

Environmental Update

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Welcome to the Shumaker, Loop & Kendrick, LLP Environmental Update; a monthly publication dedicated to providing content regarding Ohio administrative and regulatory law, as well as up to date information on the Ohio EPA's rulemaking process, including early stakeholder outreach, interested party review and request for comments, proposed rules, and public comment periods. In addition, the update offers information regarding environmental issues affecting businesses and environmental professionals across the state of Ohio. If you have questions regarding the information provided, feel free to contact Marcus Miller at mmiller@shumaker.com or 614.628.4466.

LAWYER SPOTLIGHT

[Mark Mercer](#) has extensive experience in environmental law, litigation, and administrative law. Having worked with businesses in a wide range of industries, he offers clients a unique perspective to their legal needs.

Partnering closely with his clients, Mark brings a strategic approach to his practice and helps clients put their legal questions in context to develop comprehensive and sensible resolutions on various environmental, health, and safety matters.



SHUMAKER SPOTLIGHT

Montana Federal Judge Issues Order Vacating Nationwide Permit 12, Halting Utility Projects Throughout the Country.

On April 15, 2020, U.S. Federal Chief District Judge Brian Morris issued an opinion in *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, Case No. CV-19-44-GF-BMM (MT Dist.), that vacated a general nationwide permit for the discharge of dredged or fill material into jurisdictional waters of the United States for utility line work. This case involves a challenge to the Keystone XL pipeline. Plaintiffs challenged the issuance of the Nationwide Permit for the pipeline project arguing that the issuance was a violation of the Clean Water Act (CWA), Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA) for impacts on waters of the United States. Plaintiffs also challenged the re-issuance of the Nationwide Permit 12 in 2017 as a violation of the CWA, ESA, NEPA, and the Administrative Procedure Act (APA) for "failure to consult" under Section 7(a)(2) of the ESA.

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The Court found the Corps acted arbitrarily and capriciously for failure to consult under ESA 7(a)(2). This process requires the Corps to initiate a formal consultation if it determines that an action "may affect" listed species or critical habitat. The Court concluded " [t]he Corps has an ongoing duty under ESA Section 7(a)(2) to ensure that the discharges authorized by NWP 12 will not jeopardize the continued existence of endangered and threatened species or result in the destruction or adverse modification of critical habitat. The Corps failed to fulfill that duty when it reissued [Nationwide Permit 12] in 2017." Rather than remanding the Nationwide Permit to the agency for further action, the Judge vacated Nationwide Permit 12 resulting in nationwide uncertainty regarding projects already approved under the permit. Click [here](#) for full article, or contact [Cheri Budzynski](mailto:Cheri.Budzynski@shumaker.com) at cbudzynski@shumaker.com or 419.321.1332.

HOUSE BILL 168:

The Ohio Senate passed amended [House Bill 168](#) (R-Steve Arndt) out of committee this morning and out of the full senate this afternoon, by a unanimous vote. The bill, which had previously had four hearings was amended to add additional incentives for developers to develop brownfield sites. The amendment offered by Senator Bob Hackett during committee (R- London) at the suggestion of the Ohio EPA director, specifically provides buyers of brownfields an affirmative defense if an issue comes up later that the seller should have handled before the sale. As explained by Senator Hackett, the amendment "gives the Ohio EPA more authority and allows developers to proceed quicker." The bill also does the following:

- Establishes an affirmative defense that allows a bona fide prospective purchaser (BFPP), if certain factors are met, to claim immunity from liability to the state for the state's performance of investigational and remedial activities, to address a release or threatened release of hazardous substance from the BFPP's facility.
- Specifies that a BFPP is a purchaser of a facility where hazardous substances were disposed before the purchaser acquired it who can demonstrate specific factors relating to that facility.
- Makes conforming changes to the law governing the Voluntary Action Program (VAP) consistent with the affirmative defense established by the bill.
- Eliminates a provision of law that automatically voids a covenant not to sue under the VAP Program when a property subject to institutional controls or activity and use limitations is not in compliance with those controls or limitations.
- Instead, authorizes, but does not require, the Director of Environmental Protection to issue an order voiding the covenant in that circumstance.
- Specifies that the order voiding the covenants not sue is an appealable action.

If you have any questions regarding House Bill 168, contact [Jared Holt](#) at jholt@shumakeradvisors.com or 614.628.4434.



OHIO EPA RULEMAKINGS AND ANNOUNCEMENTS



Air

Early Stakeholder Outreach - OAC Chapter 3745-80 - Anti-tampering Rules: Ohio EPA is seeking stakeholder input on the rules in Ohio Administrative Code (OAC) Chapter 3745-80, which contain the requirements for Ohio's Statewide Motor Vehicle Anti-Tampering Program. The rules in this chapter describe and prohibit acts of tampering with the pollution control devices on vehicles and provide procedures for the training of anti-tampering inspectors. The early stakeholder Fact Sheet is available [here](#). The comment deadline is Tuesday, **May 12, 2020**.

If you have any questions regarding the Anti-Tampering Rules, contact [Mark Mercer](#) at mmercerc@shumaker.com or 419.321.1436.

Public Notice - Request for Comment - Draft Amended Rules in OAC Chapter 3745-76 - Control of Non-Methane Organic Compound (NMOC) Emissions from Existing Landfills: Ohio EPA, Division of Air Pollution Control (DAPC) is making available a draft of amended rules in OAC Chapter 3745-76, "Control of Non-Methane Organic Compound (NMOC) Emissions from Existing Landfills Rules." The rules in this chapter contain the requirements and emission guidelines for the control of NMOC emissions from existing landfills. These rules are part of Ohio's plan to control NMOC emissions from these landfills under the Clean Air Act Section 111(d) and 40 CFR Part 60, Subpart Cf. The Public Notice is available [here](#). A synopsis of the rule content is available [here](#), and the Business Impact Analysis is available [here](#). The comment deadline is **Friday, May 22, 2020**.

If you have any questions regarding the NMOC Emissions Rules, contact [Mark Mercer](#) at mmercerc@shumaker.com or 419.321.1436.

Public Notice - Request for Comment - Annual Review of Sulfur Dioxide (SO₂) Data Requirements Rule Source Emissions: Ohio EPA is providing for public comment Ohio's draft 2020 Annual Sulfur Dioxide (SO₂) Emissions Review as a part of the Data Requirements Rule set by U.S. EPA in 2015. This rule established ongoing data review requirements including, for areas where modeling of actual SO₂ emissions served as the basis for an unclassifiable/attainment designation, an annual review of emissions data and submittal of a report recommending whether updated modeling is necessary due to emissions increases. The Public Notice is available [here](#). A copy of the draft plan is available [here](#). The comment deadline is **Friday, May 29, 2020**.

If you have any questions regarding the Annual SO₂ Emissions Review and Data Requirements Rules, contact [Mike Born](#) at mborn@shumaker.com or 614.628.4415.

Request for Designation of Gallia County, OH and Partial Meigs County, OH to Attainment/Unclassifiable as Part of U.S. EPA's Round Four Designation Process Associated with the 2010 SO2 NAAQS Submitted to USEPA: Based on three years of monitoring data from four monitors located in the Gavin-Kyger monitoring network, on April 27, 2020, Ohio EPA submitted a request for the Gallia County, OH and partial Meigs County, OH area to be designated as attainment/unclassifiable with respect to the 2010 one-hour sulfur dioxide (SO₂) national ambient air quality standard (NAAQS) under U.S. EPA's Round Four area designations that will occur by December 31, 2020.

If you have any questions regarding the Ohio EPA's designation request regarding the Gallia County, OH and partial Meigs County, OH area, contact [Mike Born](mailto:mborn@shumaker.com) at mborn@shumaker.com or 614.628.4415.

SHUMAKER COVID-19 RESPONSE

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our [Shumaker COVID-19 Client Resource Center](#) at shumaker.com. To receive the latest news and updates regarding COVID-19 straight to your inbox, [sign up here](#).

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