

Withdrawal of Conditional Approval to Use Phosphogypsum in Road Construction

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JUN 3 0 2021

THE ADMINISTRATOR

Mr. Corey Rosenbusch
President and Chief Executive Officer
The Fertilizer Institute
425 Third Street, SW, Suite 950
Washington, D.C. 20024

Dear Mr. Rosenbusch:

The U.S. Environmental Protection Agency conditionally approved in an October 14, 2020, letter a request from the Fertilizer Institute on behalf of its members that own or operate phosphogypsum stacks to authorize the removal of PG from the required stacks for use in certain government road construction projects. *See* 85 Fed. Reg. 66550 (Oct. 20, 2020). On December 18, 2020, various groups petitioned the United States Court of Appeals for the District of Columbia Circuit for review of EPA's action conditionally approving TFI's request. *See Center for Biological Diversity v. EPA*, No. 20-1506. On that same date, these same groups, "as a precaution and as a matter of courtesy," submitted to the EPA, ostensibly under *Clean Air Act* § 307(d)(7)(B) (42 U.S.C. § 7607(d)(7)(B)), a petition asking the EPA to reconsider its action. For the reasons discussed below, the EPA is hereby withdrawing, revoking and rescinding its action conditionally approving TFI's request to use PG in road construction, effective immediately.

Clean Air Act Phosphogypsum Regulations

The EPA's regulations require that PG be placed in stacks and may not be removed from stacks except as expressly provided for in the regulations at 40 C.F.R. Part 61, Subpart R (§§ 61.200-61.210). *See* 40 C.F.R. § 61.202. Subpart R provides for the removal of PG from stacks for certain outdoor agricultural purposes (40 C.F.R. § 61.204) and for certain indoor research and development activities (40 C.F.R. § 61.205). Subpart R also provides that, with prior EPA approval and under appropriate circumstances, PG may be removed from stacks and used for other, unspecified purposes. *See* 40 C.F.R. § 61.206.

Under the regulation providing for removal of PG from stacks for use for other, unspecified purposes, TFI sought EPA approval for use of PG in government road construction projects. Among other things, that regulation requires that a request for the EPA to approve the use of PG for some "other purpose" be submitted in writing and be signed and dated by a corporate officer or public official in charge of the facility and contain certain information, including, for example:

- a description of the proposed use, including any handling and processing that the PG will undergo;
- the location of each facility, including suite and/or building number, street, city, county, state and zip code, where any use, handling or processing of the PG will take place;
- if different from the facility location, the mailing address of each facility where any use, handling or processing of the PG will take place;
- the quantity of PG to be used by each facility;
- the average concentration of radium-226 in the PG to be used;
- a description of any measures which will be taken to prevent the uncontrolled release of PG into the environment; and
- a description of the intended disposition of any unused PG.

40 C.F.R. § 61.206(b).

TFI's Request to Use PG in Road Construction and the October 2020 Decision

The request by TFI acknowledges that it has not provided all the information required under § 61.206(b), including, for example, information about the location and mailing address of the facility where use, handling or processing of the PG will occur, the quantity of the PG to be used by each facility and the signature of a corporate officer or public official in charge of the facility. The request asserted, however, that it had provided sufficient information for the EPA to determine whether use of PG in road construction would be sufficiently protective of public health and suggested that the EPA could approve the request “conditioned upon receipt” of the remaining information required by § 61.206(b).

The October 2020 decision conditionally approving the request to use PG in road construction recognized that the request did not provide all the information required by § 61.206(b), noting that the request has not:

provided any location information where the ultimate requested use – road construction – will take place. In addition, to the extent that there may be intermediary locations (such as processing facilities or construction yards), between a PG stack and a road under construction with PG, the Revised Request has not identified any such intermediary locations. A request under 40 C.F.R § 61.206 for approval of other use of PG also must include information on the quantity of PG to be used by each “facility.” The Revised Request provided information about the percentage of PG likely to be used in either roadbed or pavement but has not provided information on the quantity of PG to be used in each road construction project.

Notwithstanding these deficiencies, the October 2020 decision largely agreed with the suggestion that, even though all the information required by § 61.206(b) had not been provided, the EPA had received sufficient information to make the determination required by § 61.206(c) – whether the proposed use is at least as protective of public health as disposal in a stack. The decision expressed the view that the other information was not essential to that determination and that the request could be granted, subject to the condition that, at a later date and prior to the removal of PG from a stack, certain additional information be provided to the EPA.

Reconsideration and Decision

As noted above, the EPA received a December 18, 2020, petition for reconsideration – characterized as “precautionary” and a “matter of courtesy” – under CAA § 307(d)(7)(B) requesting reconsideration of the October 2020 decision (“307(d) Reconsideration Petition”). The EPA does not agree that its October 2020 action was a rulemaking and does not agree that the rulemaking-related provisions of CAA § 307(d) apply. The EPA does not agree that the provision relating to reconsideration found in CAA 307(d)(7)(B) is applicable. Although the EPA is not granting or otherwise taking action on the 307(d) Reconsideration Petition, the EPA is exercising its discretionary authority to reconsider its conditional approval of TFI’s request to use PG in road construction.

By way of background, the EPA notes that the 307(d) Reconsideration Petition asserted, among other things, that TFI’s request to use PG in road construction failed to provide all the information required under 40 C.F.R. § 61.206(b). The 307(d) Reconsideration Petition contended:

Yet, the EPA approved TFI’s petition even though TFI’s request did not supply the information that 40 C.F.R. § 61.206(b) expressly requires it ‘must’ including ‘any specific location information where the ultimate requested use – road construction – will take place,’ any intermediary locations between a PG stack and road, or the quantity to be used. By approving a request that lacks this information, the EPA violated 40 C.F.R. § 61.206.

307(d) Reconsideration Petition at 14.

In addition, in connection with the petition for judicial review of the October 2020 decision, the petitioners filed with the Court, on January 19, 2021, the Petitioners’ Non-Binding Statement of Issues. That Statement of Issues indicates that, among the issues to be raised in the litigation, is whether the EPA’s conditional approval of the request to use PG in road construction violates § 61.206 because it does not include information required by § 61.206(b).

The EPA also received a submission from TFI characterized as an Opposition to the Petition for Reconsideration. TFI does not dispute that it did not submit all the information required by § 61.206(b). But, responding to the argument in the 307(d) Reconsideration Petition that the EPA violated § 61.206 by conditionally approving the request in the absence of information required by § 61.206(b), the Opposition contends that the EPA’s “sequencing” of the approval process under § 61.206 was appropriate and that the EPA’s “application of its regulations” was “reasonable and entitled to deference.”

Although the EPA is not directly responding to the “precautionary” 307(d) Reconsideration Petition, in light of the questions raised in that petition and the petition for judicial review, the EPA has decided to reconsider the October 2020 decision, at least to the extent of the decision to conditionally approve the request under § 61.206, in the absence of the information required by § 61.206(b).

Section 61.206 reaffirms that PG may not be lawfully removed from a stack and used for any purpose (other than certain outdoor agricultural purposes and indoor research and development) without prior EPA approval. § 61.206(a). The regulation then expressly provides that a request for such approval of the use of PG for some other purpose “must contain the following information,” listing various items of information, including the information noted above. § 61.206(b). (Emphasis added.) The regulation further provides that such a request may be granted if the EPA determines that the proposed use is at least as protective of public health as disposal of PG in a stack or mine. § 61.206(c). The regulation does not provide for any exceptions or qualifications on the contents of or requirements associated with a request for approval of the use of PG for other purposes. It does not provide that the information required by § 61.206(b) is only required as and if required by the EPA or to the extent required by the EPA. It simply states that certain information is required and does not, on its face, provide any latitude for EPA to dispense with the required information or to approve, even conditionally, a “request” that lacks the information that such a request must contain.

The EPA has long emphasized that proper requests under § 61.206 must include all of the information specified in § 61.206(b). In 2005, for example, the EPA issued a workbook titled *Applying to EPA for Approval of Other Uses of Phosphogypsum: Preparing and Submitting a Complete Petition Under 40 CFR 61.206*. In the workbook, the EPA reaffirmed that a request for the use of PG for other purposes “must provide the information requested in 40 CFR 61.206, ‘Distribution and use of phosphogypsum for other purposes.’” The workbook makes other statements indicating that the specific information called for by § 61.206(b) must be provided and that, without such information, a request is simply incomplete. See, for example, the “Petition Completeness Checklist.” Nowhere does the workbook indicate that the EPA may approve an incomplete request, or a request lacking the information required by § 61.206(b). In fact, the workbook explicitly states that the “[EPA] cannot finalize or review incomplete petitions or petitions that contain inaccurate or questionable data or analyses.” Workbook Section 2.4.

In addition, Subpart R already provides for and pre-authorizes certain “categorical” uses of PG, including for certain agricultural uses (40 C.F.R. § 61.204) and indoor research and development activities (40 C.F.R. § 61.205). There are no other such categorical uses authorized by Subpart R. The authority involved here (40 C.F.R. § 61.206), by contrast, does not authorize any categorical use of PG, and, instead, provides for the case-by-case consideration of the use of PG for specific “other purposes,” in particular, specified contexts.

In the October 2020 decision, the EPA acknowledged that the request to use PG in road construction did not contain all of the information required by § 61.206(b) but asserted that the missing information was “not essential to making the determination of whether the proposed use of PG would be at least as protective of public health as stacking.” On reconsideration, the EPA concludes that this statement is not germane to the review process. The EPA has authority, under § 61.206, to grant a request to use PG for other purposes. Such a “request” must contain certain required information. Even if, for the sake of argument, not all the required information is critical for the risk assessment called for by § 61.206(c), the information is a required component of a proper, complete request, and may be useful or important in other ways or may otherwise serve interests associated with consideration of a request for approval of the use of PG. The

information required by § 61.206(b) is essential to a proper and complete request, and the EPA cannot grant a request that does not contain the required information.

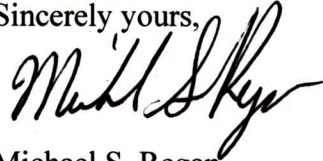
Furthermore, the EPA does not believe it can be reasonably contended, here, that the request for approval of the use of PG for road construction substantially complied with the requirements of § 61.206(b). It is undisputed that the request did not include a great deal of information required by the regulation, including the information required by § 61.206(b)(3) and (4) (information on the physical location and mailing address of “each facility” where “use, handling or processing” of PG will take place) and § 61.206(b)(5) (the quantity of phosphogypsum to be used by each facility). The request also failed to comply with the requirement of § 61.206(b)(10) (to have the request “signed and dated by a corporate officer or public official in charge of the facility”). In addition, it is also questionable whether the request fully provided information in response to § 61.206(b)(2) (requiring a description of the proposed use, including any handling or processing of the PG). The request generally described the type of road construction that might be undertaken but identified no actual road construction projects and gave little specific, particularized information about the proposed use. Similarly, it is questionable whether the request fully provided information responsive to § 61.206(b)(7) (requiring a description of measures that will be taken to prevent uncontrolled release of PG), as the request did not provide any information about any specific, particular measures that might be taken in connection with a given road construction project. Also, the request provided little, if any, information satisfying the requirement of § 61.206(b)(9) (requiring a description of the disposition of any unused PG). It is unnecessary to determine whether there might be circumstances under which the EPA could approve a request under § 61.206 for other use of PG where a request substantially complies with the requirements of § 61.206(b) but arguably omits some minor, perhaps ministerial, item. Here, it cannot reasonably be contended that the request substantially complied with the requirements of § 61.206(b).

Nor is it sufficient that the October 2020 decision contemplated that some additional information would be provided to the EPA before distribution or use of PG for any government road project. First, again, § 61.206(b) expressly requires that a request “must contain” certain specified information and that the EPA’s authority to approve an alternative use is contingent on receipt of a complete request that contains the required elements. In addition, it is notable that the October 2020 decision did not contemplate any EPA review or evaluation of any additional information that might be submitted. Under that decision, PG could be taken from a stack and used for road construction immediately after submitting the missing information, without any further EPA review or consideration. Such an approach renders the additional information all but meaningless, at least in terms of approval of a request to use PG for some other purpose, and reinforces our conclusion that TFI’s request did not comply with § 61.206(b) and that our October 2020 decision approving that request was inconsistent with our regulations.

Accordingly, in light of the considerations discussed above, the EPA is withdrawing, revoking and rescinding its October 2020 conditional approval of the broad, generalized request to use PG in road construction. This decision is without prejudice to a subsequent or further proper request under § 61.206 for approval of the use of PG for other purposes that contains the information required by § 61.206(b).

If you have any questions concerning this matter, Lee Ann B. Veal, director of the Radiation Protection Division, would be pleased to assist you and is available at veal.lee@epa.gov or (202) 343-9448.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael S. Regan". The signature is fluid and cursive, with the first name "Michael" and last name "Regan" clearly distinguishable.

Michael S. Regan