

## Recent environmental regulatory developments

March 10, 2017

The U.S. EPA and OEPA recently issued several environmental regulatory updates, please read below for more information.

### OEPA Water and Wastewater Updates

#### Beneficial use designation rule

The OEPA Division of Materials and Waste Management finalized its beneficial use rules for waste material, which will become effective in Ohio on March 31, 2017. The new rules pertain to five categories of wastes: (1) foundry sand; (2) residuals from a public water supply treatment facility; (3) solid waste, industrial waste, or other waste for use as fuel or as an ingredient in a combustion unit; (4) dredge material from Lake Erie's federal shipping channels (not to include dredge material from other locations); and (5) sewage sludge incinerator ash. The rules provide for authorization of beneficial use of a waste material in several ways. Wastes used as an ingredient in the manufacturing of specific construction materials (asphalt, cement, glass, etc.) are defined as beneficial use byproducts.

General permit coverage will be available for specific categories of beneficial use byproducts and beneficial uses: (1) foundry sand used in soil blends and bioretention soils; (2) foundry sand used as sub-bedding and structural fill; (3) drinking water treatment material used as a soil amendment; and (4) biosolids incinerator ash. The OEPA is accepting comments on its draft guidance for seeking coverage under each of these general permits and its draft Notice of Intent to seek coverage through March 17, 2017.

Individual permits will also be available for wastes not included in a general permit. Authorization for types of beneficial use already approved by the OEPA (such as land application of paper mill sludge, industrial wastewater treatment sludge, flue gas desulfurization waste from coal combustion plant scrubbers and flue gas desulfurization waste in manufacturing gypsum board) is not included in the OEPA's new rules and will continue to be handled through existing mechanisms such as land application management plans and Director's Findings & Orders.

#### Draft 401 water quality certification for 2017 Nationwide Permits

The OEPA Division of Surface Water has issued draft Clean Water Act Section 401 water quality certifications for the Nationwide Permits proposed by USEPA in the January 6, 2017, Federal Register (Volume 82, No. 4). The current 2012 Nationwide Permits expire on March 18, 2017. The OEPA held a public information session and public hearing on March 3, 2017, and is accepting comments through March 10, 2017.

#### Division of Surface Water permit to install program draft rules

The OEPA Division of Surface Water proposed draft rules under OAC 3745-42 pertaining to permits to install. In particular, amendments to OAC 3745-42-02 are proposed in order to update applicable exemptions to the permit to install requirement. New exemptions include for building sewers; sanitary sewer replacement projects; repair or replacement of a treatment works component; disposal systems designed to be a best management practice under a storm water NPDES permit; and filtration systems, ion exchange systems and oil simmers on process tanks that serve manufacturing equipment. The OEPA is soliciting interested party input and comments are due by March 13, 2017.

Other OEPA Developments

## Universal Waste Rules

Ohio EPA issued draft Ohio-specific Universal Waste Rules as part of its interested party review process on November 21, 2016. Ohio's universal waste rules, found in Ohio Administrative Code Chapter 3745-273, apply to handlers, transporters, and destination facilities for specific categories of hazardous waste streams, including lamps, pesticides, mercury-containing equipment and discarded batteries. The new draft universal waste rules include hazardous non-empty aerosol cans, hazardous antifreeze, and hazardous paint and paint-related wastes. Ohio EPA has indicated that it hopes to issue the proposed rules for public comment in late April 2017.

## U.S. EPA Water and Wastewater Updates

### United States Army Corps of Engineers Guidance

For the first time in eight years, the United States Army Corps of Engineers issued Regulatory Guidance Letter (RGL) No. 16-01, dated October 2016, addressing Jurisdictional Determinations (JDs) made by the Corps when identifying what geographic areas are subject to Corps regulation pursuant to Section 404 of the Clean Water Act and Sections 9 and 10 of the Rivers and Harbors Act. In its RGL, the Corps references *U.S. Army Corps of Engineers v. Hawkes Co.*, the May 31, 2016, U.S. Supreme Court decision holding that approved JDs issued by the Corps pursuant to the Clean Water Act are final actions and subject to judicial review by federal district courts pursuant to the Administrative Procedures Act. The RGL states that its goal is to ensure that all parties have a common understanding of the different options for JDs so that "the most appropriate mechanism for addressing the needs of a person requesting a JD can be identified." It further instructs Corps District Engineers to "set reasonable priorities based upon the district's workload and available regulatory resources" and cites, as an example, that it would be "reasonable to give higher priority to a JD request when it accompanies a permit request."

### Legislative

On February 29, 2017, President Trump issued an executive order directing that U.S. EPA's Waters of the United States Rule (WOTUS Rule) be rescinded or revised. The WOTUS Rule, finalized in May 2015, provided a new, expanded definition of "waters of the United States," the term that determines how far the jurisdiction of the Clean Water Act extends. The executive order directs the federal agencies to consider application of the interpretation of "waters of the United States" advanced by Justice Scalia in the *Rapanos v. United States* Supreme Court [decision](#) (a fractured 41-4 opinion). In *Rapanos*, Justice Scalia concluded that waters of the United States should consist of "relatively permanent, standing or continuously flowing bodies of water" connected to traditional rivers or streams that are traditionally navigable, as well as wetlands with "a continuous surface connection to such water bodies." The executive order's directed shift to Justice Scalia's interpretation may considerably limit Clean Water Act jurisdiction and narrow the scope of development projects and land use activities that are required to obtain a permit. Environmental groups are likely to oppose the executive order and any changes to the WOTUS Rule. The pre-WOTUS rule is likely to remain in effect until the U.S. EPA and the Army Corps propose a new rule.

## Other U.S. EPA Developments

### Hazardous Waste Generator Improvements Rule

On October 28, 2016, the US EPA announced its final Hazardous Waste Generator Improvements Rule pertaining to requirements for generators of hazardous wastes under the Resource Conservation and Recovery Act. The Rule includes more than 60 changes to the existing hazardous waste generator regulations and will affect large quantity generators (LQGs), small quantity generators (SQGs), and conditionally exempt small quantity generators (very small quantity generators, or "VSQGs"). Key changes include: VSQGs will be allowed to transport hazardous waste to LQGs that are under control of the same entity; SQGs and LQGs will be required to maintain hazardous waste determination records for 3 years; VSQGs and SQGs will not be subject to a higher generator category due to an episodic event resulting in short-term increase in hazardous waste generation provided the episodic waste is properly managed; and new labeling requirements for containers of hazardous waste. The new rule will take effect on May 30, 2017

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