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Open Burning and Open Detonation/RCRA: Earthjustice Notice of Intent to Sue U.S. Environmental Protection Agency for Alleged Failure to Revise Certain Regulations

11/03/2023

Earthjustice and a number of other organizations sent the United States Environmental Protection (“EPA”) a document on August 31st styled:

60-day Notice of Intent to Sue for Failure to Perform Non-Discretionary Duty Under the Resource Conservation and Recovery Act (“NOI”)

The other organizations executing the NOI included:

- California Communities Against Toxics
- Citizens for Arsenal Accountability
- Central Louisiana Coalition for a Clean and Health Environment
- Concerned Citizens for Nuclear Safety
- Kentucky Environmental Foundation

(collectively “Earthjustice”)

Open burning/open detonation (“OB/OD”) is a thermal treatment process for waste explosives, including any waste which has the potential to detonate in bulk military propellants which cannot be safely disposed of through other modes of treatment. By way of example the United States Department of Defense uses OB/OD to demilitarize, treat, or destroy waste military munitions that are damaged, past their useful life span, or are excess inventory. EPA regulates these activities as “miscellaneous units” pursuant to RCRA Subpart X.

The organizations allege that EPA has failed to perform a non-discretionary duty required by the Resource Conservation and Recovery Act (“RCRA”). EPA is alleged to have failed under RCRA § 2002(b) to review and revise a RCRA regulation that allows the OB/OD of hazardous waste explosives. RCRA requires that owners and operators of such miscellaneous units apply for a permit from the states or EPA regions.

RCRA prohibits open burning (including open detonation) of hazardous waste except for the open burning and detonation explosives that cannot safely be disposed of through other modes of treatment. This includes regulations for interim status under Title 40 Code of Federal Regulations 265.302 and requirements applicable to facilities under Title 40 C.F.R. Part 264, Subpart X (Miscellaneous Units).

Owners/operators of OB/OD units subject to these requirements must demonstrate and periodically redemonstrate they are eligible and remain eligible for the exception to the prohibition against open burning (including detonation) of hazardous waste (e.g., as part of permit issuance and renewal or as a permit condition).

Waste explosives, as defined in 40 C.F.R. 265.382, include waste which has the potential to detonate and bulk military propellants which cannot safely be disposed through other modes of treatment. Waste explosives are characteristic for activity (D003) under 40 C.F.R. 261.23(a)(6-8).

EPA has stated that it is seeking to promote the development, testing, and use of alternative technologies that are capable of safely treating munitions and other waste explosives in a manner that reduces the potential for exposure and environmental contamination, as well as limits cleanup and future obligations.

Earthjustice's August 31st NOI argues that alternative treatment technologies have become available for:

. . . virtually all hazardous waste streams that are currently open burned and open detonated.

As a result, the organizations argue that there is no justification for the existing OB/OD exception.

Cited is a RCRA requirement that EPA review, and as necessary, revise RCRA regulations every three years. They argue that EPA has not satisfied that duty with respect to the OB/OD rule since it has not been revised since its original promulgation in 1980.

The sections of the August 31st NOI include:

- OB/OD Use and Dangers
- OB/OD Regulation
- Advances in Alternatives to OB/OD
- Citizen Suit Provision of RCRA
- EPA Has Failed to Perform a Non-Discretionary Duty and Must Remedy Its Legal Violation by Completing Regulatory Review and Revision as Soon as Possible

Earthjustice and other organizations state that they intend to file suit pursuant to the RCRA citizen suit provision to compel what it describes as "EPA's overdue performance of its mandatory duty to review and revise the regulation allowing OB/OD of waste explosives as required by RCRA."

A copy of the NOI can be downloaded [here](#).