



SPILMAN THOMAS & BATTLE, PLLC
ATTORNEYS AT LAW



WEST VIRGINIA CHAMBER

West Virginia Chamber of Commerce Manufacturers Issues Forum

November 16, 2009

Environmental Compliance: Permitting Processes, Water Quality Standards, and the 15-Minute Emergency Response Rule

By: Allyn G. Turner,
Andrew B. McCallister

Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
PO Box 273
Charleston, WV 25321-0273
Phone: (304) 340-3800
Fax: (304) 340-3801
E-Mail: aturner@spilmanlaw.com
amccallister@spilmanlaw.com

I. WATER-RELATED ISSUES

A. Outside Forces Causing Increased Scrutiny Of WVDEP

1. Environmental groups' "take-back" petition
 - a. Filed on June 17, 2009, by the Sierra Club, the West Virginia Highlands Conservancy, Coal River Mountain Watch, and the Ohio Valley Environmental Coalition.
 - b. Requesting the United States Environmental Protection Agency ("USEPA") to withdraw its approval of West Virginia's delegated authority to administer the National Pollutant Discharge Elimination System ("NPDES") in the state.
 - c. Alleges that the West Virginia Department of Environmental Protection ("WVDEP") has failed to enforce or maintain its NPDES program and has repeatedly capitulated to the demands of regulated industries, resulting in impairment to West Virginia's waterways.
 - d. If granted, USEPA would administer the NPDES program in West Virginia directly.
2. *New York Times* and other coverage
 - a. Direct evidence that the EPA is undertaking actions in direct response to media coverage such as *60 Minutes* and the *New York Times*.
 - b. Prepared remarks for Administrator Jackson cite to the *New York Times*, as opposed to EPA's own scientists and work, for the proposition that exposure to airborne soot "almost doubles a person's likelihood of dying from heart disease."
3. Dunkard Creek fish kill
 - a. 30-mile fish kill that occurred in late August and early September. Ultimately attributed to a bloom of golden algae in Dunkard Creek.
 - b. Serious environmental event that has received considerable coverage.

B. Increased Difficulties In NPDES Permitting, Including Renewals

1. Water quality-based effluent limits ("WQBELs") are a primary source of contention between WVDEP and permittees. Permit renewals frequently

are being issued with new, more stringent limits. Additionally, WVDEP has shown resistance to appropriately calculated WQBELs that are in their judgment “too high.”

2. USEPA is in the process of reviewing NPDES permits, particularly those issued to permittees within the coal sector, and has made several general objections to the issuance of those permits. To date, over 15 letters have been sent to permittees in the coal industry. USEPA’s generic comments in these letters, most notably related to WVDEP’s implementation of its narrative water quality standards, have far-reaching implications for non-coal permittees and pose the danger of establishing harmful program-wide precedents that would negatively impact industrial facilities.
3. The above factors, together with ongoing agency issues, have resulted in more appeals to the West Virginia Environmental Quality Board (“EQB”).

C. Issues Related To Federal And State Enforcement

1. *Sierra Club v. Powellton Coal Company, LLC*, --- F. Supp. 2d ----, 2009 WL 2524746 (S.D. W. Va. August 18, 2009): Ruling by Judge Copenhaver that West Virginia’s administrative enforcement rule (47 C.S.R. 1) is not sufficiently “comparable” to federal administrative enforcement provisions to preclude citizen suits for the same violations.
 - a. Generally, the administrative penalty process allows for the least contentious resolution by the agency and the permittee of CWA violations. To eliminate any vulnerability to citizen suits in light of the *Powellton* decision, however, WVDEP will have to enforce CWA violations through a civil suit in state circuit court.
 - b. Requires revision of West Virginia rule to make state administrative enforcement regulations “comparable” to the CWA procedure.
 - c. Results in increased potential for citizen lawsuits under the CWA.
2. Increased scrutiny by USEPA will lead to increased inspections pursuant to Section 308 of the CWA, which are often the precursor to enforcement actions.
3. October 2009 Water EPA Enforcement policy.

D. Early Focus Of 2011 Triennial Review Of Water Quality Standards

1. Iron
2. TDS

3. Sulfates
 4. Temperature
 5. Nutrients
- E. Relationship To Air Issues
1. In addition to the many current high-profile Clean Air Act issues, it appears that with complaints that the implementation of air pollution control technologies and systems are removing pollutants from the air and “dumping them in the waterways” (as reported in the *New York Times*), and complaints that waterways and aquatic life are impacted by the air deposition of mercury (new nationwide fish tissue study), for example, there is a new push toward tackling interrelated air and water regulatory issues.

II. AIR-RELATED ISSUES

- A. Federal And State Greenhouse Gas (“GHG”) Reporting
1. Federal Law
 - a. Final rule published in the Federal Register on October 30, 2009. Rule is currently in effect.
 - b. Establishes a reporting threshold of **25,000 metric tons per year** of carbon dioxide equivalent (“CO₂e”)¹ for most covered sources. The purpose of this rule is to allow USEPA to compile comprehensive, accurate baseline data relating to GHG emissions in the United States to inform future national climate change policies, including research and development initiatives, economic incentives, and other programs designed to limit the emission of GHGs. USEPA estimates that this rule will cover 85% of the total U.S. GHG emissions from approximately 10,000 facilities.

¹ Covered GHGs are carbon dioxide, methane, nitrous oxide, hydroflourocarbons, perfluorocarbons, sulfur hexafluoride, and other fluorinated gases (except CFC and HCFC and gases 1 mm Hg @ 25°C).

c. Applicability

i. Covered emissions categories [non-mobile sources]:

Downstream Sources			Upstream Sources
All-in sources	Threshold sources	Stationary Combustion Units	
Electricity generation Adipic acid production Aluminum production Ammonia manufacturing Cement production HCFC-22 production HFC-23 destruction processes Lime manufacturing Nitric acid production Petrochemical production Petroleum refineries Phosphoric acid production Silicon carbide production Soda ash production Titanium dioxide production Municipal solid waste landfills Manure management systems	Ferroalloy production Glass production Iron and steel production Lead production Pulp and paper manufacturing Zinc production	Boilers Process heaters Combustion turbines Incinerators Stationary internal combustion engines Other stationary fuel combustion equipment	Suppliers of: – Petroleum products – Coal-based liquids – Natural gas and natural gas liquids – Carbon dioxide – Industrial GHGs

*see definition of source categories in each subpart

ii. Emissions sectors included in proposed rule but excluded from final rule pending further agency review:

Electronics manufacturing	Oil and natural gas systems
Ethanol production	SF ₆ from electrical equipment
Fluorinated GHG production	Underground coal mines
Food processing	Wastewater treatment
Industrial landfills	Suppliers of coal
Magnesium production	

Note: USEPA has stated its intention to issue supplemental rules for a number of sectors omitted from the final reporting rule. The agency plans to finalize such rules in 2010.

d. Data collection begins January 1, 2010. First annual report due March 31, 2011 for calendar year 2010.

e. Exiting the program: Covered facilities may cease reporting under the rule based on GHG emissions reductions

i. 5 consecutive years of emissions below 25,000 metric tons CO₂e/year.

- ii. 3 consecutive years of emissions below 15,000 metric tons CO₂e/year.
 - iii. GHG-emitting processes or operations are shut down.
 - f. Measuring devices: Covered facilities may use “best available data” in lieu of the required monitoring methods for the first quarter of 2010 (January-March), but data collection measures specified in the rule must be used thereafter.
 - i. USEPA can grant an extension beyond March 2010 at the request of a covered facility, but no such extensions will be granted beyond 2010.
 - g. Verification: Emissions reports verified by USEPA (vs. third party).
 - h. Preemption: Expressly does not preempt state programs. *See below*.
2. West Virginia GHG Emissions Inventory Program (45 CSR 42)
- a. Applicability: Requires reporting from facilities that:
 - i. Emit one or more GHGs in an amount greater than 10,000 short tons CO₂e/year **and**
 - ii. Are required to complete and submit to WVDEP an annual emissions inventory (“AEI”).
 - b. Data submission: First reports for CY2008 were required to be submitted by June 30, 2009. Reports for CY2009 are due on April 30, 2010.
 - c. Consistency: Statutory mandate that the Secretary **shall** make West Virginia’s program “as consistent as possible with other state and federal programs designed to monitor quantify and register emissions of GHGs.” W. Va. Code § 22-5-19(e). How WVDEP will implement this requirement remains unclear.

B. EPA’s Proposed GHG New Source Review (“NSR”) “Tailoring” Rule

- 1. Proposed rule issued October 27, 2009. Comment period extends until December 28, 2009.
- 2. Would affect Title V and PSD sources.

3. Designed to address “major source” and “significance level” thresholds currently in the Clean Air Act for criteria pollutants (100 and 250 tons per year), which would automatically take effect for GHGs upon the adoption of any rule by USEPA that controls or limits GHGs (e.g., current proposal to limit GHG emissions from light duty vehicles).
 - a. Existing thresholds would cover numerous small businesses.
4. Proposal: The new rule would create the following thresholds:
 - a. Major stationary source threshold of 25,000 metric tons CO₂e/year to determine whether a new facility or a major modification at an existing facility would be subject to PSD requirements.
 - b. Significance level between 10,000 and 25,000 metric tons CO₂e/year. Existing major sources making modifications that result in an increase of GHG emissions above the significance level would be required to obtain a PSD permit.
5. Phased approach
 - a. Phase 1: Facilities meeting the emissions applicability thresholds would be required to obtain PSD and operating permits covering those emissions, requiring the use of Best Available Control Technology (“BACT”) and energy efficiency measures to minimize GHG emissions.
 - i. Five years.
 - ii. USEPA will complete a study to evaluate the administrative feasibility of administering the program at lower GHG thresholds.
 - b. Phase 2: Within one year of reviewing the study results, USEPA must complete a follow-on regulatory action to establish thresholds by either:
 - i. Confirming the need to retain Phase 1 levels.
 - ii. Establishing different GHG emissions threshold levels that more accurately reflect the administrative capabilities of permitting authorities.

III. SAFETY: THE 15-MINUTE EMERGENCY RESPONSE RULE

A. Background

1. Tragedies at Sago and Aracoma mines led to quick legislative action for responses to mining accidents. Mining companies were required to report emergencies within 15 minutes and were subject to a non-discretionary \$100,000 fine for a failure to report.
2. Governor Manchin began pushing the 15-minute reporting rule for industrial facilities following explosion at Bayer plant in Institute. Legislation passed during the 2009 Session.

B. Statutory And Regulatory Requirements

1. Applicability: The 15-minute rule applies to the following facilities:
 - a. Facilities that submit Risk Management Plans under Section 112(r) of the Clean Air Act are automatically covered. W. Va. Code § 15-5B-3a(a)(1)(A).
 - b. Factories, mills, plants or refineries that the West Virginia Department of Homeland Security and Emergency Management (“WVDHSEM”) determines has a reasonable potential to have an emergency event are covered after WVDHSEM sends a **certified letter** notifying the facility that it is subject to the reporting requirements of the rule. W. Va. Code § 15-5B-3a(a)(1)(B); 170 C.S.R. 2-9.1.b.1.
2. Emergency event: Defined as an **unplanned event**² including, but not limited to:
 - a. An explosion
 - b. A fire that cannot be contained within 15 minutes of discovery
 - c. The release of a reportable quantity, as specified in 40 C.F.R. § 302 (2009) or its successor or by the director through this rule, of an extremely hazardous substance listed in the appendices to 40 C.F.R. § 355 (2009) or its successor.
 - d. Loss of life or serious personal injury as defined by 29 C.F.R. § 1910 at an industrial facility.

170 C.S.R. 2-2.4.

² “Unplanned event” means an event that is not otherwise authorized or permitted pursuant to state and federal law or a planned event that results in unplanned consequences such as an explosion or fire that cannot be controlled with the parameters set forth for the planned event. 170 C.S.R. 2-2.5.

3. Notification: Requires covered industrial facilities to notify either 911 or WVDHSEM at 866-WVSAFETY within 15 minutes of becoming aware of an emergency event.
 - a. WVDHSEM prefers that facilities notify 911.
 - b. May be multiple reporting obligations, but this call should be made first.
 - c. Calls will be recorded.
 - d. Provide the following information:
 - i. Name and title of the individual making the report.
 - ii. Name and address of the facility.
 - iii. Notification that an emergency event has occurred. If available, the facility should provide information available at that time about the event.
 - e. No penalty shall be imposed upon a facility for unintentionally providing inaccurate or incomplete preliminary information. W. Va. Code § 15-5B-3a(e).
4. Access: Requires covered industrial facilities to provide government officials with timely access to key decision-makers managing the response to the event.
 - a. Includes access to a central communications center and, when reasonably practical, the site of the incident if the facility has determined that area to be reasonably safe.
 - b. Establish a communication system to provide information to government officials as soon as practicable.
 - c. Designate a contact person to communicate with government officials.
5. Civil penalties: Rule imposes the following civil penalties
 - a. Up to \$100,000 penalty for failure to provide notification within 15 minutes.
 - i. Sliding scale based on (a) extent of deviation from applicable requirement (i.e., length of delay) and (b) potential for harm to the environment.

- b. Up to \$100,000 penalty for failure to communicate or provide access after the notification. Note: Industry does not agree with this interpretation and believes that there should be a penalty cap of \$100,000 per incident.
- c. Appeal process.