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INSIDE THIS ISSUE

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OSHA revises hazard communications standard: MSDS becomes SDS

BY HEIDI SLINKARD BRASHER

The Occupational Safety and Health Administration (OSHA) has revised its Hazard Communications (HazCom) standard to align with the United Nations' Globally Harmonized System (GHS) of Classification and Labeling of Chemicals in a final rule published on March 26, 2012 (***Federal Register* Volume 77, Number 58**).

OSHA's stated purpose for making such a change is to reduce worker confusion regarding workplace hazards through hazard training and understanding while classifying chemicals based on their health and physical hazards and establishing labels and Safety Data Sheets (SDSs) to replace the current Materials Safety Data Sheets (MSDSs) for chemicals made in or imported to the United States. While the HazCom standard was implemented to provide U.S. workers the right to know to what hazards the chemicals in their workplaces may expose them, OSHA is now concerned that such information is not as clear to workers with limited literacy when compared with the UN's GHS labeling.

Full implementation is scheduled for 2016. In the meantime, employers may comply with either the final standard of 29 CFR 1910.1200, the current standard, or both.

» **Read more about the HazCom revisions**

» **Read the side-by-side comparison of the existing standard and the final standard**

As was the case with MSDSs, the new SDSs are to be provided for each hazardous chemical sent to downstream users by chemical manufacturers, distributors or importers. The SDSs are to provide information regarding hazards associated with each particular chemical, but the format of the SDS is different than the MSDSs of the past. The new standard requires "harmonized" criteria and labeling elements.

The 16-part SDS format is divided as follows:

- General information about the chemical, hazards, components, safe handling, and energy control are found in sections 1-8.
- Technical and scientific information is contained in sections 9-11 and 16.
- UN GHS-compliant sections are found in sections 12-15, but will not be enforced by OSHA because other agencies regulate these concerns (i.e., ecological information, disposal considerations, transport information, and regulatory information).

As with MSDSs, employers must ensure SDSs are readily accessible to employees for all the chemicals in their workplace such that employees have ready access to that information without leaving the work area. This may be accomplished through maintenance of physical binders and/or by electronic means. However, back-up access

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must be available in case of power outage or electronic system failure if an employer chooses to utilize and electronic system for those employees whose workplace includes ready access to the electronic SDSs. Note that workplaces without ready access to computers must still maintain print copies (i.e., binders) of SDSs just as it does currently for MSDSs).

The final rule requires chemical producers to revise their products' hazard information and classify each one according to the new classification criteria while updating labels and SDSs. Chemical users are to continue to update MSDSs with SDSs as they become available and train employees on the new label elements while updating their HazCom programs if new hazards are identified.

Compliance deadlines:

- Employers must train on the new label elements and SDS format by 12/1/2013.
- Chemical manufacturers, importers, distributors and employers must comply with all modified provisions of the final rule by 6/1/2015, except that distributors may ship product with old system labels until 12/1/2015.
- Employers must update alternative workplace labeling and HazCom program as necessary and provide additional employee training for newly identified physical or health hazards by 6/1/2016.
- All chemical manufacturers, importers, distributors and employers must comply with 29 CFR 1910.1200 (final standard), or the current standard, or both during the transition period.

Industry groups voice concern over OSHA's change to HazCom standard

Several industry groups – including the American Petroleum Institute, CropLife America, American Tort Reform Association, National Oilseed Processors Association, and American Chemistry Counsel – have petitioned a federal appeals court to review OSHA's final rule revising the HazCom standard.

Industry concerns cited include:

- Labeling conflicts between the new standard requirements and pesticide labeling requirements under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).
- Inclusion of combustible dust as an "unclassified hazard" required to be listed on SDS/label (which was adjusted in the final rule by inclusion as a "hazardous chemical" and not as a "hazard not otherwise classified").
- A desire for a 5-year phase-in period.
- 20% classification threshold for "chemical mixtures."

The Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) has declined to follow OSHA's lead, and instead withdrew its proposal to harmonize hazardous materials regulations with the GHS, citing concerns regarding liquids currently classified as "combustible."

New rule governs designation of critical habitat under the Endangered Species Act

BY JESSICA JOHN BOWMAN

In a budget-saving move, the U.S. Fish and Wildlife Service and NOAA Fisheries Service issued a final rule revising the method by which the critical habitat of an endangered or threatened species is designated in the *Federal Register*. Previously, the *Federal Register*'s designation of critical habitat would include both a map depicting the critical habitat and a textual description of the habitat's boundaries. Under the new rule, textual descriptions will no longer be required, and the maps published in the *Federal Register* will be the official delineation of the critical habitat.

Although some industry groups raised concerns about the clarity and usability of the maps published in the *Federal Register*, both Services intend to continue providing additional information to the public in order to clarify any ambiguities concerning habitat boundaries. For example, the coordinates from which the maps are generated will be included in the administrative record and will be maintained at the field office responsible for the designation. Also, the Services will continue to provide interactive maps and additional descriptions of habitat boundaries on the website of the Service promulgating the designation.

Developers and industry groups who are unclear about the boundaries set forth by the maps in the *Federal Register* should take advantage of these and other resources described on the **Fish and Wildlife Service's website**.

Natural gasoline pipeline spills prompt DOJ to lodge consent decree against owner, operator

BY ROBERT J. JOYCE

On May 19, 2012, the Department of Justice, on behalf of the EPA, lodged a consent decree in U.S. District Court in Nebraska wherein it proposes to settle a number of alleged Clean Water Act violations in connection with three spills of natural gasoline from a pipeline owned by Mid-America Pipeline, LLC (MAPCO) and operated by Enterprise Pipeline.

The spills occurred in Kansas, Nebraska and Iowa between 2007 and 2011 as the result of third-party and weather-related damage to the 2769-mile-long West Red Pipeline which transports natural gasoline between Conway, Kansas, and Pine Bend, Minnesota. The three spills released 1760 barrels, 1669 barrels and 1760 barrels of natural gasoline, respectively. According to the DOJ press release, "[t]his settlement requires the defendants to honor a schedule of pipeline inspections on the ground and from the air, and reach out to local agencies, contractors and excavators to make sure they are more fully aware of pipeline locations and depths."

Among other things, the decree requires the companies to do the following:

1. Appoint a damage prevention coordinator at each company.
2. Conduct annual aerial inspections using company personnel.
3. Require contractors working on the pipeline for the companies to use state One-Call systems.
4. Inform state authorities whenever third parties are discovered to have excavated near the pipeline without informing the One-Call system.
5. Promptly report any release that reaches any body of water (whether or not it is navigable) and use a specified calculation methodology for determining the volume of product released.
6. Conduct annual ground inspections of the pipeline and identify "special threats" such as deep tilling, excavating and grading near the line, as well as inadequate markers and exposed pipe.
7. Use reasonable efforts to identify all excavators and land developers operating within 20 miles of the pipeline and provide them with written notifications of the pipeline location in their area and information on the One-Call System.
8. Implement a centralized computer system to track external force threats to the pipeline and issue quarterly reports to "appropriate personnel of Defendants, including the SCADA controllers[.]"
9. Enter agreements with landowners to cease regularly occurring excavation or deep tilling near the pipeline or lower or provide additional cover for the pipeline in that area.
10. Spend at least $200,000 over four years to mitigate external threats to the pipeline using a number of specified mitigation approaches such as installing remote shutoff valves, providing additional cover, installing physical barriers, etc,
11. Submit annual reports signed by a responsible corporate office.

This action is notable insofar as the EPA, not PHMSA, is the driving force behind the decree and is seeking to impose its own set of integrity management requirements on the pipeline companies irrespective of PHMSA regulatory requirements. This represents yet another step in the EPA's ongoing efforts to expand its authority over oil and gas operations in the United States. The DOJ will be accepting comments on the consent decree for 30 days after publication in the *Federal Register* and "will advise the Court as to whether the consent decree may be entered or whether further action may be required."

» **Read the consent decree in the *Federal Register***

EPA issues updated Clean Air Act standards for petroleum refinery process heaters and flares

BY ELLEN CORDELL

On June 1, 2012, the EPA issued a final rule updating 2008 Clean Air Standards regarding process heaters and flares at petroleum refineries. The new standards will cut pollution from process heaters, which are used to heat process fluids. The process heaters will need to meet emission standards for nitrogen oxides. Further, the new standards will also cut pollution from flares, which are used to burn waste gases during the refining process. Flares will need to meet monitoring requirements and follow work practice standards. The EPA also noted that a benefit of the rule is to encourage refineries to recover gas that will then be used to power refinery equipment.

The new regulations were enacted following the filing of petitions requesting the EPA revise 2008 standards. Input from industry stakeholders regarding new process heaters and flares at refineries was also incorporated into the rulemaking. The EPA indicated the final rule ensures that new requirements will not be triggered by refineries as they are performing routine operation modifications. Therefore, the new regulations will provide the refineries with much greater flexibility when complying with the regulations.

The EPA noted the new regulations will save the refining industry approximately $80 million per year. The agency also indicated that emissions of nitrogen oxides (NOx), sulfur dioxide (SO2) and volatile organic compounds, which produce ground level-ozone and fine particle pollution, will be reduced. According to the EPA, the benefit will be to create $610 million in annual health benefits.

However, representatives of American Fuel and Petrochemical Manufacturers and the American Petroleum Institute disagree with the EPA's assessment. In particular, they disagree with the amount that will be saved by the refining industry each year. Howard Feldman, regulatory and scientific affairs director with the American Petroleum Institute, noted that the refineries have already spent billions of dollars to improve air quality. "This is part of a tsunami of new EPA air regulations for refineries that could diminish our fuel manufacturing capacity and increase our reliance on imported fuels."

SIDEBAR

Continued issues with E15 ethanol

With the EPA granting a partial waiver for newer vehicles to use E15 (15%) rather than E10 ethanol in gasoline blends (see *RegLINC* September 2011 article titled "EPA green lights E15 despite resistance from industry groups") science and industry are taking an even harder look at the potential impact of such use. A recent analysis by the National Renewable Energy Laboratory and Underwriters Laboratories indicates that the higher ethanol levels could cause failures in gasoline storage tanks and pumps, primarily due to gasket and seal failures. These issues were anticipated as ethanol has previously been associated with excessive heat issues damaging cylinder heads, and damage to hoses, gaskets and other flexible components, and stress corrosion cracking in piping. *[C. Paul]*

Lead in ammunition

A number of environmental organizations filed suit against the EPA for failure to act on a March 2012 petition related to lead ammunition (*Trumpeter Swan Society v. EPA, D.D.C.* 6/07/12). The suit was filed in the U.S. District Court for the District of Columbia and asks the court to order the EPA to develop and implement regulations to "adequately protect wildlife, human health, and the environment" from lead ammunition used in hunting and shooting sports. *[C. Paul]*

Court dismisses toxic tort case arising from hydraulic fracturing activities

A state court judge in Denver, Colorado, recently dismissed a toxic tort action brought against three entities involved in the drilling and completion of natural gas wells in Silt, Colorado. The case, *Strudley v. Antero Resources Corp.,* No. 2011 CV 2218, was brought by a group of plaintiffs who alleged that the defendant drilling companies had tortiously caused their vaguely described "health injuries." According to the plaintiffs, these injuries allegedly resulted from the plaintiffs' exposure to air and water contaminated by the defendants' drilling activities. The court, cognizant of the burden associated with defending a toxic tort action, required the plaintiffs to make a *prima facie* showing of exposure and causation at the outset of their case.

After reviewing the facts produced by the plaintiffs, the court concluded that the plaintiffs had failed to set forth evidence to support their claim that they had been exposed to the chemicals emitted during defendants' drilling activities, or that their injuries had been caused by that exposure. *[J. John Bowman]*

FWS guidelines designed to minimize impact of wind energy development projects on wildlife

BY JESSICA JOHN BOWMAN

Recently, the U.S. Fish and Wildlife Service issued its Final Land-Based Wind Energy Guidelines, which are designed to help minimize the impact of wind energy development projects on wildlife and their habitats. The final guidelines encourage developers to communicate with the Fish and Wildlife Service during pre- and post-construction phases in order to identify, avoid and minimize risks associated with developing a project at a particular location.

The guidelines use a five-tiered approach for collecting information and evaluating risks associated with a particular development project. In the Tier 1 stage, developers work with the Service to perform a preliminary site evaluation. Tier 2 involves a broad-based site characterization of one or more potential sites, and Tier 3 involves field studies designed to document wildlife at the site and to predict the potential impacts of the project. Tiers 4 and 5 involve post-construction studies to estimate the actual impact of the project. In each of these tiers, the Service and the developer assess the risks associated with the project based upon the investigation conducted in that tier. In some cases, the Service may recommend modification, mitigation, post-construction monitoring, or even abandonment of a particular project based on the investigation and information discovered during each of the five stages.

Adherence to the guidelines is voluntary, and those who elect to adhere to the guidelines are not relieved of their obligations under other laws and regulations, such as the Endangered Species Act or the Migratory Bird Treaty Act. However, in the event that a project gives rise to a violation of one of those acts, the Service may consider a developer's documented efforts to communicate with the Service and adhere to the guidelines when considering a violation of those laws and regulations.

» **A full version of the final guidelines may be found at the Fish and Wildlife Service's website**

SIDEBAR

PHMSA penalties up in 2011

The Pipeline and Hazardous Materials Safety Administration (PHMSA) collected approximately $2.15 million in civil penalties from its hazardous materials regulatory enforcement efforts in the 2011 calendar year. The agency increased its enforcement actions in 2011 compared to 2010, when it closed a total of 510 civil penalty actions and collected about $1.53 million in civil penalties. PHMSA also resolved a record number of enforcement cases against pipeline operators in 2011.

One of the larger penalties was levied for the commercial shipment of lithium batteries in packages that were not properly marked and labeled and were not accompanied by the required emergency response information. *[C. Paul]*

San Bruno restitution

Pacific Gas & Electric Co. will pay the city of San Bruno, California, $70 million to help it recover from the September 9, 2010, explosion of a PG&E pipeline. The gas pipeline explosion killed eight people and damaged about 100 residences.

The $70 million payment is in addition to the PG&E's commitment to fund replacement and repair of the city's infrastructure and other costs related to the accident and restoration of the damaged neighborhood. The utility will not seek to recover the contribution through insurance or customer rates. The payment is also in addition to fines, penalties, or the results of any civil suits related to the accident. See related note on fines for records issues. *[C. Paul]*

Pacific Gas & Electric fined over leak surveys and pipeline records

The California Public Utilities Commission fined Pacific Gas & Electric Co. almost $20 million for failing to conduct leak-detection surveys and for failing to comply with records requirements. The PUC cited PG&E for faulty recordkeeping, saying the utility failed to inspect nearly 14 miles of gas lines for leaks. *It is unclear whether the surveys were done but no records existed to prove completion, or if the surveys were actually not completed. [C. Paul]*

Court orders EPA to hasten issuance of revised particulate standards rule

On May 31, 2012, the U.S. District Court for the District of Columbia ordered the EPA to sign a proposed rule setting air particulate standards by June 7, 2012. (*See American Lung Ass'n v. EPA, D.D.C.*, No. 1:12-cv-243). Further, the court held publication of the rule in the *Federal Register* must be expedited with the period for public comment set for nine weeks.

The EPA is required to consider revisions to air quality standards every five years, but missed the last deadline in October 2011. In an effort to compel the EPA to issue revised particulate matter National Ambient Air Quality Standards (NAAQS), the case was originally filed by the American Lung Association, National Parks Conservation Association, and the states of California, Connecticut, Delaware, Maryland, Massachusetts, New York, Oregon, Rhode Island, Vermont and Washington. The court in *American Lung Ass'n*, determined the EPA did not provide a reasonable explanation as to why rulemaking had not yet occurred following EPA's failure to revise the standards in October 2011. *[E. Cordell]*

Two federal agencies issue draft rules on fracking

BY JARED BURDEN

After several years of anticipation, the federal government has finally entered into one of the most contentious debates in recent environmental history – hydraulic fracturing. In this process, sometimes called "fracking," chemicals and/or fluids are injected into wells in order to break up underground formations and release trapped natural gas and oil. This process is largely responsible for the boom in U.S. domestic energy production. To date, the federal government had been relatively silent on the issue, preferring instead to leave regulation largely to the states. However, in the past couple of months both the EPA and the Department of the Interior (DOI) have announced proposed rules for future fracking operations.

The DOI's proposed regulations focus on the fluids utilized in fracking. These regulations will affect all federally administered lands, including Native American tribal lands. The new rules will require disclosure of all fluids used for fracking. They will also mandate that companies obtain approval before they inject fluid into a well as well as conduct mechanical integrity tests on the well to ensure that it is fit for fracking. These activities must then be reported within 30 days of the fracking operation. The DOI proposed these rules on May 11, 2012. Comments must be submitted for consideration no later than July 10, 2012, and may be transmitted to **oira_docket@omb.eop.gov**, "Attention: OMB Control Number 1004-AE26."

The EPA's proposed rule is limited to fracking operations that utilize diesel fuels. The stated goal of this regulation is to clarify rules relating to the Safe Drinking Water Act (SDWA). In 2005, Congress passed a law that exempted fracking from the strictures of the SDWA, including the requirement to register under the Underground Injection Control (UIC) program. However, Congress did authorize the EPA to regulate fracking operations that use diesel fuels. Now the EPA has proposed this new regulation to provide guidance for its interpretation of the SDWA. In essence, operators will have to seek a UIC Class II permit under the SDWA in order to inject diesel fuel into a well. The regulation also provides guidance for permit writers on various requirements that should be reviewed before issuing a permit, including well closure and construction requirements. These rules were proposed in May 2012, and the EPA will accept comments up until July 9, 2012. Comments may be transmitted to **OW-Docket@epa.gov** with the subject "Docket ID No. EPA-HQ-OW-2011-1013."

While both of these rules are relatively limited in their scope, they are indications of what may be to come. The federal government has been indicating that it would like to see more regulation of fracking for some time now. It is currently conducting several long-term studies of the phenomena and is looking at its environmental effects. These rules, then, may just be a warm-up for a more expansive regulatory scheme.

BLM issues proposed regulations concerning hydraulic fracturing

BY JESSICA JOHN BOWMAN

The Bureau of Land Management has proposed a rule intended to regulate the use of hydraulic fracturing on the 756 million subsurface acres of federal and Indian mineral estate overseen by the BLM. The proposed rule, which sets forth a number of reporting, monitoring, and certification requirements, may be found in its entirety on the **Department of the Interior's website**.

The key changes set forth in the proposed rule are intended to (1) promote the public disclosure of chemicals used in hydraulic fracturing operations on federal lands, (2) ensure that wells used in fracturing operations meet appropriate construction standards, and (3) provide for appropriate management of flowback waters from fracturing operations. To accomplish these goals, the proposed rule requires operators to disclose and describe any fluids used during the fracturing operation. This information would be made available to the public, and may be integrated into an existing website, **FracFocus.org**. The proposed rule also increases preliminary reporting and approval requirements, obligating operators to obtain BLM approval prior to commencing well stimulation activities, and to provide significant details concerning proposed well stimulation – such as fluid volume and pressure estimates, and engineering design details – prior to commencing operations. Finally, the proposed rule sets forth new requirements for the collection, handling and storage of flowback fluids.

The proposed rule has the potential to impact a vast number of operations across the nation. According to BLM estimates, approximately 90 percent of wells currently drilled on federal and Indian lands utilize hydraulic fracturing and could be affected by the proposed rule. Interested parties are invited to comment on the proposed rule during the 60-day period following the publication of the proposed rule in the *Federal Register*.

Plastic producer enters $1M consent decree to settle alleged CAA violations

BY HEIDI SLINKARD BRASHER

On May 31, 2012, Plastic manufacturing company Saudi Basic Industries Corp. (SABIC) Innovative Plastics, LLC (formerly GE Plastics) agreed to a proposed consent decree with the EPA to settle alleged Clean Air Act (CAA) violations at its Indiana and Alabama chemical plants. Alleged violations were related to fugitive emissions from leaking equipment. This is just one of the many EPA efforts to crack down on manufacturers for CAA compliance issues related to hazardous air pollutant (HAP) emissions from equipment such as valves, pumps and drains, and as opposed to stack emissions. These fugitive emissions are generally controlled through leak detection and repair processes and procedures.

Not only did SABIC Innovative Plastics agree to improve its leak detection and control procedures, it now must also pay a $1,012,873 civil penalty, replace valves with "low emissions" valves and packing materials, engineer emissions controls for drains and trenches, control oil/water separator emissions, and further invest in process vent HAP emissions control projects – all for an estimated total cost of more than $6 million.

Some of the requirements imposed by the consent decree include:

- Leak detection and repair (LDAR) training;
- Quality assurance/quality control (QA/QC) monitoring/certification;
- LDAR audits and corrective action;
- Development of facility-wide documents for each covered facility describing the facility-wide LDAR program – including applicability of regulations to specific equipment, leak definitions, and monitoring frequency;
- Tracking/management of change (MOC) program to integrate new equipment into LDAR program and removed unused or retired equipment;
- Description of employee and contractor roles and responsibilities with respect to LDAR functions at the facility;
- Assurance that the number of personnel assigned to LDAR tasks is sufficient for compliance with LDAR program;
- A plan for how the facility will implement the Enhanced Leak Detection and Repair Program (ELP), to be updated annually;
- Periodic monitoring of valves (quarterly), connectors (semiannually), pumps/agitators (monthly), and open-ended lines (quarterly); and
- Program regarding valve and connector replacement, repair, repacking and improvement.

» **Read more about the consent decree**

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