



## **Regulatory Update: WOTUS, MACT & Waste**

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Wray Blattner  
Nathan Hunt  
Thompson Hine LLP

# WOTUS

## ■ Clean Water Act

- ❑ Prohibits discharges of pollutants to “Navigable Waters” without a permit
- ❑ “Navigable Waters”: “The waters of the United States, including the territorial seas.”

## ■ Executive Order 13778 (February 28, 2017)

- “It is in the national interest to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of Congress and the States under the Constitution.”
- Directs EPA and the Army Corps of Engineers to rescind the 2015 “Waters of the United States” regulations (“WOTUS Rule”) and
- Issue a proposed rule interpreting “navigable waters” in a manner consistent with the opinion of Supreme Court Justice Scalia in Rapanos v. U.S.

## ■ U.S. Supreme Court Decision in Rapanos v. U.S. (2006)

- In a 4-1-4 decision, Justice Antonin Scalia wrote the plurality opinion holding that the body of water at issue was not a waters of the U.S.
- Bodies of water are waters of the U.S. and thus subject to CWA if relatively permanent, standing or continuously flowing... connected to traditional navigable waters...and to wetlands with a continuous surface connection” to those types of waters

## ■ Justice Anthony Kennedy's Concurring Swing Vote:

- The appropriate test: whether a water or wetland has a “significant nexus to waters that are or were navigable in fact or that could be made so”
- Following Rapanos, EPA and the Army Corps of Engineers, States, businesses and the public continued to struggle with the scope of the CWA

## ■ August 28, 2015 EPA Issues Final WOTUS Rules

- ▣ Touchstone of the rule: Justice Kennedy’s “significant nexus” criterion
- ▣ Interpreted as broader than pre-existing EPA rules (despite Scalia’s opinion in Rapanos)
- ▣ Industry and certain States promptly challenge the WOTUS Rule

## ■ Post WOTUS Rule Legal Wrangling:

- October 6, 2015: 6<sup>th</sup> Circuit Court of Appeals issues nationwide stay of WOTUS Rule pending completion of challenge
- July 27, 2017: EPA and Army Corps issue Notice of Proposed Rulemaking – to rescind WOTUS Rule
- November 22, 2017: EPA and Army Corps propose 2020 effective date of WOTUS Rule
- January 2018: Supreme Court reverses 6<sup>th</sup> Circuit stay, holding that lawsuits challenging the WOTUS Rule must first be filed in federal district courts
  - Lawsuits in District Courts follow

## Legal Wrangling...

- February 6, 2018: EPA and Army Corps issue final rule pushing back effective date of WOTUS Rule to February 6, 2020
  - Lawsuits follow
- July 12, 2018: EPA and Army Corps publish Supplemental Notice of Proposed Rulemaking bolstering the case for repeal of WOTUS Rule
- August 16, 2018: Federal District Court in South Carolina rejects the February 6, 2018 rule delaying effective date of WOTUS Rule
  - Effectively reinstates WOTUS Rule in 26 states
  - Immediately appealed by industry coalition
  - WOTUS Rule remains blocked in 24 states

# ONCE IN, ALWAYS IN MACT POLICY

- **Clean Air Act §112:**

- ▣ Regulates Hazardous Air Pollutants

- ▣ Required establishment of “Maximum Achievable Control Technology” emissions standards

- **January 25, 2018: EPA reverses “Once In, Always In” MACT applicability policy for Major Sources**

- May 16, 1995 John S. Seitz “Potential to Emit for MACT Standards -- Guidance on Timing Issues”
  - ▣ Facilities to be subject to a MACT standard may switch to Area Source status only prior to the standard’s “first compliance date”
  - ▣ Thereafter, a Major Source of HAPs is permanently subject to the MACT standard
  - ▣ Sources may not accept PTE limits or reduce emissions below Major Source thresholds in order to become Area Source and avoid MACT

- Objective of OIAI:
  - ▣ Ensure that MAXIMUM ACHIEVABLE Control Technology reductions in toxic emissions are achieved and maintained
- EPA's OAQPS drafted revised guidance November 16, 2005 but the policy was never finalized

- January 25, 2018: William Wehrum “Reclassification of Major Sources as Area Sources Under Section 112 of Clean Air Act” (and see “Issuance and Withdrawal of Guidance Memorandums” 83 Fed. Reg. 5543 February 8, 2018)
- Section 112 allows Major Sources to accept an enforceable HAP PTE limit below 10/25 tpy threshold at any time to avoid Major Source MACT
  - ▣ CAA definitions of “Major” and “Area Sources” are clear; no time limits
- OIAI disincentivized sources subject to MACT to reduce HAPs emissions

- Opportunity to perhaps
  - ▣ reduce monitoring, recordkeeping, reporting requirements
  - ▣ Eliminate Title V permit status (Is MACT your only trigger for Title V?)
- Will require State acquiescence
- Rulemaking contemplated
  - ▣ will any current MACT rules need to be revised?
- Sierra Club, EDF, NRDC, and others have sued EPA
  - ▣ lack of opportunity for public input
  - ▣ failure to analyze impact on health and the environment

# Ohio EPA's New Universal Waste Rules

## What is Universal Waste? (OAC Chapter 3745-273)

- Batteries, fluorescent lamps, suspended or recalled pesticides, and mercury containing devices (light switches, thermostats)
- UW is category of hazardous waste that is exempt from most hazardous waste requirements (if managed correctly)
- Does not count towards amount of hazardous waste a facility accumulates each month
- Can be stored onsite for longer periods than other hazardous wastes (up to one year from time generated)
- No manifesting in Ohio (but DOT requirements still apply)
- Handlers (small and large quantity), transporters, and destination facilities

## General Requirements

- Management by trained employees (if large quantity handler)
- Immediate placement into structurally sound, closed (except when adding waste) container that is compatible with the applicable UW
- Container must be marked with type of UW it holds and earliest date waste was placed in container
- Small quantity handlers (accumulate less than 11,023 pounds at any time) not required to notify Ohio EPA of UW activities; obtain and EPA hazardous waste ID number; provide employee training; or maintain records

## Ohio EPA's New UW Rules

- Antifreeze, non-empty aerosol containers, and paint and paint-related wastes added as Ohio-specific UWs
- General UW requirements also apply to Ohio-specific UWs

## Requirements for Ohio-Specific UWs

- Aerosol containers and containers of paint that do not exceed five gallons may be punctured or crushed to remove their contents; however, materials removed from aerosol containers (other than paint and air filters) may be hazardous waste that cannot be managed as UW
- Satellite accumulation containers allowed for aerosol containers (55 gallons or less)
- Written approval from the authority with jurisdiction over the local fire code must be obtained if aerosol containers, paint or paint-related wastes that are ignitable or reactive will be stored less than 50 feet from a facility's property line

## Specific Requirements for Ohio UWs, Cont'd.

- Paint and paint-related wastes cannot be burned for energy recovery
- Antifreeze, paint and paint-related wastes may be reclaimed onsite, but any waste generated during reclamation may be hazardous waste that cannot be managed as UW
- Operation and maintenance training required for operators of reclamation equipment
- Cannot commingle antifreeze after it is removed from the equipment in which it was used (written procedure required)
- Antifreeze mixed with used oil after generation is regulated as used oil

# Status of Definition of Solid Waste Rule

- In 2008, EPA added two exclusions to the definition of solid waste:
  - (1) hazardous secondary material recycled under the control of the generator
  - (2) hazardous secondary material transferred to a third party for recycling
  
- In 2015, EPA revised the 2008 rule:
  - (1) replaced the transfer-based recycling exclusion with the verified recycler exclusion;
  - (2) “strengthened” the definition of legitimate recycling
  
- In 2018, US Court of Appeals for DC vacated the 2015 verified recycler exclusion and reinstated the transfer-based exclusion from the 2008 rule to replace it

## Status of Definition of Solid Waste Rule, Cont'd.

- In 2018, EPA issued a final rule that addressed the court's ruling
- So what's this have to do with Ohio EPA?
  - ▣ Rule not yet adopted by Ohio
  - ▣ Proposed rule expected in Fall 2019

## Status of Generator Improvement Rule

- In 2016, EPA updated its regulations regarding hazardous waste generators
  - ▣ added very small quantity generator category
  - ▣ episodic generation requirements changed
- So what's this have to do with Ohio EPA?
  - ▣ Rule not yet adopted by Ohio
  - ▣ Proposed rule expected by end of 2018