CASE NOTES

recent environmental cases and final rules

Environmental and Natural Resources Section — OREGON STATE BAR
Editor: Micah Steinhilb — December 2009

Editor's Note: Welcome to the first issue of Case Notes. This issue contains selected summaries of cases and administrative final rules issued in August, September, and October 2009. These summaries will be distributed quarterly and are intended to provide an overview of recent developments in environmental law. The newsletter covers cases from the U.S. Supreme Court, the Ninth Circuit, the U.S. District Court for the District of Oregon, the Oregon Supreme Court, and the Oregon Court of Appeals, as well as Oregon and federal administrative final rules. Please contact me if you have any comments or suggestions about the newsletter, or would like to suggest a case or rule for inclusion in future issues. Also, thank you to all of the volunteer authors in this issue and to those who have signed up to write summaries for future newsletters. If you are interested in summarizing cases and rules for this newsletter, please contact me.

Regards,

Micah Steinhilb
Case Notes Editor *or* *Oregon Court of Appeals*
steinhmr@yahoo.com *micah.r.steinhilb@ojd.state.or.us*
(541)380-0293 *(503)986-5664*

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Saint John's Organic Farm v. Gem County Mosquito Abatement District, 574 F.3d 1054 (9th Cir. 2009).
Samantha Lebeda Gamboa, Schwabe, Williamson & Wyatt
sgamboa@schwabe.com

Plaintiff and defendant settled a lawsuit brought under 33 U.S.C. § 1365, the citizen-suit provision of the Clean Water Act ("CWA"), in which plaintiff alleged defendant was discharging pesticides into waters of the United States without a permit. The settlement agreement required defendant to limit its spraying of pesticides in several ways, and provided that plaintiff could apply to the district court for attorney fees under § 1365(d) of the CWA. The district court denied plaintiff's application for attorney fees, finding that plaintiff was not a "prevailing or substantially prevailing party" under the statute and, in the alternative, that it was not "appropriate" to grant fees to plaintiff. The Ninth Circuit reversed, holding that plaintiff was a "prevailing party" under Section § 1365(d), and remanded to the district court to determine if the attorney fees were "appropriate" under the standards set forth by the Ninth Circuit in its opinion.

The Court used a three-part test in determining that plaintiff was a "prevailing party" under the statute. First, the terms of the settlement agreement were *judicially enforceable*. Second, the agreement effected a *material alteration in the legal relationship between the parties* because the requirement that defendant change its pesticide practices became legally required under the agreement. And lastly, plaintiff achieved *actual relief* on the merits of his claim, as the remedy achieved in the settlement agreement was part of the relief plaintiff sought in his complaint.

The Ninth Circuit remanded the case to the district court to determine if an award of attorney fees would be "appropriate" under the statute. Looking to cases involving civil rights statutes and other environmental statutes with similar attorney fee provisions, the Court articulated that the attorney fee provision in §1365(d) was broad, and that a district court may only deny attorney fees under § 1365(d) in rare cases when there are "special circumstances".

California ex rel Lockyer v. U.S. Dept. of Agriculture, 575 F.3d 999 (9th Cir. 2009).
Marianne Dugan, Attorney at Law
mdugan@mdugan.com

In this case the Ninth Circuit addressed a lawsuit filed by California, Oregon, and other states, as well as environmental groups, challenging the U.S. Forest Service's 2005 decision to revoke the Clinton Administration's "Roadless Rule" and replace it with the "State Petitions Rule." The lawsuit alleged violations of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). On cross-motions for summary judgment, the trial court found that the government had violated those statutes, enjoined the new rule, and reinstated the Roadless Rule. The Ninth Circuit agreed.

The Clinton-era Roadless Rule (with some limited exceptions) prohibited road construction and timber harvest in roadless areas within the National Forests. The agency explained that it believed that a uniform nationwide rule was required in order to protect these areas from incremental reduction due to logging and road-building. The Bush Administration withdrew the rule and replaced it with a new rule that allowed the governor of any state to petition the federal government to promulgate regulations to manage roadless areas on National

Forests within that state, established a National Advisory Committee to review such petitions, and set a time limit for the federal government to accept or decline such petitions. In so doing, the Bush Administration explained that it did not feel a "one-size fits-all" approach was appropriate for these lands.

The fatal flaw in the government's rule change was that it rushed the change through with a so-called "categorical exclusion" (CE) to NEPA. The CE invoked by the government is for "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions." The Forest Service asserted that the revocation of the Roadless Rule was "merely procedural in nature and scope and, as such, has no direct, indirect, or cumulative effect on the environment." The agency also argued that the effects of the new rule had already been addressed in the "no-action alternative" originally presented in the Environmental Impact Statement for the Roadless Rule.

The court rejected these arguments (as well as a procedural "ripeness" argument). The Ninth circuit held that this was not a "routine" administrative action and would certainly have on-the-ground environmental effects. The court noted that government counsel could cite no occasion when this CE had previously been used to repeal a rule with substantive effects on land management.

The court also held that the decision violated the ESA, because the agency did not consult with the U.S. Fish and Wildlife Service before revoking the Roadless Rule--a process that is required whenever a government action "may" affect an endangered or threatened species or its critical habitat. The court rejected the government's argument that the rule change would not affect any listed species.

Sierra Forrest Legacy v. Rey, 577 F.3d 1015 (9th Cir. 2009).
Micah Steinhilb, Oregon Court of Appeals
steinhmr@yahoo.com

This is an interlocutory appeal from denial of plaintiffs' request to enjoin three USFS logging contracts, in which the court granted defendants-intervenors' petition for reconsideration, and held that, when deciding whether to issue a narrowly tailored injunction, district courts must assess the harms pertaining to injunctive relief in the context of that narrow injunction.

The district court refused plaintiffs' request to enjoin three logging projects projects, and plaintiffs appealed, arguing that the USFS violated NEPA by failing to consider a reasonable range of alternatives. USFS developed all three plans under the "2004 Framework," which superseded the "2001 Framework." As relevant here, the 2004 Framework allowed logging of trees up to 30 inches in diameter, whereas the 2001 Framework allowed logging of trees up to 12 to 20 inches in diameter. In the court's previous opinion, it agreed with plaintiffs that USFS failed to consider a reasonable range of alternatives, and therefore, that plaintiffs were likely to succeed on the merits. On reconsideration, the court continued to hold that plaintiffs are likely to succeed on the merits of their NEPA claim. However, in light of *Winter v. Natural Res. Def. Counsel, Inc.*, 129 S.Ct. 365, 374 (2008), the court also concluded that the district court erred because it did not assess non-merits factors in the particular context of the injunction sought—to halt the three projects *only* to the extent they are inconsistent with the 2001 Framework.

Under *Winter*, plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest. On the merits, the court concluded that the plaintiffs were likely to succeed on the merits because the 2004 Supplemental Environmental Impact Statement (SEIS) relied on inaccurate date from the 2001 Final Environmental Impact Statement (FEIS) and introduced new objectives without accounting for them in the in the considered alternatives. On the non-merits factors (irreparable harm, balancing the equities, and the public interest), plaintiffs argued that the district court erred in assuming that it lacked the authority to narrowly enjoin the challenged projects only to the extent they were inconsistent with the 2001 Framework. The court agreed and held that, when deciding whether to issue a narrowly tailored injunction, district courts must assess the harms pertaining to injunctive relief in the context of that narrow injunction. Remanded for consideration of the non-merits factors.

City of Rialto v. West Coast Loading Corp., 581 F.3d 863 (9th Cir. 2009).
Robin Bellanca Seifried, Cable Huston Benedict Haagensen & Lloyd LLP
rseifried@cablehuston.com

The Ninth Circuit in *City of Rialto v. West Coast Loading Corp.*, 581 F.3d 863 (9th Cir. 2009), held that the district court properly dismissed for lack of jurisdiction a "pattern and practice" claim challenging the EPA's administration of unilateral administrative orders under CERCLA § 106(a), 42 U.S.C. § 9606(a) ("UAOs"). In *Rialto*, the Ninth Circuit made clear that it will not allow an untimely challenge to a UAO characterized as a "pattern and practice" claim regarding EPA administrative procedure.

The claim relates to a UAO directing the Goodrich Company to perform a remedial investigation at a site in Rialto, California. After commencing the remedial investigation, Goodrich brought a "pattern and practice" claim against EPA, alleging that (1) EPA issues UAOs, characterized in the claim as "emergency orders," in the absence of an emergency; (2) EPA obstructs judicial review of UAOs by delaying its certification of completion; and (3) EPA controls and manipulates the Record of Decision ("ROD") that supports EPA's action. Goodrich acknowledged that it could not at that time directly challenge the UAO because CERCLA § 113(h) does not allow judicial review of a UAO during the remedial activities. Rather, Goodrich argued its "pattern and practice" claim challenged not the UAO itself but EPA's administration of UAOs generally. Goodrich relied on a Supreme Court case, *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), finding that a federal agency's administration of an immigration program violated due process by failing to provide direct judicial review of individual determinations of eligibility. From *McNary* and a subsequent case, the Ninth Circuit determined a "pattern and practice" claim arises when (1) the claim challenges an agency's procedural practices where no meaningful judicial review is otherwise available and (2) the claim is ripe, meaning the claimant has taken the other affirmative steps available before bringing the claim.

The Ninth Circuit in *Rialto* concluded that Goodrich's allegations were not consistent with a "pattern and practice" claim and the district court therefore lacked jurisdiction. First, the allegation that EPA issues "emergency orders" in the absence of an emergency is a substantive claim, not a procedural one, and therefore not a "pattern and practice" claim. Also, Goodrich

could obtain meaningful judicial review of the validity of the UAO after the work is completed and does not have standing to challenge the validity of other UAOs. Second, the allegation that EPA delays its certification of completion is not ripe for adjudication because Goodrich has not yet completed the work required to comply with the UAO. Also, after Goodrich has completed the work, Goodrich could obtain meaningful judicial review under CERCLA § 106(b)(2)(B). Third, the allegation that EPA controls and manipulates the ROD is based on CERCLA provisions (limiting opportunities for PRP input to the administrative record and generally limiting judicial review to the administrative record), constituting a facial challenge to the statute and not a challenge to EPA procedure.

***Ctr. for Biological Diversity v. U.S. Dept. of the** Interior*, 581 F.3d 1063 (9th Cir. 2009).
Frank Lupo, U.S. Department of the Interior, Office of the Solicitor, Southwest Region
loopoh@hotmail.com
(NOTE: The views in the article are the author's alone and do not necessarily represent those of the Office of the Solicitor, the Department of the Interior, or the United States.)

The Center for Biological Diversity, the Western Land Exchange Project, and the Sierra Club ("appellants") challenged the Department of the Interior's planned land exchange with a mining company, Asarco LLC, under NEPA, FLPMA, and the Mining Law of 1872. The parcels of land subject to the proposed exchange were all subject to mining claims, the majority of which were held by Asarco. Asarco proposed the land exchange to BLM in 1994 in order to consolidate its holdings and to expand its operations. Asarco would receive thirty-one parcels of public land, totaling 10,976 acres. The BLM would receive eighteen parcels of land, totaling 7,300 acres, providing important wildlife and plant habitat.

BLM published a DEIS in 1998 and a FEIS in 1999. The FEIS analyzed the environmental, cultural, and socioeconomic impacts of the proposed exchange, as compared with two alternative exchanges of lesser acreage and a no action alternative. BLM's analysis was premised on the assumption that if the exchange proceeded, Asarco would take fee simple ownership of the land and would no longer be subject to the requirements of the Mining Law of 1872. Conversely, if the exchange did not occur, ownership would remain with the United States and Asarco would need to submit a Mining Plan of Operation to the Department prior to any new mining operations. BLM assumed in the FEIS that Asarco would carry out mining operations on the land in the same manner regardless of whether or not the exchange occurred. Accordingly, the FEIS contained only a single analysis of the impact to each resource because BLM assumed the environmental consequences of mining would the same under every alternative. BLM issued a ROD in April 2000 approving the exchange. The appellants filed suit in district court. The district court rejected the challenge via summary judgment.

In reversing the district court, the split panel found that the FEIS failed to take a "hard look" at the environmental consequences of the exchange. The court found that evidence in the record did not support BLM's assumption that mining would occur on the selected lands in the same manner regardless of the exchange. Asarco would have the right to mine the lands under any alternative, however, in the event the exchange did not occur, Asarco would be required to submit a Mining Plan of Operations to BLM for approval. The court found that this process was critical in that it provided for additional environmental, cultural, and socioeconomic review which, in the majority's opinion, was highly likely to affect the manner of mining operations on

the selected lands. Further, the flaws in this NEPA analysis prevented a proper consideration of the implications for the exchange on the "public interest" as required by FLPMA. Accordingly, the court reversed on both NEPA and FLPMA grounds. The court did not reach the Mining Law of 1872 issue.

U.S. v. Milner, 583 F.3d 1174 (9th Cir. 2009).
Connie Sue Martin, Bullivant Houser Bailey, PC
conniesue.martin@bullivant.com

Under a recent Ninth Circuit decision, *U.S. v. Milner*, 583 F.3d 1164 (9th Cir. 2009), waterfront property owners who erect bulkheads and other "shore defense structures" on leased tidelands to protect against erosion and storm damage are liable for common law trespass and violation of the §10 of the Rivers and Harbors Appropriation Act of 1899 (RHA) when erosion causes the upper boundary of the tidelands to move upland of the shore defense structures, and the lease term ends.

Sandy Spit is located within the Lummi Indian Reservation in northwestern Washington but currently owned in fee by non-Indians. The upland parcels had been divided into lots and patented by members of the Lummi Tribe under an 1837 Executive Order that expanded the Lummi reservation to include additional property, including the tidelands at issue. The tidelands are held in trust by the United States for the benefit of the Lummi Tribe. Between 1963 and 1988 the upland owners leased the tidelands from the Tribe and built bulkheads and other structures.

After 1988, the owners declined to renew their leases. Over time, the shoreline eroded significantly and the shoreline boundary adjusted, by 2002 resulting in bulkheads that sat seaward of the boundary, on the tidelands. The United States demanded that the owners remove the shore defense structures, or, alternatively, enter into new leases. When they refused, the United States sued and the Tribe intervened. The United States and the Tribe prevailed at trial, and the owners appealed. Under the Ninth Circuit decision, which affirms in part and reverses in part the trial court, the owners must remove the structures below the mean high water mark line, and pay a nominal fine.

Nw. Envtl. Def. Center v. Nat'l Marine Fisheries Serv., 647 F.Supp.2d 1221 (D. Or. 2009).
Erin Madden, Cascadia Law P.C.
erin.madden@gmail.com

Nw. Envtl. Def. Center v. Nat'l Marine Fisheries Serv., 647 F.Supp.2d 1221 (D. Or. 2009), involved a challenge to a decision authorizing the replacement of a dock structure on the lower Willamette River under the Endangered Species Act (ESA), 16 U.S.C. §§1531-1544, the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321-4370 and the Rivers and Harbors Act (RHA), 33 U.S.C. §§401-426. The District Court held for defendants on all claims.

NEDC brought five claims under the ESA challenging the sufficiency of NFMS' biological opinion and incidental take statement (ITS) regarding the impacts of the dock on listed salmonids. Specifically NEDC argued that NMFS had improperly limited the size of the action area, the "no jeopardy" and "no adverse modification" findings were arbitrary and capricious,

and the ITS was invalid because it failed to determine the current level of take in the river and failed to impose a limit on take or create a trigger for re-initiation of consultation. The District Court held that NMFS' determination of the action area was based on the reasonable opinions of qualified experts regarding the extent of impacts associated with noise and turbidity, which would be caused by the construction of the dock. The court also concluded that the "no jeopardy" decision was supported by a study finding that predation in this area of the river was "negligible." Further, the location of the dock and its proposed design elements were sufficient to support NFMS' opinion. Similarly, the court held that NFMS' conclusion that no adverse modification of critical habitat would occur was supported by "studies analyzing the migratory behavior, timing, rearing and habitat use of juvenile salmonids in the lower Willamette." With regards to the ITS claims, the court concluded that NFMS has conducted a "thorough analysis of the status of affected salmonids," including abundance, productivity, spatial structure and genetic diversity, as well as degraded habitat conditions and existing docks and other structures. In addition, the court found that NMFS' use of a surrogate as a trigger to re-initiation of consultation was proper because "take" could not be quantified numerically. Moreover, the chosen surrogate was proper because it was not co-extensive with the size of the project.

NEDC also challenged the Army Corps of Engineers (Corps) determination of public and private need for the dock and its balancing of the positive and negative impacts of the project. However, the court held that the Corps' determination of need was supported by local and state land use plans, and that the Corps had properly balanced the benefits and detriments of the project.

Finally, NEDC challenged the Corps' Environmental Assessment under NEPA arguing that the agency failed to properly analyze the cumulative impacts of the project. Here, the court deferred substantially to the agency, concluding that the record as a whole supported the agency's determination that cumulative impacts would be minimal. Further, the Corps' reliance on NFMS' biological opinion was proper because "in the absence of reasonably foreseeable federal actions in the action area, the difference between the scope of the ESA and NEPA cumulative impacts is largely immaterial."

Gienger v. Dept. of State Lands, 230 Or. App. 178, 214 P.3d 75 (2009).
Kelly O'Brien, Attorney at Law
kelly@kellyobrienlaw.com

At issue in *Gienger v. Dept. of State Lands* was whether or not the Department of State Lands correctly determined that Golf Course Creek was a "water of the state" which required a permit for removal of material from the beds or banks under ORS 196.810, or whether permit exemptions of ORS 196.905 (3), (4), or (6) applied.

The petitioner in *Gienger* removed more than 50 cubic yards of material from Golf Course Creek without a permit. The Department subsequently issued a proposed order fining petitioner for unpermitted removal of material from the creek. After a contested case hearing, the final agency order ultimately concluded that none of the permit exemptions applied. Petitioner sought review of the order arguing that removal from the creek was exempt from the permit requirements under ORS 196.905 (3), (4), or (6).

The decision turned on the agency's finding of fact and interpretation of its own rules defining "drainage ditch" and natural waterways. The agency determined that, at the point the

creek crossed petitioner's farm, it retained its essential character as a natural waterway, despite the fact that the creek had been channelized and modified over the years. Ultimately, the court determined that the agency's interpretation of the rule was plausible and therefore should be given deference. Moreover, the facts of the case made clear that none of the activities took place on converted wetlands according to ORS 196.905 (3). Therefore, none of the permitting exemptions applied and the court affirmed the order.

EPA Flexible Air Permitting Rules

Operating Permit Programs; Flexible Air Permitting Rule, 74 Fed. Reg. 51,418 (Oct. 6, 2009) (to be codified at 40 C.F.R. pts. 40 and 41), *available at* *http://edocket.access.gpo.gov/2009/pdf/E9-23794.pdf*.

Christina Zemina, Bateman Seidel
czemina@batemanseidel.com

On October 6, 2009, the EPA published a final rule revising the regulations governing state and federal operating permit programs required by title V of the Clean Air Act (CAA) to promote flexible air permitting (FAP) approaches that provide greater operational flexibility but also ensure environmental protection and full compliance with the CAA. The revisions consisted of adding definitions of "alternative operating scenario" (AOS) and "approved replicable methodology" (ARM), and codifying some clarifications to existing provisions. Many permitting authorities have used AOSes and ARMs in their title V permits for some time, but before this rule there was no consistent definition of either term.

If a source is interested in an FAP with advanced minor NSR approval, AOSes or ARMs, it should request that the permitting authority consider those in its permit application. The permitting authority will then review the request and determine whether those FAP mechanisms are appropriate on a case by case basis. This final rule provides greater certainty about FAPs to permitting authorities and should reduce the need for permit revisions for certain classes or categories of operational change. It became effective as of November 5, 2009.

The full text of the final rule can be found online at: *http://edocket.access.gpo.gov/2009/pdf/E9-23794.pdf.*

Two EPA Rules Relating to National Emissions Standards for Hazardous Air Pollutants

National Emission Standards for Hazardous Air Pollutants from Petroleum Refineries, 74 Fed. Reg. 55,670 (Oct. 28, 2009) (to be codified at 40 C.F.R. pts. 9 and 63), *available at* *http://edocket.access.gpo.gov/2009/pdf/E9-25454.pdf*.

National Emission Standards for Hazardous Air Pollutants from Chemical Manufacturing Area Sources, 74 Fed. Reg. 56,008 (Oct. 29, 2009) (to be codified at 40 C.F.R. pt. 63), *available at* *http://edocket.access.gpo.gov/2009/pdf/E9-25576.pdf*.

Nathan Karman, Ater Wynne LLP
nak@aterwynne.com

The U.S. Environmental Protection Agency ("EPA") recently promulgated two final rules relating to national emissions standards for hazardous air pollutants ("NESHAPs"). For brief background, Section 112 of the Clean Air Act (the "Act") addresses hazardous air pollutants

("HAPs") from stationary sources. Subsection (d) of section 112 requires the EPA to promulgate NESHAPs for both major and area sources of HAPs listed for regulation pursuant to subsection (c).

The Act defines a major source as a stationary source that emits or has the potential to emit 10 tons per year ("tpy") or more of any single hazardous air pollutant or 25 tpy or more of any combination of HAPs. For major sources, the standards (which are technology-based) must reflect the maximum reductions of HAP achievable (after considering cost, energy requirements, and non-air quality health and environmental impacts) and are commonly referred to as maximum achievable control technology ("MACT"). MACT standards must meet certain minimum stringency requirements, often called floor requirements.

For an area source, which is a stationary source that is not a major source, the Act requires EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas. Under subsection (d)(5), EPA may elect to promulgate standards or requirements for area sources "which provide for the use of generally available control technologies or management practices ('GACT') by such sources to reduce emissions of hazardous air pollutants." The final rules address the MACT and the GACT requirements for certain source categories.

In National Emission Standard for Hazardous Air Pollutants from Petroleum Refineries, 74 Fed. Reg. 55,670 (Oct. 28, 2009), (to be codified at 40 C.F.R. pts. 9 and 63), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-25454.pdf, EPA amended the MACT for petroleum refineries. EPA initially published MACT standards for petroleum refineries on August 18, 1995 (60 Fed. Reg. 54,620). These earlier standards, referred to as "Refinery MACT 1," excluded certain process vents which were subsequently regulated under a second MACT standard, referred to as "Refinery MACT 2." EPA issued an advance notice of proposed rulemaking on March 29, 2007 to solicit additional emissions data any correction to the data it already had. Based on the comments it received, EPA revised its analysis of the MACT floor for heat exchange systems. As this revised MACT standard applies on a continuous basis, it does implicate the D.C. Circuit's opinion in *Sierra Club v. EPA*, 551 F.3d 1019 (2008) invalidating EPA U.S. Environmental regulations exempting HAP occurring during periods of startup, shutdown, and malfunction ("SSM") from compliance with NESHAPs. EPA did note, however, that this decision "requires further analysis" and that it is "currently evaluating how to address SSM events for Refinery MACT."

In, National Emission Standards for Hazardous Air Pollutants from Chemical Manufacturing Area Sources, 74 Fed. Reg. 56,008 (Oct. 29, 2009), (to be codified at 40 C.F.R. pt. 63), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-25576.pdf, EPA issued GACT standards for the control of HAPs for certain source categories in the chemical manufacturing sector: The rule collects these NESHAPs in one subpart and was issued in response to a court-ordered deadline (of October 16, 2009). The nine source categories affected are as follows:

- Agricultural Chemicals and Pesticides Manufacturing
- Cyclic Crude and Intermediate Production
- Industrial Inorganic Chemical Manufacturing
- Industrial Organic Chemical Manufacturing
- Inorganic Pigments Manufacturing
- Miscellaneous Organic Chemical Manufacturing
- Plastic Materials and Resins Manufacturing

• Pharmaceutical Production, and
• Synthetic Rubber Manufacturing.

The rule establishes emission standards in the form of management practices for each chemical manufacturing process unit, emission limits for certain subcategories of process vents and storage tanks, and management practices and other emission reduction requirements for subcategories of wastewater systems and heat exchange systems. As a general matter, this rulemaking applies continuously and, like the revised refinery MACT, does not implicate the *Sierra Club* decision. However, in one context, EPA established one standard that would apply at all times and one that would apply only during startup and shutdown.

EPA Requires Reporting of Greenhouse Gas Emissions

Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260 (Oct. 30, 2009) (to be codified at 40 C.F.R. pts. 86, 87, 89 et al.), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-23315.pdf.

Patrick Rowe, Sussman Shank LLP
prowe@sussmanshank.com

On January 1, 2010, the U.S. Environmental Protection Agency will, for the first time, require emitters of greenhouse gases to begin collecting greenhouse gas (GHG) data under a new reporting system. EPA estimates that the new program will cover approximately 85 percent of the nation's GHG emissions and apply to roughly 10,000 facilities.

The purpose of the reporting system is to provide EPA a better understanding of where GHGs are coming from and to guide development of future policies and programs to reduce emissions. The data will also allow businesses to track their own emissions, compare them to similar facilities, and facilitate identifying cost effective ways to reduce emissions.

Who reports

The rule applies to three types of facilities—downstream, upstream and mobile sources. Downstream sources are facilities that have directly emit GHGs. Upstream sources produce, import or export fossil fuels or industrial GHGs. Mobile sources are heavy duty trucks, motorcycles and off-road engines.

Downstream sources include electricity generators, aluminum, cement, and petrochemical producers, petroleum refineries, pulp and paper manufacturers, landfills, and large-scale farming operations. Facilities already subject to the acid rain program must report regardless of the volume of their GHG emissions. Most other covered sources must report if their emissions exceed 25,000 tons of GHG per year.

Upstream sources include suppliers of coal-based liquid fuels, petroleum products, natural gas, natural gas liquids, industrial GHGs, and carbon dioxide. Fuel production sources must report not only their own process emissions, but also emissions from all fuel they produce, import or export.

Mobile sources include manufacturers of heavy duty trucks, motorcycles and engines. The rules do not apply to "light duty" cars and trucks. Heavy duty engine manufacturers must report their own process emissions, as well as emissions from the engines they manufacture. Several sources that originally were proposed to be covered in the draft rule are not covered by the final rule, at this time: suppliers of coal; underground coal mines; oil and natural gas systems

(i.e., offshore oil and natural gas production facilities, onshore natural gas processing and transmission compression facilities, underground natural gas storage facilities, liquefied natural gas storage and import and export facilities); wastewater treatment facilities; producers and manufacturers of ethanol, electronics, fluorinated GHGs, and magnesium; industrial landfills; and food processors. EPA deferred regulation of these sources based primarily on the lack of data or consensus on how these sources would monitor their GHG emissions.

Timing

Facilities and suppliers will begin collecting data on January 1, 2010. The first emissions report is due on March 31, 2011, for emissions during 2010. Manufacturers of heavy duty vehicles and engines will begin reporting CO2 for model year 2011 and other GHGs in subsequent model years as part of existing EPA certification programs. Reports are submitted annually unless they are facilities with electric generating units that also report to the Acid Rain Program. Those reporters will continue current practices, as well as submit annual GHG emission reports under this rule.

How to report

Reporting entities will report directly to EPA. Reports can be submitted electronically. EPA intends to have the electronic reporting system operational in January 2011, approximately three months in advance of the March 31, 2011 reporting deadline. EPA intends to make training on the emissions reporting system available in fall 2010 and continuing into 2011.

Relationship to State GHG Reporting Programs

Oregon, Washington, and approximately 15 other states have already adopted their own GHG reporting rules. EPA's reporting rules do not preempt states from requiring their own GHG emission reporting. EPA has stated that it is committed to working with states and regional programs to coordinate implementation of reporting programs and harmonize data systems to the fullest extent possible. Nevertheless, in the initial stages of reporting, there is likely to be overlap, causing entities that are subject to both federal and state reporting requirements to have to submit separate reports to the EPA and state programs.

Cost

EPA estimates the average cost of reporting for the private sector under this rule will be approximately $115 million in the first year of reporting and $72 million in subsequent years.

Verification

EPA will verify the data submitted; third party verification will not be not required. Prior to EPA verification, reporters will be required to self-certify the data they submit to EPA. This is consistent with other Clean Air Act programs.

Enforcement

Facilities that fail to report would be subject to enforcement under the Clean Air Act, which can lead to civil penalties of up to $37,500 per day per violation. More information on EPA's GHG reporting rules and information related to the rules can be found at: *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html*.