No Migration Variances/Resource Conservation and Recovery Act: U.S. Environmental Protection Agency Requests Comment on Petition Guidance

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01/21/2021

The United States Environmental Protection Agency ("EPA") published a January 19th Federal Register Notice requesting comments on guidance relating to the No Migration Variance ("NMV") petition process. See 86 Fed. Reg. 5190.

The NMV is related to the Resource Conservation and Recovery Act ("RCRA") land disposal restrictions ("LDRs").

Regulatory requirements for an NMV have been in place since the RCRA LDRs were first established in 1986. Land disposal of hazardous waste that does not meet applicable treatment standards can be allowed if an NMV is approved by EPA. The NMV is a formal decision rendered by EPA in response to a petition requesting allowance of land disposal at a particular facility of a prohibited waste.

The NMV petition submittal/decision process is codified in 40 C.F.R. 268.6. EPA Regions have been delegated the authority to address such petitions. States do not have the authority to implement the NMV petition process.

The focus of the draft NMV guidance public noticed by EPA is related to demonstrating that the treated waste and constituents will not migrate beyond a temporary waste pile. The relevant RCRA statutory language requires a demonstration:

. . . to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the waste remains hazardous . . .

EPA has interpreted such language to mean that a demonstration is required (to a reasonable degree of certainty) that hazardous constituents will not exceed agency-approved health levels (or environmentally protective levels, if they are appropriate) beyond the boundary of the disposal unit.

EPA previously determined that man-made barriers or engineered systems will generally not by themselves meet the "no migration" standard. However, EPA states that this conclusion is not necessarily the case for temporary land-based storage of treated waste as addressed in the guidance.

The NMV guidance as described in the January 19th Notice references information that should be set forth in an NMV petition. It also describes certain consideration regarding NMV petition submittals which include:

- Facility description
- Units covered by the NMV
- Duration of temporary storage
- Monitoring plan

A copy of the January 19th Federal Register Notice can be downloaded here.