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Phosphogypsum Waste/Process Wastewater/RCRA: Center for Biological Diversity Notice of Intent to Sue U.S. Environmental Protection Agency for Alleged Failure to Perform Nondiscretionary Duty

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The Center for Biological Diversity (“CBD”) sent a February 13th Notice of Intent to Sue (“NOI”) to the United States Environmental Protection Agency (“EPA”) alleging a failure to perform a nondiscretionary duty under the Resource Conservation and Recovery Act (“RCRA”).

The NOI alleges that EPA has violated its mandatory duty under 42 U.S.C. § 6974(a) to take action within a reasonable time regarding a petition requesting promulgation of regulations to address phosphogypsum waste and process wastewater from phosphoric acid production.

The fertilizer industry is stated to generate phosphogypsum when it chemically digests phosphate rock with sulfuric acid to create phosphoric acid for fertilizer. This production process is stated to also create process wastewater which is stored with the phosphogypsum in waste piles known as phosphogypsum stacks.

The phosphogypsum and its leachate is stated to contain constituents such as arsenic, lead, nickel, cadmium, fluoride, chromium, silver, antimony, copper, mercury, thallium, and radionuclides. The process wastewater is stated to also contain these constituents as well as selenium. It is also stated to be acidic and corrosive.

The NOI states that EPA prior to exempting phosphogypsum in process wastewater from hazardous waste regulations indicated that it would revisit the Bevill regulatory determination if it found during a Toxic Substance Control Act regulatory investigation that RCRA could “better handle the problem.” EPA is stated to have not promulgated any rules under the Toxic Substance Control Act for phosphogypsum or process wastewater nor has it revisited its Bevill Determination.

CBD alleges that EPA has unreasonably delayed responding to a February 8, 2021, petition for a rulemaking that would reverse EPA’s 1991 Bevill Determination and list the waste as hazardous waste subject to Subtitle C of RCRA.

The NOI argues:

- EPA's delay is not guided by the rule of reason.
- EPA's delay in responding to the 2021 Petition frustrates the purposes of RCRA and threatens significant harm to human health and the environment.
- Communities closet to these phosphogypsum stacks are prejudiced by EPA's delay.

CBD alleges that EPA is in violation of RCRA and the Administrative Procedures Act. As a result, CBD states if the requests under RCRA are not answered on or before the 60th day after receiving the NOI that CBD and other referenced conservation organizations intend to file a legal action to compel an answer.

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