

# ARMA HSE Committee

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**RCRA SOLVENT-CONTAMINATED WIPES RULE  
*and*  
CLEAN AIR ACT NSR STATUTE OF LIMITATIONS**

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# Two Recent Developments

- One from EPA, one from federal courts
- EPA – Finally issued RCRA rule on management of solvent-contaminated industrial wipes
- Courts – Two more federal appellate courts issued important rulings against EPA on the statute of limitations for new source review enforcement actions under the Clean Air Act

# Solvent-Contaminated Industrial Wipes RCRA Rule

- Rule published July 31st, but complicated as to when it becomes effective in states
- A long time coming
  - EPA issued proposal 10 years ago!
  - Numerous delays over the years
- Rule concerns exclusions under RCRA if solvent-contaminated industrial wipes are handled properly

# Final Wipes Rule (cont.)

- At <http://www.gpo.gov/fdsys/pkg/FR-2013-07-31/pdf/2013-18285.pdf>
- Disposable wipes do not need to be managed as hazardous waste
  - “Conditional exclusion” from the RCRA definition of “hazardous waste”
- Cleaned and reused wipes do not need to be managed as solid waste
  - “Conditional exclusion” from the RCRA definition of “solid waste”

# Current Treatment of Solvent-Contaminated *Disposable* Wipes

- Treated as RCRA hazardous waste by states
- 90-day or 180-day accumulation time
- Manifests required
- Shipment to hazardous waste combustion facilities and landfills only



# Current Treatment of Solvent-Contaminated *Reusable* Wipes

- Waste status depends on state policy
- Many states provide a conditional exclusion from the definition of solid waste or hazardous waste, with varying conditions
- Leads to confusion, especially for companies that operate in different states

# Rule Requirements for Obtaining the Conditional Exclusions

- Facilities that generate the contaminated wipes must satisfy various requirements:
  - Wipes must be managed in closed, nonleaking, labeled containers
  - Wipes cannot contain free liquids when sent for cleaning or disposal
  - Wipes may not be accumulated for longer than 180 days
  - The generator must comply with certain recordkeeping requirements

# Still Regulated as Hazardous Wastes under New Rule

- Wipes that contain listed hazardous waste other than solvents, or exhibit characteristic of toxicity, corrosivity, or reactivity due to contaminants other than solvents (such as metals)
- Solvent-contaminated disposable wipes that are hazardous waste due to the presence of trichloroethylene

# Still Regulated as Hazardous Wastes under New Rule (cont.)

- Free liquid spent upon removal from the solvent-contaminated wipe or from the container holding the wipes (for solvents considered hazardous waste)



# Implementation of the Rule

- In states where EPA administers RCRA, the rule is effective on January 31, 2014
- In states to which EPA has delegated RCRA authority, the state needs to adopt the new EPA rule for it to take effect
  - States can retain more stringent requirements
  - But EPA encourages authorized states to adopt the rule ASAP to reduce regulatory burdens and for national consistency

# CAA New Source Review Statute of Limitations

- CAA new source review (NSR) is a pre-construction permitting program
  - Applies to certain types of construction at certain new and modified major stationary sources
  - Prevention of significant deterioration (PSD) program in “attainment areas”
  - Nonattainment NSR program in “nonattainment areas”

# EPA Enforcement of NSR Requirements

- In approximately the last 15 years, EPA has become more aggressive in enforcing the two NSR programs
  - Especially PSD program enforcement for power plants & other large stationary sources
  - But also for other industrial sources
  - Leaning on states to enforce too, and threatening to step in if they don't

# Enforcement for Failure to Obtain an NSR Permit

- Most controversial aspect of EPA's NSR enforcement initiative
- EPA has enforced even when states had indicated to company that a permit was not required
- In some cases, actions essentially conflict with EPA informal policy in effect when facilities were built or modified

# 5-Year Statute of Limitations

- Statute of Limitations for an NSR violation is 5 years
  - Industry view is that 5-year period begins when plant was constructed or modified (*i.e.*, there is a *one-time violation*)
  - EPA takes position that the period essentially *never ends* -- that is a “*continuing violation*”
    - “Continuing violation” because plant continues to operate without a legal NSR permit, EPA asserts

# Major Fights Over Issue

- EPA's "continuing violation" claim has been litigated over the years
  - Particularly in PSD enforcement actions against power plants & other large sources
  - Companies often settled for fear of courts ruling against them on the issue
- Before this year, two federal appellate courts had ruled against EPA
  - 11<sup>th</sup> Circuit Court of Appeals (2007)
  - 8<sup>th</sup> Circuit Court of Appeals (2010)

# 2 More Federal Courts Ruled Against EPA in July & August

- 7<sup>th</sup> Circuit Court of Appeals (July)
  - Power plant enforcement action
  - Modifications to plant were made at least 10 years before EPA commenced lawsuit
- 3<sup>rd</sup> Circuit Court of Appeals (August)
  - Another power plant case
  - Court said Clean Air Act protects “reasonable investment expectations” of companies

# So What Happens Now?

- In all states under jurisdiction of the four federal appellate courts, EPA's "continuing violation" theory is invalid
- EPA still takes position that its theory is valid in the other states
  - But if courts keep ruling against EPA, may be forced to abandon position
  - For now, EPA's leverage against companies in lawsuit settlement negotiations is decreased

# Slide title

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