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# Environmental Update

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## INSIDE THIS EDITION

<i>FDEP RULE WORKSHOP – SOLID WASTE RECYCLING .....</i>	<i>1</i>
<i>FDEP PROPOSES PM<sub>2.5</sub> AMENDMENTS AND REPEAL OF REASONABLE PROGRESS CONTROL TECHNOLOGY RULE .....</i>	<i>2</i>
<i>D.C. CIRCUIT COURT OF APPEALS GRANTS INTERVENOR ATTORNEY FEES .....</i>	<i>2</i>
<i>ERC APPROVES REPEAL OF FLORIDA'S DIESEL IDLING RULE .....</i>	<i>3</i>
<i>D.C. CIRCUIT ANNOUNCES OPINION IN PORTLAND CEMENT ASSOCIATION V. EPA .....</i>	<i>3</i>
<i>EPA RELEASES FINAL UTILITY MACT AND NSPS .....</i>	<i>4</i>
<i>EPA RESPONDS TO RECOMMENDED 2008 OZONE NAAQS DESIGNATIONS FOR FLORIDA .....</i>	<i>4</i>
<i>EPA AMENDS RULE FOR MANDATORY REPORTING OF GREENHOUSE GASES, EXTENDS 2012 REPORTING DEADLINE .....</i>	<i>5</i>



## FDEP Rule Workshop – Solid Waste Recycling

Contact: Mike Petrovich

The Florida Department of Environmental Protection (FDEP) announced that it will conduct another rule development workshop on January 19, 2012, to discuss proposed changes to Chapters 62-716 (Solid Waste Grants and Annual Reports) and 62-722 (Regulation of Recovered Materials), Florida Administrative Code (F.A.C.), in order to implement the 75% recycling goal established in Chapter 2010-143, Laws of Florida. The workshop will be held at FDEP's Bob Martinez Center in Tallahassee. The public may also attend the workshop via webinar. To participate via webinar, one can register at <https://www2.gotomeeting.com/register/240811394>. The workshop agenda and draft rule changes will be posted in the near future to FDEP's webpage at [http://www.dep.state.fl.us/waste/categories/solid\\_waste/pages/rulemaking\\_62-716.htm](http://www.dep.state.fl.us/waste/categories/solid_waste/pages/rulemaking_62-716.htm).

## **FDEP Proposes PM<sub>2.5</sub> Amendments and Repeal of Reasonable Progress Control Technology Rule**

**Contact: Joseph Brown**

In the December 16, 2011, *Florida Administrative Weekly*, FDEP published notice of proposed amendments to PM<sub>2.5</sub> standards in its Preconstruction Review and Prevention of Significant Deterioration rules. See Vol. 37, No. 50 Fla. Admin. Weekly. These proposed amendments add increments for PM<sub>2.5</sub> and require FDEP to consider condensable PM emission standards consistent with Clean Air Act regulations. In the same edition of the *Florida Administrative Weekly*, FDEP also proposed to repeal its Reasonable Progress Control Technology (RPCT) rule. See Rule 62-296.341, F.A.C. FDEP's RPCT rule was originally developed as a component of the state's Regional Haze State Implementation Plan. However, the provision has been determined by FDEP to be unnecessary to meet Clean Air Act visibility standards, and is being repealed as a result. A hearing will be held on both FDEP's proposed PM<sub>2.5</sub> amendments and RPCT rule repeal on January 19, 2012, at 9:00 a.m., before the Environmental Regulation Commission. Comments on either rulemaking should be submitted to FDEP prior to January 6, 2012.

## **D.C. Circuit Court of Appeals Grants Intervenor Attorney Fees**

**Contact: Susan L. Stephens**

The D.C. Circuit Court of Appeals issued a 2-1 decision on December 20 that will potentially establish new precedent in suits filed challenging EPA rulemaking (or for failure to engage in rulemaking). In *State of New Jersey, et al. v. EPA, et al.*, Case No. 05-1097, a group of Native American tribes and tribal associations intervened in ongoing litigation challenging EPA's Clean Air Mercury Rule (CAMR) mercury emissions trading provisions and sought attorneys' fees in their petition to intervene. When the CAMR was vacated in 2008 without addressing the intervenors' arguments, EPA argued that it should not be required to pay the group's fees because the rule was vacated on other grounds. The tribes, of course, disagreed. On December 20, a divided court sided with the tribes, requiring EPA to pay the tribes' legal fees in the case, over \$300,000. The majority held that failing to grant fees could have a chilling effect on future interventions, while the dissent argued that the majority has now set a negative precedent, because the rules were vacated on issues never raised by the intervenors.

The standard for the fee award in environmental cases such as this is highly discretionary, allowing the court to award costs of litigation (including reasonable attorney and expert witness fees) whenever the court "determines that such award is appropriate." Clean Air Act section 307(f), 42 U.S.C. § 7607(f). The D.C. Circuit distinguished its rulings in two other cases denying fees to intervenors because, in those cases, the intervenors had intervened on the side of the government, not in opposition to the rulemaking.

The decision is likely to have the effect of increasing interventions in challenges to EPA rules.

## **ERC Approves Repeal of Florida's Diesel Idling Rule**

**Contact: Robert Manning  
Thomas Philpot**

On December 8, 2011, the Florida Environmental Regulation Commission approved the repeal of the Heavy-Duty Vehicle Idling Reduction rule. *See* Rule 62-285.420, F.A.C. FDEP had identified the rule for repeal during the comprehensive rule review conducted pursuant to Governor Rick Scott's Executive Order 11-72, affirming Executive Order 11-01, which directed agencies to review and pursue repeal of rules deemed to be duplicative, unnecessarily burdensome, or no longer necessary. According to FDEP, market incentives for diesel fuel cost savings rendered the anti-idling requirements of Rule 62-285.420, F.A.C. unnecessary.

## **D.C. Circuit Announces Opinion in *Portland Cement Association v. EPA***

**Contact: Robert Manning  
Thomas Philpot**

The D.C. Circuit Court of Appeals released its opinion in *Portland Cement Association v. EPA* on December 9, 2011, holding that EPA's standards for portland cement kilns under the National Emission Standards for Hazardous Air Pollutants (NESHAP) and the New Source Performance Standards (NSPS) were arbitrary and capricious. Accordingly, the Portland Cement Association's (PCA) petition for review was granted by the court and remanded to EPA for reconsideration.

The decision follows a petition by PCA to review EPA's denial of a petition for reconsideration. In September 2010, EPA finalized rulemaking procedures under both NESHAP and NSPS to revise emissions standards for the portland cement industry. Simultaneously, EPA was developing a new definition of commercial and industrial solid waste incinerators (CISWI) that would subject certain kilns to standards under CISWI rather than NESHAP. The CISWI definition was enacted six months after the final NESHAP rule. PCA sought administrative reconsideration of the rules, arguing that EPA's setting of NESHAP standards, without regard for the ongoing CISWI rule development, was arbitrary and capricious. Specifically, PCA emphasized that the rules had the potential to include sources in NESHAP floor-setting calculations that ultimately would be reclassified and not subject to the standards once the CISWI rule was finalized.

While the court agreed with PCA that the rule was arbitrary and capricious, it rejected other claims regarding NESHAP, including claims that: EPA had violated the Clean Air Act (CAA) by basing NESHAP standards on bare emissions data rather than data that isolates the effect of technology; EPA's pollutant-by-pollutant approach to setting NESHAP floors violates the CAA; EPA impermissibly reset NESHAP floors rather than revise existing floors; and adoption of a continuously-monitored standard (CEMS) rather than a sampling standard or particulate matter was not a logical outgrowth of the proposed rule. Though the court declined to stay the NESHAP rule pending reconsideration, it did issue a stay of the NESHAP standards applicable to clinker storage piles, citing EPA's concession that it provided insufficient notice of the

standard and the likelihood that the standards will change substantially following the consideration of initial comments.

PCA also raised challenges to the NSPS rulemaking, including that it improperly focused on newer, advanced kilns while failing to consider the effect of its standards on kilns of older design and that it impermissibly incorporated newly-promulgated NESHAP standards into the NSPS rule without consideration of cost and other factors that NSPS requires. The court rejected the challenges to the NSPS rule, determining that the rulemaking process had addressed all of the issues raised by PCA. The court also rejected a claim by environmental groups challenging EPA's failure to adopt greenhouse gas emissions standards as part of the portland cement NSPS.

## **EPA Releases Final Utility MACT and NSPS**

**Contact: Joseph Brown**

On December 21, 2011, the U.S. Environmental Protection Agency (EPA) released its final National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units (Utility MACT) and its Standards for Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units (Utility NSPS). Key changes from the proposal include: filterable-only PM emission limits instead of total PM; the use of work practice standards instead of emission limits during start-up and shut-down; and an alternative, more stringent mercury emission limit of 1.0 lb/Tbtu averaged over a longer ninety (90) day period, in addition to the previously proposed emission limit provisions.

Also of note, while EPA did not grant a blanket one-year compliance extension, EPA did indicate that permitting authorities might allow such extensions "in a broad range of situations." This includes the possibility of extensions for: 1) the construction of on-site replacement power; and 2) units being retired where operation is required past the three-year initial compliance period for reliability concerns while off-site replacement power is constructed, other units install controls, or transmission upgrades are completed. Petitions for judicial review must be filed within sixty (60) days after publication of the final rule in the *Federal Register*, which is anticipated within the next few weeks.

## **EPA Responds to Recommended 2008 Ozone NAAQS Designations for Florida**

**Contact: Joseph Brown**

On December 20, 2011, EPA published notice of its response to state designation recommendations for the 2008 Ozone National Ambient Air Quality Standards (2008 Ozone NAAQS). 76 Fed. Reg. 78872. EPA has indicated to Florida that it intends to designate all areas within the state as either unclassifiable or attainment. No non-attainment designations are proposed. EPA intends to make final designations for the 2008 Ozone NAAQS in the spring of 2012. Comments on EPA's response to Florida must be submitted to EPA on or before January 19, 2012.

## **EPA Amends Rule for Mandatory Reporting of Greenhouse Gases, Extends 2012 Reporting Deadline**

**Contact: Robert Manning  
Thomas Philpot**

Effective December 29, 2011, EPA is revising the Mandatory Reporting of Greenhouse Gases (GHGs) rule to address technical and editorial errors that have been identified since promulgation of the rule. Additionally, the EPA is authorizing a one-time six month extension of the 2012 reporting deadline (March 31 to September 28) for facilities and suppliers that contain one or more source categories for which data collection began in 2011. The extension is intended to enable stakeholder testing of the electronic-GHG Reporting Tool (e-GGRT). Accordingly, EPA is requiring that any entity that submitted a report in the 2010 year notify EPA through e-GGRT by March 31, 2012, that it is not required to submit the second annual GHG report until September 28, 2012, under the extension. EPA is also adding a provision that will allow the annual GHG report and other submissions to be submitted to the agency on the next business day when a regulatory deadline falls on a weekend or federal holiday.

The revisions for particular source categories clarify existing reporting requirements, but do not change how GHG emissions or quantities are calculated or the information that must be collected. Information on specific revisions for selected source categories is highlighted below:

- Electrical Transmission and Distribution Equipment Use – applicability thresholds are revised in table A-3 of subpart DD to clarify that only facilities above the capacity threshold requirements of 40 CFR 98.301 must submit an annual report.
- Industrial Wastewater Treatment – definitions of terms in Equation II-4 are amended to clarify that average temperature and average pressure should be used for multiple temperature and pressure measurements during a measurement period; weekly sampling is clarified to be at least one sample each calendar week with at least three days between each measurement; continuous gas flow measurements are clarified to require measurements from each anaerobic digester, reactor or lagoon from which biogas is recovered, and the measurements must be used to determine cumulative gas production each week; data reporting requirements are clarified to state that reporters should provide information on each lagoon, not an average of all lagoons; cumulative volumetric biogas flow for each week is clarified to intend collection of information on total gas recovered for the week, up to 52 weeks per year; and replacing the terms “anaerobic digester” with “anaerobic sludge digester” and “gas” with “biogas.”

For more information on revisions included in this rule and other impacted source categories, please contact the HGS attorneys identified above.