

DEC Issues Fine Particulate Policy

DEC has issued a procedure for evaluating the impact of fine particulate matter (otherwise known as particulate matter smaller than 2.5 microns or PM_{2.5}) until the new ambient air quality standard for PM_{2.5} is fully implemented. The procedure, entitled *Assessing and Mitigating Impacts of Fine Particulate Matter Emissions*, applies to any project that is subject to review under the State Environmental Quality Review Act (SEQRA) and did not receive a notice of complete application as of December 29, 2003, the date the policy was issued. Under the procedure, if primary PM₁₀ emissions from a project are 15 tons per year or more, the project sponsor must analyze secondary PM emissions and model PM_{2.5} impacts. If this analysis shows that emissions exceed certain thresholds, the project is assumed to have a significant adverse impact and the sponsor must prepare an Environmental Impact Statement (EIS) to assess the severity of the impacts, evaluate alternatives, and employ reasonable mitigation measures to minimize those impacts.

Originally, the Clean Air Act regulated only coarse particulate. In 1997, EPA adopted new standards applicable to PM_{2.5}. States are currently collecting data on ambient PM_{2.5} concentrations that will be used by EPA to designate PM_{2.5} nonattainment areas. Once areas have been designated, states will have three years to develop plans to implement the new standards.

In New York, questions have arisen concerning what type of PM_{2.5} analyses, if any, are required in the absence of a fully implemented PM_{2.5} standard. In a series of decisions, New York State courts have ruled that project applicants must assess whether PM_{2.5} emissions will cause a significant impact and thus require an EIS. To date, however, the courts have offered virtually no guidance on how this analysis should be conducted. The policy is intended to fill this void until the PM_{2.5} standard is fully implemented in New York.

The guidance can be obtained from DEC's web site at <http://www.dec.state.ny.us/website/dar/pm25.html>.

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FEDERAL NEWS

Supreme Court Decides NSR Case

The United States Supreme Court recently issued a decision addressing EPA's authority to intercede in state permitting decisions when it concludes that the state has acted improperly in issuing a federally-mandated permit. In a five-to-four decision, the Court in *Alaska Department of Environmental Conservation v. EPA* held that EPA can order a facility to stop construction under the Prevention of Significant Deterioration (PSD) program where it concludes that the permit was based on an improper technology determination. The controversial decision clarifies EPA's authority to intervene directly in permitting decisions in delegated states. It does not, however, directly address whether EPA can bring an enforcement action against a facility that was constructed or modified under a state-issued permit to which EPA later objects.

In the Alaska case, a mining company sought permission from the State to install a new diesel electric generator under the PSD program. After extensive negotiations, the State approved the use of low NOx as Best Available Control Technology (BACT). EPA objected on the ground that low NOx was not BACT and issued a series of orders prohibiting the state from issuing a PSD permit and prohibiting the applicant from beginning construction. The Supreme Court held that the

CAA authorizes EPA to stop construction of a major facility when EPA finds that the state's BACT determination was unreasonable. In reaching its decision, the court rejected arguments by Alaska that EPA's enforcement role was restricted to ensuring that the permit issued contained a BACT limitation, without regard to whether the limitation was reasonable in light of the criteria for BACT. Four of the nine justices dissented from the decision, concluding that EPA exceeded its powers in setting aside the state's BACT determination.

While this case addresses EPA's authority to intervene in permitting decisions *before* construction of a facility has commenced, the court did not decide whether EPA's authority extended to enforcing alleged violations of the CAA identified *after* a facility has been constructed in accordance with a state permit. However, the court did reject concerns raised by the State and the dissent that the decision opened the door for EPA to challenge state permitting decisions years after they are made. However, several lower courts have held in the past that EPA cannot penalize companies operating in accordance with air permits issued by delegated states where EPA concludes that the permits were improperly issued.

EPA Clarifies Rules Governing Periodic Monitoring

EPA recently rescinded a regulatory revision and interpretation which gave states the authority to use the general monitoring provisions of Title V to require enhancement of monitoring where they conclude that the monitoring authorized by regulation is insufficient to demonstrate compliance. Under the new interpretation, states are limited to imposing monitoring under existing applicable requirements or as necessary to satisfy the periodic monitoring requirement of the Act. In conjunction with this rulemaking, EPA announced

that it planned to implement measures to improve the quality of the monitoring required by applicable regulations and clarify when and how the periodic monitoring rules apply. Environmentalists immediately attacked the rule, arguing that it will weaken the ability of agencies to monitor compliance with federal and state air regulations.

The rule, which was issued January 22, 2004, takes effect February 23, 2004 and can be found at: www.epa.gov/fedrgstr.

EPA Extends Deadline for Commenting on Industrial Wipe Exclusion

EPA recently extended the deadline for submitting comments on a November 20, 2003 proposed rule that would exempt industrial wipes going for disposal from the definition of "hazardous waste" and reusable wipes that are sent to an industrial laundry for cleaning and reuse from the definition of "solid waste" (and, by

extension, from the definition of hazardous waste). EPA is now accepting comments on the proposal until **March 19, 2004**. For more information, see the December 2003 issue of the *Environmental Cable*.

STATE NEWS

List of Impaired Waters Available for Review

DEC recently made available for comment the list of impaired waters required by Section 303(d) of the Clean Water Act. The list identifies those waters that require Total Maximum Daily Load (TMDL) development. The federal Clean Water Act and state regulations require DEC to classify waters based on their highest and best uses. This classification, in turn, dictates what water quality standards apply to a given waterbody and what can then be discharged to that waterbody. Under Section 303(d) of the Clean Water Act, DEC must identify a list of impaired waters where the specified uses are not fully supported; for these waters, the State must consider developing TMDLs or other strategies to reduce the input of the pollutants that restrict waterbody uses and restore such uses.

The draft 303(d) list identifies various waters

throughout New York State as "high priority" for TMDL development. The list also identifies numerous waterbodies in the Adirondacks as impaired because of acid deposition, and other waterbodies throughout New York State as impaired because of fish consumption and shellfish consumption advisories. Finally, the list includes waterbodies that require verification of impairment or cause/pollutant, i.e., waters where TMDL development may be deferred until water quality can be evaluated. Comments on the 303(d) list must be submitted to DEC by **March 12, 2004**. The list can be obtained from DEC's website at: www.dec.state.ny.us/website/dow/303dcalm.html.

DEC Issues Remedial Program Annual Report

DEC recently issued the *Remedial Programs Annual Report for the State Fiscal Year 2002-03*. The report provides statistics on New York's progress in cleaning up sites under various state remedial programs. The report states that, since the Registry of Inactive Hazardous Waste Sites was established in June 1980, a total of 1,765 sites have been placed on the Registry; of that number, 875 remain and 890 have been delisted (either because no hazardous waste was found or because the site has been remediated or merged with another site). Of the 1,765 sites, 985 require or required some type of remediation. 455 of these sites already have been remediated; of the remaining 530 sites, more than 70 percent are either in the Remedial Investigation/Feasibility Study phase or are undergoing remedial action.

Responsible parties have paid approximately 63 percent (\$3.35 billion) of the cost of cleanups, with DEC contributing 25 percent and the federal government, 12 percent.

The report states that DEC has executed VCP agreements covering 443 sites since the inception of the Voluntary Cleanup Program in 1993, with 116 agreements in fiscal year 2002-03 alone. To date, 86 remedial actions have been completed under the program. With the enactment of the new Superfund legislation, the VCP program has been phased out in favor of a new statutory brownfield cleanup program. Sites subject to an existing VCP agreement have the option of continuing under that agreement or transitioning to the new program.

The report also includes statistics relating to

spill prevention, response and remediation under DEC's petroleum bulk storage, major oil storage facility, and chemical bulk storage programs, including data on: (1) the number of facilities and tanks regulated under each program; (2) the types of materials stored under each program; and (3) DEC's enforcement efforts. On the issue of spills, the report states that DEC received 15,258 spill reports in Fiscal Year 2002-03; of these,

approximately 8,500 were inspected by DEC field personnel. The report includes data on the type of material released, the cause of the release, and the source of the release. It also includes information on spill remediation efforts and on DEC programs addressing MTBE and ethanol. The report can be obtained from DEC's web site at: <http://www.dec.state.ny.us/website/der/rplan.html>.

DEC Proposes Revised Erosion Control Guidance

DEC recently proposed changes to its *New York Standards and Specifications for Erosion and Sediment Control*. The erosion control guidelines provide information on minimizing erosion and sediment problems on land undergoing development. Individuals seeking coverage under New York's General SPDES Permit for Stormwater Discharges from Construction Activities (GP 02-01) must conform to the

guidelines as part of their pollution prevention planning efforts. DEC is accepting comments on the proposed revisions until **March 19, 2004**. A copy of the revised document, including a summary of the proposed changes, can be obtained from DEC's web site at: www.dec.state.ny.us/website/dow/toolbox/escstandards/index.html.

DEC Proposes to Amend TOGS 1.1.1 Guidance Values

DEC recently proposed to amend TOGS 1.1.1 entitled *Ambient Water Quality Standards and Guidance Values and Groundwater Effluent Limitations* to add guidance values for three substances. TOGS 1.1.1 contains the water quality standards and guidance values used by DEC to classify waterbodies and to establish water-quality based discharge limitations in wastewater discharge permits. With the recent notice, DEC announced that it planned to establish a 1,000 microgram/liter guidance value for propylene glycol (with a more stringent value of 300 micrograms/liter applicable at the point of intake of water supplies that use ozonation in their

treatment process). This change follows a decision by the New York State Department of Health to increase the drinking water standard for propylene glycol from 50 to 1,000 micrograms/liter. DEC also plans to add standards for metolachlor ESA and metolachlor OA of 50 micrograms/liter. DEC is accepting comments on the new guidance values until **February 20, 2004**. The draft addendum can be obtained from DEC's January 21, 2004 Environmental Notice Bulletin at www.dec.state.ny.us/website/enb2004/20040121.

DEC Revises Air Guide-1 Table

DEC recently revised Air Guide-1 to update the guideline concentrations contained in Appendix C with the latest toxicological information and to add other information. Air Guide-1 is used by DEC staff to establish air pollution control requirements for sources regulated under 6 NYCRR Part 212, General Process Emission

Sources. The current DAR-1 maintains the text of the draft version of Air Guide-1 issued in 1991 and includes the revised Appendix C as a separate document. The revised Air Guide-1, Appendix C, can be obtained from DEC's web site at: <http://www.dec.state.ny.us/website/dar/boss/toxics.html>.

CALENDAR OF EVENTS

- March 5:** Capital District Environmental Breakfast Club 7:30 am, Holiday Inn Turf, Wolf Rd. Colonie. Topic: Implementing Environmental Management Systems: A Plant Manager's Perspective. Speaker: Bob Geary, Barton & Loguidice. \$12 pre-registered, \$14 day of event. 518/438-9907 ext. 240 or e-mail bpopolizio@youngsommer.com
- March 10:** Mohawk Valley Environmental Information Exchange Monthly Meeting. Topic: Radisson Hotel Utica Center- 200 Genesee St. Utica (Across from the State Office - Building- Park in the garage free) Meeting Format: Buffet Breakfast 7:30 - 8:00AM - Program 8:00 - 9:30 AM \$10-12 includes breakfast. For reservations email davep@mvatc.net.
- March 17:** Eastern NY Chapter, Air & Waste Management Association Monthly Meeting. Speaker: Ken Pokalsky (NYS Business Council) - Environmental Regulatory Update. 12:00 noon, Holiday Inn Turf, Wolf Rd. \$15 members; \$25 non-members (includes \$10 Chapter membership). For reservations contact Janis Falon, 518-487-7648 or email jef@woh.com
- April 2:** Capital District Environmental Breakfast Club 7:30 am, Holiday Inn Turf, Wolf Rd. Colonie. Topic: to be announced \$12 pre-registered, \$14 day of event. 518/438-9907 ext. 240 or e-mail bpopolizio@youngsommer.com
- April 21:** Eastern NY Chapter, Air & Waste Management Association Monthly Meeting. Topic: MACT Update - Misc. Organic Chemical Manufacturing NESHAPS. 12:00 noon, Holiday Inn Turf, Wolf Rd. \$15 members; \$25 non-members (includes \$10 Chapter membership). For reservations contact Janis Falon, 518-487-7648 or email jef@woh.com
- May 19:** Eastern NY Chapter, Air & Waste Management Association Monthly Meeting. Topic: Plant Vulnerability (New DOT Regulations, terrorism and other emergencies) 12:00 noon, Holiday Inn Turf, Wolf Rd. \$15 members; \$25 non-members (includes \$10 Chapter membership). For reservations contact Janis Falon, 518-487-7648 or email jef@woh.com