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ENVIRONMENTAL, SAFETY AND HEALTH REVIEW – UNITED STATES

Summer 2011

Welcome to the Summer edition of the Squire Sanders *Environmental, Safety and Health Review – United States,* our quarterly update on developments in the fast moving area of environment, safety and health and other regulatory issues. For further information on any of the articles included in this review, please feel free to contact the individuals named after each article.

Inside:

"Solid Waste" Definition May Change Again to Regulate Hazardous Secondary Materials

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On July 22, 2011 US EPA published a notice of proposed rulemaking that would again revise the definition of "solid waste" under the Resource Conservation and Recovery Act (RCRA). *See Definition of Solid Waste, Proposed Rule*, 76 Fed. Reg. 44094 (July 22, 2011) (the Proposed Rule). The rulemaking was initiated in response to the requirements of a September 7, 2010 settlement agreement between US EPA and the Sierra Club relative to the Sierra Club's administrative petition under Section 7004(a) of RCRA, 42 U.S.C. §6974(a), requesting that US EPA repeal the 2008 revisions to the definition of solid waste (DSW Rule) on the basis that those revisions are unlawful and that they increase threats to public health and the environmental without producing compensatory benefits. US EPA agreed to prepare a notice of rulemaking by June 30, 2011 and take final action by December 31, 2012. The Proposed Rule is primarily directed at withdrawal and replacement of the exemption under 40 CFR §261.4(a)(24) for hazardous secondary materials generated and then transferred to another person for the purpose of reclamation. However, US EPA is soliciting comment with regard to provisions to tighten up the enforceability of its regulatory exemptions generally.

Based on its current analysis of the DSW Rule, US EPA now believes that most hazardous secondary materials

transferred from the generator for reclamation are ultimately discarded and thus are best regulated under RCRA Subtitle C.

Accordingly as drafted, the Proposed Rule would replace the exclusion for hazardous secondary materials with an alternative Subtitle C regulation. Under this alternative, hazardous secondary materials essentially would be managed according to current RCRA Subtitle C requirements, including those related to manifesting and hazardous waste storage, except that generators could accumulate hazardous recyclable materials for up to a year without a RCRA permit if the generator makes advance arrangements for the legitimate reclamation of the materials and documents the arrangements in a reclamation plan.

Additionally, US EPA's Proposed Rule would retain the exclusion for hazardous secondary materials reclaimed under the control of the generator, but would include the following revisions:

1) addition of a regulatory definition of "contained";
2) requiring generator notification as a condition of the exclusion;
3) addition of a recordkeeping requirement for speculative accumulation; and
4) addition of a recordkeeping requirement for reclamation under toll manufacturing agreements.

To encourage legitimate recycling, however, US EPA is also proposing revisions to the definition of "legitimacy" under 40 CFR 260.43, which would include:

1) applying the definition to all recycling activities regulated under 40 CFR 260-266;
2) making all legitimacy factors mandatory, with a petition process for instances where a factor is not met, but the recycling is still legitimate; and
3) requiring documentation of legitimacy.

In addition, to create greater consistency of solid waste variances and non-waste determinations, US EPA proposes the following revisions:

1) requiring facilities to re-apply for a variance in the event of a change in circumstances that affects how a material meets the criteria upon which a solid waste variance has been based;
2) requiring facilities to provide updated information every two years;
3) revising the criteria for partial reclamation variances to more clearly explain when the variance applies; and
4) revising the criteria for the non-waste determination under 40 CFR 260.34 and requiring that petitioners demonstrate why the existing solid waste exclusions would not apply to their hazardous secondary.

US EPA is also seeking comments on revisions that would affect other exclusions and exemptions under the definition of solid waste including:

1) recordkeeping for speculative accumulation in all cases;
2) requiring facilities to provide updated information on their operating status every two years; and
3) containment standards for excluded hazardous secondary materials.

Facilities affected by these proposed revisions to the RCRA definition of "solid waste" should consider providing comments to US EPA prior to October 20, 2011 to ensure that the agency has all relevant information before taking final action on or before December 31, 2012.

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US EPA to Reassess Manganese Inhalation Exposure Risk in 2012

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Manganese is a naturally occurring metal utilized in numerous processes including the manufacture of steel alloys and dry-cell batteries, for wastewater treatment, and as a paint pigment. Manganese emissions have also been associated with incineration of sewage sludge and medical waste, welding, and the wear of certain parts (e.g., brakes, tires and rail car wheels) on mobile sources. While trace amounts of manganese are required for normal human function, "manganese compounds" – which include any unique chemical substance with manganese as part of its infrastructure – are listed as toxic air pollutants in the Clean Air Act. As such, US EPA is required to regulate manganese emissions. US EPA's current manganese air toxics regulation is based on its calculated inhalation reference concentration (RfC), which essentially represents the acceptable chronic human respirable exposure limit.

Recently, federal and state environmental and public health agencies have been increasingly focused on potential human health risks from manganese exposure. For example, in 2009, US EPA began monitoring outdoor air near schools for air toxics including manganese. Similarly, the Agency for Toxic Substances and Disease Registry (ATSDR) has been investigating health concerns from manganese emission inhalation in several communities over the past few years. These efforts have spawned an increase in private toxic tort litigation (primarily based on nuisance theories).

Yet, US EPA's current inhalation manganese RfC of 0.05 $\mu g/m^3$ has not been updated since its original 1993 publication. Since then, a number of key epidemiological studies have been published or are underway justifying a significantly less stringent RfC. Manganese was originally chosen for reassessment as part of US EPA's Integrated Risk Information System (IRIS) Agenda for 2008. However, in May 2009, US EPA implemented a new IRIS process and manganese reassessment was not completed. This year, with additional compelling science in its back pocket, US EPA renewed its intention to reassess manganese by including it in the "high priority" list for 2012.

A less stringent acceptable chronic human respirable exposure limit for manganese is important. Issuance of a revised RfC by US EPA will likely lead to other regulatory revisions affecting manganese emitters in the US. Indeed, Minnesota is already reviewing its manganese standard, while Michigan has been actively advocating for US EPA reassessment of the manganese RfC. Further, in its IRIS Progress Report issued last month, US EPA noted the development of a Memorandum of Understanding with ATSDR and California EPA's Office of Environmental Health Hazard Assessment designed to ensure cooperation in developing health assessments. This is significant since California recently adopted a final manganese chronic Reference Exposure Level (REL) of 0.09 $\mu g/m^3$, a three-fold increase from its 2009 proposed REL of 0.03 $\mu g/m^3$. Given these developments, manganese emitters should continue to stay informed about the status of US EPA's reassessment so that they can support development of a less stringent RfC. Such a revision would have impacts in both the regulation and enforcement realm, but also in private party litigation.

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Checking in on Greenhouse Gas (GHG) Permitting: US EPA's Response to Initial State Permitting Efforts

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It has been over a year since US EPA issued its first GHG regulations for light duty vehicles in 2010 and took the position that these regulations triggered GHG permitting requirements for stationary sources under the Clean Air Act Prevention of Significant Deterioration (PSD) program. Despite legal challenges to these rules, as of January 2, 2011, large sources that wish to install new or modified equipment are required to evaluate GHG emissions during the permitting process. Those exceeding GHG emission

thresholds must incorporate Best Achievable Control Technology (BACT) requirements for GHGs into their permits. Eight months of GHG permitting has provided insight into EPA's concerns over BACT determinations in such state-issued permits. Evaluation of the issues raised by US EPA in these permitting actions can be used by future permittees to address controversial issues up front and avoid potential challenges and delays to their projects.

US EPA's major concerns have focused on:

1) lack of concrete, enforceable requirements;

2) lack of documentation; and

3) lack of continuous compliance measures.

While US EPA suggested in its GHG BACT Guidance[1] that add-on control devices and emission limits may not be appropriate in some circumstances, US EPA has made clear in its comments on state-issued permits that a numeric standard in the form of an operating standard or emission limitation is still expected. Permit requirements of "good combustion practices" or "high efficiency unit" alone are generally insufficient unless accompanied by a specific design or efficiency standard. If permits lack a numerical emission limit, the permitting agency must explain why such a limit was not feasible.[2]

The second sticking point with the agency is documentation. US EPA's GHG BACT Guidance acknowledges that lower-emitting processes and energy efficiency measures may be more appropriate than control technology and emission limits, but requires the latter be evaluated for feasibility. US EPA expects documentation as to why specific control technologies are infeasible for each project, including carbon capture and sequestration for some industries. Applicants have an opportunity to significantly influence state feasibility evaluations by providing thorough documentation to the permitting agency at the application stage.[3]

To address its final point of concern, US EPA has uniformly required continuous emission monitoring systems (CEMs) for CO2 to demonstrate continuous compliance with GHG requirements. This expectation applies whether the source is subject to a combustion efficiency standard or a numeric GHG emission limit. However, a CO2 CEM alone is not sufficient to demonstrate compliance with GHG emission limits. Permits also must include the emission factors (or references to emission factors) that will be used to calculate emissions of the other five GHG pollutants.[4]

Despite ongoing legal challenges to US EPA's authority to regulate GHGs, GHG permitting marches on and remains a risk for sources seeking to install new or modified equipment. Keeping apprised of how the states and US EPA are regulating GHGs in PSD permits is imperative to assessing costs and risks for any major project with PSD implications.

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Federal Agencies Continue Preparation of Programmatic EIS for Solar Energy Development

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The Draft Programmatic Environmental Impact Statement (Draft EIS) was released by the Department of Energy

[1] US Environmental Protection Agency, Office of Air and Radiation, PSD and Title v Permitting Guidance for Greenhouse Gases (March 2011) (GHG BACT Guidance).
[2] *See* Letter from Deborah Lebow Aal, EPA, Region 8, to Cheryl Heying, UDEQ, re: Pacifcorp Lake Side Power Plant (Mar. 4, 2011); Letter from U.S. EPA, Region 6, to Tegan Treadaway, Administrator, LDEQ, re: Nucor Steel (Jan. 7, 2011) (hereinafter "Nucor Steel").
[3] Region V has encouraged one state to simply adopt the applicant's CCS feasibility analysis to fulfill the documentation requirements. *See* Letter from Genevieve Damico, EPA Region 5, to Andrew Stewart, WDNR, re: WE Energies – Biomass Fueled Cogeneration Facility (Mar. 4, 2011).
[4] *See* Letter from Pamela Blakly, EPA Region 5, to Mary Ann Dolehanty, MDEQ, re: Wolverine Power (May 19, 2011); Letter from Becky Weber, EPA Region 7, to John Mitchell, Kansas Dept. of Health & Envt., re: Abengoa Bioenergy Biomass of Kansas LLC (Apr. 1, 2011); Nucor Steel, *supra* at 2.

(DOE) and Department of Interior, Bureau of Land Management (BLM) in December 2010. The purpose of the Draft EIS is to establish a framework for developing utility-scale solar energy projects on public lands in solar energy zones in six Western states (California, Arizona, Utah, Nevada, Colorado and New Mexico). Public comment on the Draft EIS closed in May 2011. However, on July 14, the DOE and BLM announced that a Supplement to the Draft EIS (Supplement) would be prepared. A Final Programmatic Environmental Impact Statement (Final EIS) is still expected by the end of 2011.

The Council on Environmental Quality's EIS regulation (40 C.F.R. Sec. 1502.9) requires a supplement if the agency has made substantial changes in the proposed action or there are new circumstances or information "relevant to environmental concerns and bearing on the proposed action or its impacts." Any agency *may* decide to prepare a supplement if the agency "determines that the purposes of the [National Environmental Policy] Act will be furthered by doing so."

According to DOE and BLM, the Supplement to the Draft EIS is in response to comments received and will be directed toward:

1) developing criteria for identifying solar zones;
2) developing incentives for encouraging developers to site projects in such zones; and
3) the creation of a variance process for projects outside such zones.

The Supplement itself will not establish additional solar energy zones, but is expected to identify and prescribe the criteria for doing so in the future. In addition, the Supplement will require additional surveys of biological and cultural resources in the solar energy zones and provide for a more detailed analysis of transmission issues.

These power transmission issues may prove difficult to contain in a narrow, or targeted, Supplement because of their breadth and complexity. Further analysis of the issue may also prove particularly complex in light of the Federal Energy Regulatory Commission's (FERC) July 21, 2011 Order – the so-called "Power Line Rule" – which changes FERC's planning and cost allocations for transmission projects.

A Final EIS will follow the Supplement. The Final EIS must contain an adequate response to the public comments submitted as well as compliance with other legal (state and federal) requirements. Many of the solar energy zones and lands where solar projects have been approved provide habitat for myriad of wildlife and plants species, some of which are protected by the Endangered Species Act and other federal and state wildlife laws. Projects often involve decisions by multiple jurisdictions. For purposes of the Final EIS, compliance with federal requirements will be determined by the BLM and the DOE before the Decision Record is signed. This may be scant comfort to project developers, since challenges on a number of theories could still be brought by third parties, either to the Final EIS itself or to projects approved subsequently that relied in part on the environmental analysis in the Final EIS.

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PRPs Are Changing Their Approach to Defending Natural Resource Damages Claims

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Potentially responsible parties (PRPs) are changing their approach to defending natural resource damages (NRD) claims brought by public entity trustees. In the face of enormous potential liability, PRPs appear to be taking a more proactive approach to restoration of natural resources and natural resource trustees, rather than engage in the more traditional course of lengthy litigation and years-long natural resource damage assessments.

Under this revised approach, parties have been seeking interim settlements and early restoration projects to

minimize costs on the back end. For example, PRPs involved with the Fox River contamination [5] and the Deepwater Horizon spill have entered into interim settlements. These settlements do not provide a release of liability, but do provide that the PRPs will receive a credit against their yet-to-be-determined liability for early restoration projects that will be selected and implemented prior to the completion of a full natural resource damages assessment. By engaging in restoration early on, PRPs can potentially reduce the amount of NRDs by reducing the length of the damages and by saving sensitive and valuable resources that might be destroyed in the interim. Trustees gain the advantages of quicker restoration and a wider range of alternatives. In the Deepwater Horizon matter, for example, BP Exploration and Production has placed US$1 billion into a dedicated trust for the express purpose of funding early restoration projects. The trustees will select projects through interim restoration plans and public input. Prior to funding any project, all parties must stipulate to the exact NRD offset that BP will receive.

In contrast to the proactive approach utilized in Fox River and Deepwater Horizon, other sites employ a more traditional approach. For example, on June 13, 2011, US EPA, the Coeur d'Alene Tribe and Hecla Limited entered into a Consent Decree to resolve all of Hecla's liabilities at the Bunker Hill Mining and Metallurgical Complex Superfund Site in Idaho. As part of the settlement, Hecla will pay US$65.85 million plus interest to the plaintiffs to resolve the 20-year old litigation and to settle NRD claims stemming from 100 years of mine waste tailings disposal at the site. Over the course of the 20-year litigation, the scope quickly expanded from a 21-square mile area to a basin-wide area, increasing the alleged NRDs along the way. The Bunker Hill Site represents one of the largest NRD recoveries in history and is typical of the average NRD case involving protracted litigation with no mitigating measures at the front to minimize the scope.

Interim settlements and early restoration alternatives are gaining momentum as methods for dealing with NRD claims. This approach requires that both the PRP and the trustee agree to move forward in the face of uncertainty surrounding the total amount of NRDs, the performance of restoration projects and the long-term restoration goals. The efficacy of this approach is also limited by the challenge of determining how to value and account for restoration projects. This approach may not be as effective in cases involving older contamination, such as the Bunker Hill Site, where the parties may have a reduced incentive to participate in such a program if they have strong arguments against liability or if the opportunity to prevent future harm is diminished (i.e., scope is already well defined). Over the next two years, as the Deepwater Horizon trustees select restoration projects and move forward, we will gain better perspectives on this approach to responding to NRD claims.

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[5] Consent Decree in *Unites States v. Appleton, Inc.*, No. 01-c-0816, (Aug, 14, 2001), *entered by court* (E.D. Wis. Dec. 10, 2001) (available at: http://www.epa.gov/Region5/cleanup/foxriver/pdf/foxriver_cd_200108.pdf).

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Environmental, Safety & Health

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