

Hopping Green & Sams

Attorneys and Counselors

Environmental Update

• P.O. Box 6526 • Tallahassee, FL 32314 • (850) 222-7500 • <http://www.hgslaw.com/> •

Friday, January 20, 2012

INSIDE THIS EDITION

<i>FDEP SUBMITS SIP REVISION FOR ETHANOL PLANT EXCLUSION</i>	<i>1</i>
<i>RPCT RULE REPEAL HEARING DELAYED.....</i>	<i>1</i>
<i>FDEP REFOCUSSES AGENCY APPROACH TO REGULATORY COMPLIANCE</i>	<i>2</i>
<i>D.C. DISTRICT COURT VACATES EPA STAY OF BOILER MACT AND CISWI</i>	<i>2</i>
<i>NOAA'S MARINE SPECIES DUTIES MAY BE TRANSFERRED TO FWS.....</i>	<i>3</i>



FDEP Submits SIP Revision for Ethanol Plant Exclusion

Contact: Joseph Brown

As previously reported in the *HGS Environmental Update*, the Florida Department of Environmental Protection (FDEP) has amended its definitions of “major source of air pollution” and “major stationary source” to exclude ethanol fuel production facilities. On December 12, 2011, FDEP submitted those amendments to the U.S. Environmental Protection Agency for approval in a State Implementation Plan (SIP) revision. Materials related to this SIP revision are available on FDEP’s Division of Air Resource Management Regulatory Projects website.

RPCT Rule Repeal Hearing Delayed

Contact: Joseph Brown

As previously reported in the *HGS Environmental Update*, FDEP has begun the process of repealing the Reasonable Progress Control Technology (RPCT) Rule. The RPCT Rule was developed to implement federal Regional Haze requirements. FDEP has since determined the rule to be unnecessary. The proposed repeal is currently scheduled for hearing before the

Environmental Regulation Commission on February 16, 2012, in Tallahassee. The rule remains in effect pending completion of the repeal process; and subject sources should note that the rule includes an impending January 31, 2012, permit application deadline.

FDEP Refocuses Agency Approach to Regulatory Compliance

Contact: Joseph Brown

FDEP's Deputy Secretary Littlejohn recently outlined FDEP's refocused approach to regulatory compliance in a November 16, 2011, guidance memorandum sent to FDEP regulatory directors. The guidance's focus is on achieving the primary objective of regulatory compliance through a rubric of "compliance assistance." This includes encouraging the use of pre-application meetings and the expansion of outreach, education, and technical assistance to help FDEP's "constituents" avoid violations.

The guidance also includes field inspections within its rubric of compliance assistance. In particular, while field inspections are a means of detecting violations and making responsible decisions about enforcement, they can also serve to identify patterns and trends that may indicate confusing regulatory requirements or inconsistencies in their application. These are issues that FDEP should seek to identify and correct.

The guidance further suggests that where noncompliance occurs despite best efforts at education and outreach, the first consideration should be whether a return to compliance can be achieved without enforcement. The guidance notes that compliance without enforcement is usually timelier and less costly than formal measures and focuses "on fixing the problem, achieving environmental results and moving forward." However, the guidance acknowledges that knowing when such an approach is appropriate may not always be straightforward, and it encourages reliance on FDEP's *Enforcement Manual* for consistency in characterizing and handling violations.

In a final note of significance, the guidance indicates that Deputy Secretary Littlejohn will be soliciting recommendations for reviewing penalties and other compliance and enforcement practices from within the various FDEP divisions and the Office of General Counsel.

D.C. District Court Vacates EPA Stay of Boiler MACT and CISWI

Contact: Joseph Brown

On January 9, 2012, the Federal District Court for the District of Columbia issued an order vacating and remanding the U.S. Environmental Protection Agency's (EPA) stay of its New Source Performance Standards for Commercial and Industrial Solid Waste Incinerators (CISWI) and its National Emission Standards for Hazardous Air Pollutants for Major Source Industrial, Commercial, and Institutional Boilers and Process Heaters (Boiler MACT). EPA finalized its CISWI and Boiler MACT rules on March 21, 2011, but subsequently stayed both rules pending judicial review or completion of agency reconsideration. EPA issued its stay under the authority of the Administrative Procedure Act (APA) because it provides the option of a stay of indefinite

length while judicial review remains pending. In contrast, a stay under the Clean Air Act may only last a maximum of three months.

In ordering vacatur, the Court found that while EPA had authority to issue the stay under the APA and that the stay was not subject to notice and comment requirements, EPA nevertheless failed to demonstrate how its action met the standard justifying a stay. The Court also doubted EPA's ability to justify the stay even on remand and decided to vacate the stay (rather than leave it in place on remand, which is what EPA requested), in part, on that basis.

Because of the Court's vacatur, both CISWI and the Boiler MACT are currently effective. Please feel free to contact Hopping, Green & Sams to address compliance questions, including submissions of initial notifications. As a reminder, EPA's reconsiderations of both the Boiler MACT and CISWI are still proceeding, with EPA intending to finalize its reconsiderations by the end of April 2012.

NOAA's Marine Species Duties May Be Transferred to FWS

Contact: Susan L. Stephens

On January 13, 2012, the Obama Administration proposed to consolidate various overlapping trade and commerce functions of disparate federal agencies into one cabinet-level trade agency. As part of this effort, the Administration proposed moving the duties of the National Oceanic & Atmospheric Administration (NOAA) - now part of the Commerce Department - to the U.S. Fish & Wildlife Service (FWS), which is within the Department of the Interior. Under the President's proposal, FWS would be responsible for undertaking the marine species-related duties of NOAA's National Marine Fisheries Service (NMFS), including review of the effect of proposed federal actions on Essential Fish Habitat. FWS is currently responsible for evaluating impacts of proposed federal actions on endangered and threatened species under the Endangered Species Act.

This concept has been stalled for some time, largely due to disputes concerning the relocation of NOAA's National Weather Service duties. The Weather Service is the largest part of the Commerce Department.

While many special interest groups favor eliminating regulatory duplication, certain environmental groups worry that an arguably business-oriented "culture" of the Interior Department would overwhelm the NMFS. Whether FWS has sufficient staff to timely accommodate an increase in its tasks is unclear. If implemented, this proposal will impact permitting under section 404 of the Clean Water Act, which requires consultation with both entities.

For more information please contact [Susan Stephens](mailto:SusanStephens@hgslaw.com) at (850) 222-7500 or SusanS@hgslaw.com.