National Environmental Policy Act/Applicability to Hazardous Waste Permitting: Associated General Contractors of America Amicus Brief Addressing Pending U.S. Supreme Court Appeal

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The Associated General Contractors of America, Inc and a number of other trade organizations submitted an Amicus Brief to the Supreme Court of the United States ("SC") in the currently pending matter:

United States Department of the Air Force, ET AL v. Prutehi Guahan.

The other organizations joining the Amicus Brief include:

- Chamber of Commerce of the United States of America
- American Cement Association
- American Forest & Paper Association
- American Road & Transportation Builders Association
- Center for LNG
- National Association of Manufacturers
- Natural Gas Supply Association

(Collectively, "AGC").

One of the two questions that the SC will be addressing is whether the Air Force must undertake the environmental review requirements of the National Environmental Policy Act ("NEPA") before submitting a Resource Conservation Recovery Act ("RCRA") permit renewal application. The issue is driven by the fact that the RCRA permitting procedures have detailed environmental requirements addressing the treatment, storage, or disposal of hazardous waste.

NEPA requires federal agencies to include values and issues in their decision-making processes. Its federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions.

The statute requires federal agencies in certain circumstances to prepare a detailed Environmental Impact Statement ("EIS"). However, the requirement to prepare this document is only triggered in the event of a major federal action which will significantly affect the human environment.

NEPA differs from action enforcing environmental statutory programs such as the Clean Water Act and the Clean Air Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of the EIS and certain defined instances. NEPA does not require a certain alternative or to meet a particular standard. Nevertheless, failure to adhere to applicable NEPA requirements can result in an action being enjoined until there is compliance.

This matter arises out the United States Air Force's ("Air Force") disposal of hazardous waste munitions in Guam through Open Burning and Open Detonation ("OB/OD") operation. OB/OD activities require the acquisition of a RCRA permit to ignite or explode the ordinance in open air.

The Air Force had previously obtained a RCRA permit from the Guam Environmental Agency and subsequently requested a renewal. No NEPA procedures were undertaken in relation to the RCRA permit renewal. The Guam Environmental Agency did hold a public comment period and issued a preliminary notice neither approving nor denying the application while it received public comment. Under RCRA's automatic extension provision, OB/OD activities were continued under the expired permit.

Prutehi Litekyan filed an action in the United States District Court arguing that the RCRA permit application should have also involved NEPA environmental review.

The 9th Circuit posed the question as to whether the NEPA procedures and those in the RCRA statute were sufficiently similar that the overlap renders NEPA superfluous. The 9th Circuit noted some similarities but concluded that RCRA requirements did not constitute the "functional equivalent" of the NEPA environmental review process.

AGC states by introduction that the 9th Circuit held that NEPA requires the Air Force to prepare an EIS before submitting its permit/renewal application even though Congress and RCRA established its own detailed, comprehensive regime for evaluating the environmental consequences of hazardous waste management facilities. This is held to disregard the traditional rule of statutory construction that the specific governs the general. They also argue that the 9th Circuit's holding:

… conflicts with the EPA's long-standing regulation/created temporaneous with RCRA and enforced for nearly half a century – providing that "all RCRA…permits are not subject to the EIS provisions of NEPA.

AGC cites what it describes as severe practical consequences if the 9th Circuit is upheld. Specifically, it notes that RCRA's permitting universe comprises of 6,600 facilites that handle the nation's 2.96 billion tons of solid, industrial, and hazardous waste. The federal RCRA permitting process is predicted to:

… grow more protracted, and U.S. businesses' investments and financing operational decisions will suffer.

In other words, concerns are expressed that layering "a free-standing NEPA obligation" into every RCRA applicant would stack redundant review on top of NEPA's already lengthy and inefficient regime.

A copy of the Amicus Brief can be downloaded here.