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Environmental Update

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DEP Announces It Will Resume Rulemaking for Solid Waste Management Rule

Contact: Mike Petrovich
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On July 1, 2011, the Florida Department of Environmental Protection (DEP) announced it will resume rulemaking for Chapter 62-701, F.A.C. This rule chapter concerns solid waste management facilities, including landfills and construction and demolition debris disposal sites. Last year, the DEP Solid Waste Section (Section) requested permission to initiate rulemaking for Chapter 62-701, F.A.C. The Section intended to address several glitches in the significant modifications to the rule chapter made in January 2010. The Section also intended to address Chapter 2010-143, Laws of Florida (HB 7243), which requires all construction and demolition debris disposal sites to be equipped with liners and leachate control systems and directs the agency to develop rules addressing processing of construction and demolition debris prior to disposal. DEP published its intent to initiate its rulemaking, 36 Fla. Admin. W. 3694 (Aug. 13,

2010), and it held a rulemaking workshop on September 29, 2010. Rulemaking was halted by Governor Scott's Executive Order Number 11-1 on January 4, 2011.

The Section plans to hold a rule workshop in Tallahassee in Room 609 of the Bob Martinez Center on Tuesday, August 2, 2011. For the first time, the Section will also hold the meeting as a webinar. The online audience will be able to view the discussion live and participate by sending in questions. More details will be released by DEP soon, including draft rule language and information on the webinar. HGS is actively monitoring the rulemaking.

Comment Deadline Extended for CWA Guidance

Contact: Amelia Savage

On July 5, 2011, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) extended the public comment period by 30 days for comments regarding draft guidance under the Clean Water Act. 76 Federal Register 39101. The draft guidance was originally announced on May 2, 2011, and the comment period was originally set to expire on July 1, 2011. With the extension, comments are now due by Monday, August 1, 2011. The draft guidance can be found on EPA's website at:

<http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

EPA Announces Proposed Rules Revising Definition of Solid Waste Rule

Contact: Carl Eldred
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On July 6, 2011, EPA announced a proposed rule to revise the 2008 Definition of Solid Waste (DSW) rule. The DSW rule redefined hazardous waste under the Resource Conservation and Recovery Act to exclude "hazardous secondary materials" from regulation if the materials were reclaimed and recycled. EPA is publishing this rule as part of a settlement agreement with the Sierra Club, which challenged the 2008 DSW rule. The proposed rule has not been officially published yet, but a pre-publication version, along with other information, is available at <http://www.epa.gov/waste/hazard/dsw/rulemaking.htm>. EPA will accept comment on this proposal for 60 days after publication in the Federal Register. EPA will hold webinars and two public meetings to enable public comment on the rulemaking. HGS is monitoring this rulemaking and will provide updates as more information becomes available.

EPA Finalizes New Transport Rule

Contact: Joe Brown

On July 6, 2011, EPA signed its final Cross-State Air Pollution Rule (CSAPR) replacing the 2005 Clean Air Interstate Rule (CAIR), which was remanded to EPA in 2008, but not vacated. CSAPR will regulate emissions of SO₂ and NO_x that contribute to PM_{2.5} and ozone by requiring annual SO₂ and NO_x reductions for PM_{2.5} and seasonal NO_x reductions for ozone. Significantly, under the new CSAPR, Florida is not subject to the annual PM related SO₂ and NO_x reductions;

it is only subject to the ozone-season NO_x reductions. CSAPR provides a NO_x ozone season trading budget of 27,825 tons in Florida, which includes a 529-ton new unit set-aside and a 28-ton Indian country set-aside. EPA will continue to implement CAIR through 2011. CSAPR takes effect January 1, 2012.

EPA Proposes New Secondary NAAQS for NO_x and SO_x

Contact: Joe Brown

Pursuant to a court-ordered schedule, EPA signed a proposed rule on July 12, 2011, regarding secondary NAAQS standards for NO_x and SO_x. As proposed, EPA will retain existing secondary standards for NO₂ at 0.053 ppm averaged over a year, and for SO₂ at 0.5 ppm averaged over three hours (not to be exceeded more than once per year). In addition, EPA is proposing an additional set of secondary standards identical to the new health-based primary standards EPA set in 2010: NO₂ at 100 ppb and SO₂ at 75 ppb (both averaged over one hour). EPA explored the possibility of developing a multi-pollutant standard that would address the indirect effects that SO_x and NO_x have on sensitive ecosystems, but due to substantial uncertainties EPA is not pursuing that approach. However, EPA is presenting plans included in the rule proposal for a 5-year field pilot program to aid in considering a multi-pollutant standard to inform its next review of NAAQS for NO_x and SO_x. EPA is accepting comments for 60 days after the proposed rule is published in the Federal Register and will issue a final rule by March 20, 2012, per the court's order.

Update on EPA's Numeric Nutrient Criteria for Florida Waters

Contact: Mohammad O. Jazil

I. Background & Litigation

On January 14, 2009, the U.S. Environmental Protection Agency (EPA) determined that numeric nutrient criteria are necessary for Florida's waters. Consistent with its January 2009 determination, EPA published a final rule establishing numeric nutrient criteria for Florida's lakes and flowing waters (freshwater rule). *See* 75 Fed. Reg. 75762 (Dec. 6, 2010). If the Florida Department of Environmental Protection (DEP) fails to establish a similar rule for Florida's marine and estuarine waters by August 15, 2012, EPA must promulgate a second rule.

A 2009 consent decree negotiated between EPA and various environmental organizations sets forth the deadlines for EPA's phased rulemaking. The U.S. Court of Appeals for the Eleventh Circuit is currently reviewing the order approving the 2009 consent decree. And, the U.S. District Court for the Northern District of Florida – the district court that entered the 2009 consent decree – is now presiding over challenges to the freshwater rule. The State of Florida is one of 37 plaintiffs who have sued EPA arguing that the freshwater rule is arbitrary and capricious. The district court has indicated that it will issue a decision prior to the freshwater rule's March 6, 2012, effective date. Regardless of who prevails at the district court level, appeals to the Eleventh Circuit are likely to follow.

II. Congressional Action & NRC Review

Members of Florida's Congressional Delegation have also taken significant actions. Senator Bill Nelson requested that EPA subject its freshwater rule to an independent economic analysis prior to enforcing the rule. EPA complied with this request and committed to having its criteria reviewed by the National Research Council prior to the March 2012 effective date. Additionally, Congressman Cliff Stearns, who chairs the Subcommittee on Oversight and Investigations, opened an investigation into EPA's decision making process associated with the rulemaking. In an April 21, 2011 letter to EPA, Chairman Stearns requested a number of documents that should shed light on EPA's decision to single out Florida for numeric nutrient criteria development. Other Florida Delegation members have sent letters to EPA and questioned EPA Administrator Lisa Jackson in hearings about EPA's actions.

III. DEP Petition & State Rulemaking

On April 22, 2011, DEP filed a petition with the EPA asking EPA to withdraw its January 14, 2009, determination that numeric nutrient criteria are necessary in Florida; to repeal its freshwater rule; and to "discontinue proposing or promulgating further numeric nutrient criteria in Florida." The petition explains that Florida regulates nutrients more diligently and comprehensively than most other states and argues that EPA never should have interfered with Florida's water quality standards program.

EPA responded to the petition on June 14th. EPA does not expressly accept or deny DEP's petition, but instead encourages the state to move forward with state rulemaking. Also, EPA indicates a willingness to seek modifications to the rulemaking schedule outlined in the 2009 consent decree, so long as Florida continues towards rule adoption. EPA represents that it intends to repeal its rule if Florida's final nutrient criteria rules are satisfactory. Any such decision, however, would be subject to legal challenge.

If DEP continues with its rulemaking, Florida's nutrient rules are anticipated to be ready for legislative ratification during the 2012 Florida Legislative Session:

- Public Workshop on Draft Rule: July, 2011
- Public Workshop on Revised Rule: September, 2011
- ERC Briefing: November, 2011
- ERC Adoption: January, 2012
- Legislative Ratification: 2012 Legislative Session