0407](#)

[How to Evaluate Alternative Cleanup Technologies for Underground Storage Tank Sites: A Guide to Corrective Action Plan Reviewers \(EPA 510-B-94-003; EPA 510-B-95-007, and EPA 510-R-04-002\)](#)

EPA FINALIZES CHANGES TO AREA SOURCE BOILER RULE

BY: PHILLIP L. CONNER

EPA has revised the National Emissions Standards for Hazardous Air Pollutants (NESHAP) for industrial, commercial and institutional boilers at area sources. The area source boiler NESHAP was initially promulgated on March 21, 2011 and is found at 40 CFR Part 63, Subpart JJJJJJ. The revisions relate to issues on which EPA granted reconsideration.

Area sources are commercial, institutional or industrial facilities that emit or have the potential to emit less than 10 tons per year of a single hazardous air pollutant or less than 25 tons per year of combined hazardous air pollutants. These sources include laundries, apartments, hotels, schools, churches, medical centers, municipal buildings, and manufacturing facilities. EPA estimates there are more than 183,000 boilers used to generate heat at area sources. The NESHAP applies to these facilities if their boiler burns coal, oil or other liquid fuel, biomass or non-waste materials. The NESHAP does not apply to gas-fired boilers, hot water heaters, residential boilers, electric boilers, or boilers that burn solid waste. (Boilers that burn solid waste are subject to the incinerator standards.)

The revisions include an exemption from the requirement to meet the particulate matter (PM) emission limit for new or reconstructed oil-fired boilers that combust only ultra-low-sulfur liquid fuel (less than or equal to 15 parts per



million of sulfur). This replaces previous provisions that allowed this exemption for new or reconstructed oil-fired boilers that combust low-sulfur liquid fuel (less than or equal to 0.05 weight percent sulfur). Sources that were using the exemption for low-sulfur liquid fuel now have three years to decide how to comply with the PM limit – either convert to ultra-low-sulfur liquid fuel or conduct performance tests demonstrating compliance with the PM limit provided in the regulation. Sources using the ultra-low-sulfur fuel exemption must monitor and record the type of fuel they combust on a monthly basis. Also, if these sources intend to burn a fuel other than ultra-low-sulfur fuel or gaseous fuels, a performance test is required within 60 days of burning the new fuel.

Another change to the NESHAP applies to the frequency of PM performance testing. Previously, additional PM testing was not required for boilers with initial compliance tests showing that PM emissions were equal to or less than half of the limit provided in the regulation. Now PM performance testing is required every five years for these boilers. Sources that previously demonstrated compliance by showing that PM emissions were equal to or less than half of the limit now have until September 14, 2021 to conduct the additional performance testing.

In addition, a revision was made to the provision applicable to area source coal-fired boilers that use fuel sampling as their initial compliance test to demonstrate compliance with the mercury emission limit. As revised, if the initial performance test shows that mercury in the fuel is equal to or less than half of the mercury emission limit in the NESHAP, then further fuel sampling does not need to be conducted for 12 months as long as the source continues

to use the same fuel. Previously, no additional fuel analysis was required if the initial performance test showed that the mercury level in the fuel was equal to or less than half of the mercury emission limit in the NESHAP.

The revisions also include minor changes to the definitions of startup and shutdown as well as some technical corrections and clarifications. The affirmative defense for malfunctions was removed from the NESHAP in light of the decision by the U.S. Court of Appeal for the District of Columbia Circuit in *NRDC v. EPA*.

81 Fed. Reg. 63112 (Sept. 14, 2016).

EPCRA UPDATE: NONYLPHENOL ETHOXYLATES PROPOSED AS 313 TOXIC CHEMICAL CATEGORY

BY: ETHAN R. WARE

EPA is proposing to add Nonylphenol Ethoxylates (NPEs) to the list of Toxic Chemicals under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA). Comments on the proposal must be received on or before January 17, 2017.

Pursuant to Section 313, a facility manufacturing, processing, or otherwise using a listed Toxic Chemical in excess of certain threshold amounts throughout the calendar year must submit a report on environmental releases and waste management quantities. The facilities also must report pollution prevention and recycling data. The initial list of Toxic Chemicals included 308 identified substances and 20 categories of chemicals.

EPCRA 313(d) authorizes EPA to add or delete chemicals to the Toxic Chemicals list if any one of a list of criteria is met. Chemicals are to be added if the substance is “known to cause or can reasonably be anticipated to cause”:

- > Significant adverse acute human health effects;
- > Cancer or teratogenic effects or irreversible reproductive dysfunctions, neurological disorders, heritable genetic mutations, or chronic health effects in humans; or

- > Significant adverse effect to the environment due to toxicity, persistence in the environment, or bioaccumulation.

EPA proposes to list NPEs because they may accumulate in sediments and because “available experimental data demonstrates [certain NPE chemicals] cause acute and chronic toxicity to aquatic organisms at very low concentrations.” The list of NPE chemicals proposed as Toxic Chemicals are surfactants that have “widespread industrial and commercial use in adhesives, wetting agents, emulsifiers, stabilizers, dispersants, defoamers, cleaners, paints, and coatings.” Accordingly, EPA proposes to list NPEs as a category including thirteen NPEs appearing on the TSCA registry.

Companies using adhesives, surfactants, or emulsifiers may wish to review their Safety Data Sheets for the presence of NPEs. If NPEs are in the products they use, they may wish to submit comments to EPA regarding the listing by the January 17, 2017 deadline.

[81 Fed. Reg. 80624 \(Nov. 16, 2016\).](#)

COMMON STOCK USED TO REIMBURSE EPA FOR CERCLA RESPONSE COSTS

BY: RYAN W. TRAIL

A recent CERCLA settlement provides an unusual method for reimbursing response costs incurred by EPA at a Superfund site. Under a proposed Consent Decree concerning the Yavapai Penta Superfund Site in Prescott, Arizona, WestRock CP, LLC – a subsidiary of Westrock Company and the successor to the now bankrupt Smurfit-Stone Container Corporation – will pay approximately half of the response costs by transferring common stock of WestRock Company and a related entity to the federal government.

The Yavapai site is a former wood treating plant where EPA discovered arsenic and pentachlorophenol contamination in 2012. After spending \$6.2 million to remove 4,209 tons of contaminated soil, EPA sought reimbursement from WestRock CP, LLC as the successor-in-interest to Southwest Forest Industries Inc., which operated the wood treating plant from 1961-1985. In a Consent Decree lodged in the United States District Court for the District of Arizona, WestRock CP, LLC

and EPA agreed the claim for response costs would be satisfied by payment of (i) \$1,602,877.46 in cash, (ii) 56,064 shares of WestRock Company stock, and (iii) 9,344 shares of Ingevity Corporation stock (a specialty chemical business spun off from Westrock Company). The current value of the shares is approximately \$3 million. Once the Consent Order is entered and the stock is transferred, EPA will sell the stock and deposit the proceeds in the EPA Hazardous Substance Superfund.

The sale of stock and other assets as a means to raise funds to pay CERCLA settlements or administrative penalties is not uncommon and is even a suggested method in EPA’s “Ability to Pay” guidance. However, a transfer of stock directly to EPA is unusual. That said, there are reasons why it occurred here, and those reasons relate to the fact that WestRock CP, LLC had filed a Chapter 11 petition in bankruptcy and was being administered by a bankruptcy trustee pursuant to an approved Plan of Reorganization. Shares of WestRock Company and Ingevity Corporation were used to make payment because these shares were an asset of the bankruptcy estate. Thus, this wasn’t a case where the responsible party used its own shares to make payment. Instead, the bankruptcy trustee used shares belonging to the bankruptcy estate to make payment.

The settlement raises questions regarding the role of government in private business and potential market consequences of the government owning shares of a corporation, even if only for a limited time and purpose. However, the circumstances here were unusual, so it seems unlikely this scenario is one that will become commonplace in future settlements.

Interested parties may view the Complaint and Consent Decree by clicking on the link below.

[United States v. WestRock CP, LLC - Consent Decree](#)

EPA PUBLISHES REVISED PESTICIDE APPLICATION GENERAL PERMIT

BY: ETHAN R. WARE

EPA has promulgated a final rule revising the Pesticide General Permit (the “2016 PGP”). The 2016 PGP is applicable only in four states (Idaho, Massachusetts, New Hampshire, and New Mexico) and at federal facilities, but the remaining States will have to revise their current PGP to be no less stringent than the 2016 PGP when their current PGP expires. The 2016 PGP was effective October 31, 2016.

The 2016 PGP authorizes point source discharges of runoff from pesticide applications to waters of the United States (WOTUS) as long as certain monitoring and recordkeeping requirements are met. PGP coverage applies to pesticide operators and decision-makers. Activities not eligible for the 2016 PGP may require an individual NPDES permit. EPA’s list of covered operations include farmers and forestry (NAICS III, 113), pesticide manufacturers and consultants (NAICS 325), and utilities (NAICS 221).

The 2016 PGP applies to “pesticide operations,” which is defined as pesticide applicators and the decision-maker, who control the application of pesticides resulting in a

discharge to WOTUS. All applications are subject to work practice restrictions including the duty to minimize pesticide discharges by limiting the amount and frequency of pesticide application. Any “adverse incidents” must be monitored and reported. Pest management options may be required if WOTUS are impaired or otherwise protected or contain resources of concern. The 2016 PGP is generally the same as the prior PGP, and the following provisions are revised in the new permit:

- > Electronic reporting is now required (Part 7.8);
- > Additional species are included in the list of Resources of Concern which must not be adversely affected by pesticide runoff;
- > The filing date for Notices of Intent is extended to January 2, 2017; and
- > Part 9.0 has been updated to incorporate restrictions in state water quality certifications.

As noted, the 2016 PGP is not yet applicable in states with delegated programs. However, those states must incorporate the provisions of the 2016 PCP into their pesticide application general permit when their existing permit expires.

81 Fed. Reg. 75816 (Nov. 1, 2016).

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