

Worldwide Pollution Control Association

Michigan Coal to Gas Seminar
June 5-6, 2012

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WPCA Michigan Coal to Gas Seminar

Clean Air Act Regulatory & Statutory Update June 2012

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My Background

- Former enforcement attorney for U.S. EPA, Region 5 (Chicago) from 1998-2001, where focus was Clean Air Act (“CAA”) enforcement.
- Environmental Attorney at Latham from 2001-2012, focus on complex Clean Air Act controversies and the defense of EPA enforcement actions and citizen suits under the CAA.

Time of Transition

- Crossroads for coal-fired power in the United States
- Decades of Enforcement of PSD/NSR
- Reinvigorated EPA enforcement under Obama
- Aggressive Rulemakings, such as CSAPR, MATS, Boiler MACT, NSPS rulemakings, NAAQS/One-hour standards, GHGs, and thermal restrictions under the CWA.
- Aggressive Citizen Suits – End Coal Campaign
- Hydraulic fracturing & historically low natural gas prices

Time of Transition

- May 29 *NY Times* –
 - 100 of the nation's 500 coal-fired power plants will shut down in the next few years
 - Today, coal-fired generation supplies one-third of our nation's electricity; four years ago, coal-fired generation supplied 50% of the nation's power.

Time of Uncertainty

- Will EPA's new CAA rules suffer a similar fate to CAMR and CAIR?
 - Invalidation? Remand?
 - Delay & Change?
- Will election outcomes change the balance of power?
 - Republican EPA?
 - Congressional opposition to EPA rules?
- Will new regulation of and opposition to fracking, together with other factors (*e.g.* export demand), push up natural gas prices?
- Will new emission control technologies reinvigorate coal just as demand for and price of coal dips?

EPA Rulemakings & Regulatory Updates

- Obama's EPA has targeted coal-fired power for aggressive rulemakings.
- "Policy" goals as well as a sense of statutory mandate from the 1990 CAA Amendments.
- Duty to study mercury and the impact of EGUs and regulate if "necessary and appropriate."
- CAA § 112(n)(1)(B) required EPA to specifically study mercury emissions from EGUs, municipal waste combustion units, and other sources including area sources, the resulting impacts on health and the environment, available control technologies, and the cost of different controls.

Necessary & Appropriate?

- Clinton's EPA said it was, W. Bush's EPA said it wasn't (CAMR), Obama's EPA said it was (MATS & Boiler MACT).



MATS

- For existing and new coal-fired EGUs, rule establishes numerical emission limits for mercury, PM (a surrogate for toxic non-mercury metals), and HCl (a surrogate for all toxic acid gases).
- Rule establishes alternative numeric emission standards, including SO₂ (as an alternate to HCl), individual non-mercury metal air toxics (as an alternate to PM), and total non-mercury metal air toxics (as an alternate to PM) for certain subcategories of power plants.
- Work practices, instead of numerical limits, to limit emissions of organic air toxics, including dioxin/furan, from existing and new coal- and oil-fired power plants. Annual performance test program for each unit that includes inspection, adjustment, and/or maintenance and repairs to ensure optimal combustion.
- Control technologies include wet and dry scrubbers, dry sorbent injection, activated carbon injection systems, and fabric filters.
- The revisions to the NSPS for fossil-fuel-fired EGUS include revised numerical emission limits for PM, SO₂, and NO_x.

MATS Challenged

- *White Stallion Energy Center, LLC v. EPA*, Case No. 12-1100 (and consolidated case Nos. 12-1101 & 12-1102)
 - Utilities
 - States
 - Interest Groups
- Timing too short
- EPA's decision-making was arbitrary & capricious
- Economic impacts not adequately considered
- Data & Risk assumptions flawed

CSAPR

- CSAPR based on “good neighbor” provision of the Act which “prohibits . . . any source . . . within the State from emitting any air pollutant in an amount which will . . . contribute significantly to non-attainment in, or interfere with maintenance by, any other state.” CAA § 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I).
- CSAPR replaces CAIR, maybe....

Challenges to CSAPR

- An avalanche of challenges to CSAPR:
 - 45 lawsuits/petitions for review
 - 89 parties
 - 15 States
 - 2 Municipalities
 - 3 Public Services Commissions
 - 2 Unions
 - Several Coops
 - 15 Motions to Stay CSAPR (7 by States)
- Perhaps the most complex legal challenge ever to a CAA rulemaking.

CSAPR Legal Issues

- Final rule significantly different and more stringent than proposed rule.
- EPA is allowed to make “refinements” which are a “logical outgrowth” of the proposed rule. With CSAPR, allowances to some states and sources dropped by 20% - 40%, which is a substantial difference.

CSAPR Legal Issues

- Under the Good Neighbor Provisions, States are required to reduce “their actual, specific contribution.”
- CSAPR forces reductions based on cost, not contribution to air quality.
- FIP out of the box, no opportunity for a SIP.
- EPA’s data is flawed, and they admitted as much. EPA made unpublished changes to its dispersion and dispatch modeling between the proposed and final rule.

CSAPR – Stay Granted

- CAIR continues for now
- Oral Argument on April 13, 2012
- Decision Imminent
 - Overturned?
 - Remanded?
 - Upheld?

Boiler MACT

- National Emission Standards for Hazardous Air Pollutants (NESHAP) for Industrial, Commercial, and Institutional Boilers and Process Heaters.
- The rule will regulate emissions of the following HAPs:
 - PM (surrogate for non-mercury metallic HAPs) or total selected metals TSM)
 - Mercury
 - Hydrogen chloride (surrogate for acid gas HAPs)
 - Carbon monoxide (surrogate for non-dioxin organic HAPs)
- Emission limits subcategorized between existing or new boilers and boiler type.
- Annual stack testing and establishing/monitoring operating limits for controls.

Boiler MACT

- Applies to new and existing Industrial, commercial, and institutional boilers and process heaters and utility boilers less than or equal to 25 MW (non-EGUs).
- Applies at major sources of hazardous air pollutants (HAPs):
 - PTE greater than or equal to 25 tons/year of total HAPs (entire facility), or
 - PTE greater than or equal to 10 tons/year of any single HAP (entire facility)
- Limits apply only to the boiler or process heater at a major source of HAPs.
- The rule is now at OMB; expected to be finalized by June/July 2012.
- Boilers will have to be in compliance with the work practice standards and emission limits by three years after the date that the final rule is published in the *Federal Register*, which would be approximately late spring or early summer 2015.

Cooling Water Intake Structures

- Section 316(b) of the Clean Water Act requires that National Pollutant Discharge Elimination System (NPDES) permits for facilities with cooling water intake structures ensure that the location, design, construction, and capacity of the structures reflect the best technology available to minimize harmful impacts on the environment.

Cooling Water Intake Structures – Existing Facilities

- Rule has 3 components:
 - Facilities that withdraw at least 25% of their water from an adjacent waterbody and have a design intake > 2MGD are subject to an upper limit on fish kill (impingement). Facility can install technology or reduce intake velocity to <0.5 ft/sec
 - Facilities withdrawing > 125MGD must study impingement mitigation techniques and allow for public input
 - New units at existing facilities which add to electric generation output must add technology equivalent to closed-cycle cooling.

Fracking Coming Under Increased Scrutiny

- EPA issued draft guidance on the regulation of hydraulic fracturing when diesel fuel is used. The Agency apparently rejected calls from environmentalists to use a broad definition of “diesel fuels,” instead limiting it to 6 CAS numbers which would trigger Safe Drinking Water Act requirements when used in hydraulic fracturing operations.
- Department of Interior released its proposed hydraulic fracturing rule, which would govern hydraulic fracturing on federal and tribal lands, and which mandates chemical disclosure. The proposal has not yet been published in the Federal Register, but there will be a 60 day comment period once it is published.
- Vermont legislature approved the first complete ban of hydraulic fracturing in the nation.
- DOJ announced plans to increase its criminal enforcement efforts against hydraulic fracturing, stating that “the emerging industry sector could be ripe for violations given the remote location of some extraction sites and little federal focus on the sector.”
- Sierra Club announced its “Beyond Natural Gas” campaign, claiming that “The natural gas industry is dirty, dangerous, and running amok.”

Thank you

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