

# ENVIRONMENTAL NOTES

May 2016

## ENVIRONMENTAL AND INDUSTRY GROUPS CHALLENGE EPA COAL ASH RULE

BY: JESSICA J.O. KING

The news has been full of stories and articles concerning Coal Combustion Residuals (CCR), also referred to as coal ash. CCR became a hot topic in 2008 when a coal ash pond at a utility plant in Tennessee spilled more than 5 million cubic yards of coal ash into a nearby river. The bad news continued in 2014 when a broken pipe under a coal ash pond at Duke Energy's Eden, North Carolina facility allowed an estimated 30,000 cubic yards of coal ash to spill into the Dan River. Dominion Power is now closing its coal ash ponds in Virginia, and there have been public protests and lawsuits associated with how its closures are being completed.

CCR is generated when coal is burned to produce electricity. According to EPA, it is one of the largest industrial waste streams generated in the U.S. Most CCR is in dry form and historically has been placed in on-site landfills or beneficially reused as fill or replacement for raw materials in products like wallboard, concrete and brick. Sometimes, however, CCR is managed in surface impoundments and wet ponds. CCR may contain low levels of mercury, cadmium, and arsenic.

As a result of public pressure to address proper management and disposal of CCR, EPA issued a final waste management rule for CCR in 2015 (the "Rule"). During its years-long rulemaking, EPA offered commenters two options: manage and dispose of CCR as a solid waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA) or manage and dispose of it as a hazardous waste under Subtitle

C of RCRA. EPA received over 450 comments and ultimately chose to regulate CCR as a solid waste under Subtitle D. This was a win for the power industry for obvious reasons, and specifically because regulating CCR as a solid waste: (1) imposes much less stringent requirements than management and disposal as a hazardous waste; (2) requires each state to determine if and how it wants to permit CCR disposal; and (3) gives EPA no enforcement authority, leaving enforcement up to the states and citizens groups.

The Rule established requirements for existing and new CCR landfills and surface impoundments, including the following:

- Structural integrity and inspections;
- Groundwater monitoring;
- Corrective action where hazardous constituents in groundwater are above groundwater protection standards;
- Location restrictions;
- Liner design criteria;
- Closure of inactive surface impoundments within three years to avoid additional requirements;
- Day-to-day operating criteria; and
- Recordkeeping, notification and Internet posting.

As expected, environmental groups filed petitions challenging the Rule on the grounds that regulating CCR as a solid waste under Subtitle D is insufficient. A coalition of electric utilities and concrete companies also challenged the Rule, but for other reasons. Among other things, they argue that the Rule's regulation of inactive surface impoundments -- those that no longer receive coal ash -- is unlawful because RCRA does not allow it. A total of seven petitions challenging the Rule have now been consolidated into

one case before the United States Court of Appeals for the D.C. Circuit.

Last month, EPA filed its brief in the case and addressed the petitions filed by industry and environmental groups. EPA said it stands by the Rule, arguing it “made well-reasoned judgments based on the data available...” The agency said it “is entitled to considerable deference in making these technical judgments, and...each of the challenged provisions should be upheld because they represent a rational application of EPA’s authority and responsibility to regulate CCR in a manner that will protect public health and the environment.”

Oral argument has not yet been scheduled. In the meantime, the Rule is in effect, and those subject to it are taking steps to meet its requirements. Many utilities have strict deadlines to manage their existing stockpiles of CCR and to close out or upgrade their existing landfills and surface impoundments. EPA estimates there are approximately 735 impoundments affected by the Rule. That means there is a lot of work to be done to comply.

80 Fed. Reg. 21,302 (Apr. 17, 2015); *Utility Solid Waste Activities Group, et al. v. EPA*, No. 15-219 (D.C. Cir. 2015); *Brief of Respondent EPA*, Doc. #1609241, p. 14 (Apr. 18, 2016).

## FEDS RENEW FOCUS ON WORKER SAFETY AND INDIVIDUAL ACCOUNTABILITY

BY: CHANNING J. MARTIN

Massey Energy CEO Donald Blankenship reported to a California prison on May 12 to begin serving a one-year sentence for willfully violating mine safety standards. His conviction was related to the deadliest United States mine explosion in decades, one in which 29 people died. Earlier that day, the United States Circuit Court of Appeals for the Fourth Circuit denied a motion by his counsel to allow him to remain free while his appeal is pending. More than likely, that means he will serve his sentence before an appellate court can even consider his appeal.

The case against Mr. Blankenship illustrates the federal government’s renewed focus on worker safety laws and holding individuals accountable for their conduct. The renewed focus began in 2010 with the BP Deepwater Horizon oil spill, and some say it culminated in December, 2015 when U.S. Deputy Attorney General Sally Quillan Yates issued a memorandum that has come to be known as the “Yates Memo.” The Yates Memo announced a Department of Justice (DOJ) initiative to impose criminal and civil liability on the individuals responsible for corporate misdeeds. Among other things, it states that both criminal and civil corporate investigations should focus on individuals from the inception of the investigation. It also requires corporations seeking cooperation credit to provide DOJ with all relevant facts about the individuals involved in the corporate misconduct.

Also in December, 2015, Deputy Attorney General Yates issued a memorandum to all 93 United States Attorneys around the country indicating that DOJ and the Department of Labor (DOL) were launching an initiative to investigate and prosecute environmental and worker safety violations more effectively. Federal prosecutors were encouraged to “engage regularly” with DOJ and DOL enforcement personnel to identify matters appropriate for investigation and prosecution. Environmental laws are front and center under the worker safety initiative because workers often are tasked with handling hazardous substances and responding to releases.

It’s important to understand that environmental crimes don’t always require the “willful” conduct that sent Don Blankenship to jail. In fact, many environmental laws require only that the defendant acted “knowingly,” meaning the defendant intended the act or omission regardless of whether he knew he was breaking the law. Thus, the endangerment provisions of the Clean Air Act, Clean Water Act and Resource Conservation and Recovery Act can apply whenever an individual commits a violation that puts others in danger. In fact, the Clean Water Act and Clean Air Act contain provisions under which even negligent conduct can constitute a crime. In all of these instances, the Yates Memo makes clear that both the company and the employees who engaged in the conduct are at risk of prosecution.

What should companies do? Employers should consider an internal audit of all environmental, health and safety risks and should conduct such an audit under the attorney-client privilege. Developing an appropriate internal investigation can be complicated, and companies must consider potential reporting obligations, use of EPA’s Audit Privilege, and other applicable regulatory obligations. An internal audit can be extremely helpful in identifying activities that could give rise to liability not only for the corporation, but also for the individuals associated with it.

Memorandum from Assistant Attorney General Yates regarding individual accountability (Sept. 9, 2015); Memorandum from Deputy Attorney General Yates regarding worker safety violations (Dec. 17, 2015).



### **AIR PROGRAM MALFUNCTION EXEMPTION NIXED, BUT NOT AGENCY DISCRETION**

**BY: HENRY R. “SPEAKER” POLLARD, V**

Virginia’s State Air Pollution Control Board (“Board”) recently amended its regulations to remove the long-standing malfunction exemption available to regulated sources of air pollution for violations of emission limits and monitoring requirements. Though somewhat perfunctory at this stage, the Board’s action is the latest chapter in the long story of the exemption and other defenses to violations relating to start-up, shut-

down and malfunctions (“SSM”). The amendment takes effect June 1, 2016.

Virginia’s malfunction exemption had been expressly incorporated into the Board’s regulations for decades. It reflected practical realities that remain for many industrial and local government entities with manufacturing processes or power or steam generation units. Malfunctions by their very nature disrupt normal fuel-burning and process equipment as well as the ability of air pollution control equipment to meet emission limits. Such events can create emissions in excess of permitted limits or interfere with emission monitoring, even if only for brief periods of time. Depending on the nature of a malfunction, it may not be technologically feasible to prevent excess emissions or monitoring failures, so the defense offered a reasonable and clear pathway to avoid a regulatory or permit violation if certain factors could be demonstrated.

What prompted the Board’s action? A petition by the Sierra Club and a court decision led to EPA declaring that most SSM exemptions violated the Clean Air Act. EPA then called on Virginia and other states in June 2015 to amend their State Implementation Plans to remove these exemptions from their respective air programs (“SIP Call”). (A SIP is a state’s plan to implement certain Clean Air Act regulatory and permit programs under EPA authorization.) Ironically, SSM exemptions had survived for decades in state SIPs, including Virginia’s. Eighteen states and a number of industries have challenged the SIP Call in court, so it may yet be upheld. However, Virginia is not among the challengers, so the Board proceeded with its amendment to comply with the SIP Call.

Still, all is not lost for sources in Virginia. Although the Board struck the malfunction exemption, the amendment still allows sources to demonstrate that a malfunction occurred. Virginia DEQ can then consider this demonstration as a mitigating factor in exercising discretion about whether to bring an enforcement action, discretion recognized by EPA in the SSM SIP Call itself.

The Board's amendment may be the last nail in the coffin for the malfunction exemption, but the exemption's spirit, or at least its logic, lives on. Accordingly, to preserve the opportunity for enforcement discretion by DEQ, it is still critical for sources to document malfunctions carefully and to provide the notice and demonstration of malfunction to DEQ soon after the event occurs.

32 Va. Reg. 2422 (May 2, 2016); 80 Fed. Reg. 33840 (June 12, 2015); *Walter Coke, Inc. v. Environmental Protection Agency*, No. 15-1166 (D.C. Cir).



### WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE (IN THE WORKPLACE)

BY: A. KEITH "KIP" MCALISTER, JR.

For the third consecutive year, OSHA's second most cited violation was for failure to comply with the Hazard Communication Standard (HCS). The HCS was promulgated in 1983 and requires chemical manufacturers and importers to classify the hazards of chemicals they produce or import. It also requires employers to provide information to their workers about the hazardous chemicals to which they are exposed. Although not complicated, the HCS is often overlooked, which is why employers are cited regularly.

Employers who do not produce or import chemicals need focus only on those parts of the HCS that

deal with establishing a workplace program and communicating information to their workers. For example, employers are required to have safety data sheets (SDS) for each hazardous chemical used in the workplace and make them available to their employees. Hazardous chemicals include any substance that presents a physical or health hazard. The amount or concentration of a particular chemical is irrelevant so long as it poses a risk to employees.

In addition to SDSs, employers must provide information and training to employees about hazardous chemicals in their work area at the time of initial assignment. Such information includes a written hazard communication program that describes labels, SDSs, operations where the chemical is present, and mitigation measures, including personal protective equipment and emergency procedures.

Over the last few years, the HCS has been a favorite target of OSHA compliance inspectors, and there is no indication that will abate anytime soon. Thus, employers should review their written program to verify it's up-to-date. It's also important that they review their SDSs to confirm they have one for each chemical used in the workplace and to confirm no changes in chemical composition or hazards presented have occurred. Employers should also confirm that all employees have been adequately trained. A failure to communicate may expose your company to liability unnecessarily.

### EPA REGION III ASSESSES LARGEST SUPERFUND STIPULATED PENALTY EVER

BY: RYAN W. TRAIL

The Rodale Manufacturing facility in Emmaus, Pennsylvania was added to the National Priorities List in 1991 after more than 50 years of electrical component manufacturing. Operations at the facility included electroplating, vapor degreasing, and metal shaping, all of which involved the use of chlorinated solvents. In 2002, Schneider Electric USA, the facility's owner, entered into a Consent Decree with the U.S. Department of Justice (DOJ) and others for remediation of groundwater contamination at the facility. Among

other things, the Consent Decree required Schneider to operate a groundwater pump and treat system equipped with air pollution control equipment that was designed to prevent harmful emissions from the groundwater being treated to the atmosphere. The Consent Decree also contained a stipulated penalties provision by which Schneider agreed to pay a set dollar amount for each day it was out of compliance with the Consent Decree.

The air pollution control equipment began malfunctioning in 2008, something that Schneider did not correct until 2013 when it replaced the groundwater treatment system with a system that eliminated the need for air pollution controls. Thus, Schneider was out of compliance with the Consent Decree for approximately 5 years. On May 3, 2016, DOJ, EPA, and the Pennsylvania Department of Environmental Protection announced that Schneider had been assessed stipulated penalties totaling \$6,868,975. This is the largest Superfund stipulated penalty ever assessed by EPA.

Violations of the Consent Decree include Schneider's alleged failure to maintain equipment used to collect and treat hazardous air pollutants such as trichloroethylene; failure to alert state and federal agencies of the malfunctioning air pollution control device; failure to comply with state air permitting regulations; and failure to provide records to agency officials. Although Schneider agreed to pay the multi-million dollar penalty, it neither admitted nor denied liability for the alleged violations.

EPA's press release announcing the Schneider penalty stated, "We will not tolerate violation of our consent decrees, especially where those violations can result in risks to public health, welfare and the environment . . . The significant penalty in this case shows that non-compliance with settlement requirements has serious consequences." Companies involved in cleanups pursuant to Consent Decrees with stipulated penalty provisions should take note.

<https://www.epa.gov/newsreleases/epa-doj-and-pa-dep-announce-68-million-penalty-violations-pa-schneider-electric-usa>

## EPCRA 313 REPORTING – FAQs

BY: ETHAN R. WARE

The Emergency Planning and Community Right-to-know Act (EPCRA) requires Form R reports to be filed with EPA each July 1 for each listed "toxic chemical" a facility manufactures or processes in excess of 25,000 lbs., or "otherwise uses" in excess of 10,000 lbs., during the previous calendar year. The reporting form and implementing regulations are found at 40 CFR Part 372. For the list of toxic chemicals, consult the EPA "Consolidated List of Lists" at <https://www.epa.gov/epcra/consolidated-list-lists>. EPA has published three frequently asked questions that should be of interest to our readers, along with EPA's responses, as follows:

**QUESTION NO. 1:** Suppose a facility consists of several establishments, some of which have primary NAICS codes within the covered codes and some of which have primary NAICS codes outside that range. How would this facility determine if it is covered by EPCRA Section 313?

**ANSWER:** A facility must file a Form R where:

- The facility is included in a TRI-covered North American Industry Classification System (NAICS) code (see the [TRI NAICS code webpage](#) or Table I of the current Reporting Forms and Instructions for a complete list); and
- The facility has 10 or more full-time employee equivalents (i.e., a total of 20,000 hours or greater; see 40 CFR 372.3); and
- The facility manufactures (defined to include importing), processes or otherwise uses any [EPCRA Section 313 chemical](#) in quantities greater than the established threshold in the course of a calendar year.

A facility must report if those establishments that are in the covered NAIC codes have a combined value added of more than 50 percent of the total value added of services provided or products shipped or produced by the whole facility, or if one of

those covered SIC code establishments has a value added of services or products shipped or produced that is greater than the value added of any other establishment in the facility (40 CFR Section 372.22(b) (3)). If the facility determines that the establishments meet this test, the entire facility has met the SIC code criterion. If the entire facility also meets the employee and chemical activity thresholds (based on all establishments at the facility), then the entire facility would be subject to EPCRA Section 313 reporting.

**QUESTION NO. 2:** If a toxic chemical is derived from the phase separation of wastes received from off-site and that chemical is subsequently incorporated into a product at the facility and then distributed into commerce, has the toxic chemical been processed or otherwise used?

**ANSWER:** If a facility receives materials containing toxic chemicals from off-site for further waste management and the toxic chemicals are treated for destruction, stabilized, or disposed on-site, the facility would be otherwise using the toxic chemicals. However, during phase separation the toxic chemical in the waste is not actually destroyed. Furthermore, the toxic chemical is incorporated into a product at the facility and is further distributed in commerce (e.g., retorted mercury sold for reuse in thermometers and mercury switches). Thus, as long as the toxic chemical coming from the waste is not stabilized, treated for destruction, or disposed, it would not be otherwise used because it is neither treated for destruction nor disposed on site.

Because it is distributed in commerce, it would be processed. Once a facility exceeds a threshold for a particular toxic chemical, amounts of that chemical that are released or otherwise managed as a waste must be calculated for all on-site activities.

**QUESTION NO. 3:** A covered facility manufactures and repairs small engines and automobile engine parts. Prior to beginning the work, any fuel in the fuel tanks of the small engines is removed, and fuel used to test fire the engine parts is also collected. After the work is completed, the removed fuel is re-used along with any necessary new fuel to fill the need.

Must the toxic chemicals in the fuel be included when determining if 313 EPCRA thresholds and release threshold are exceeded?

**ANSWER:** Yes. Listed toxic chemicals in the fuel must be reported in this example because the fuel constituents listed as 313 toxic chemicals are "processed." The constituents in the fuel go out the door into distribution with the product. "Process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce: (1) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance, or (2) as part of an article containing the toxic chemical. Process also applies to the processing of a toxic chemical contained in a mixture or trade name product. See 40 CFR 372.3.





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### CONTACT US



**William A. Anderson, II**  
Partner, Washington, D.C.  
202.327.5060  
wanderson@williamsmullen.com



**Amos C. Dawson, III**  
Partner, Raleigh, NC  
919.981.4010  
adawson@williamsmullen.com



**Jessica J.O. King**  
Partner, Columbia, SC  
803.567.4602  
jking@williamsmullen.com



**Channing J. Martin**  
Partner & Chair, Richmond, VA  
804.420.6422  
cmartin@williamsmullen.com



**A. Keith "Kip" McAlister, Jr.**  
Associate, Columbia, SC  
803.567.4604  
kmcaster@williamsmullen.com



**Henry R. "Speaker" Pollard, V**  
Partner, Richmond, VA  
804.420.6537  
hpollard@williamsmullen.com



**Ryan W. Trail**  
Associate, Columbia, SC  
803.567.4605  
Rtrail@williamsmullen.com



**Ethan R. Ware**  
Partner, Columbia, SC  
803.567.4610  
eware@williamsmullen.com



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