

Looking Beyond Climate Change

Law360, New York (February 22, 2010) -- As any loyal reader of this publication — or any other lawyerly trade publication for that matter — would acknowledge, environmental practitioners lately have been consumed with the near-daily drama unfolding in Washington, D.C., regarding climate change and the regulation of greenhouse gases. And for good reason.

There is no question that federal cap-and-trade legislation, or alternatively, the U.S. Environmental Protection Agency's regulation of greenhouse gases, will affect the bottom line, if not the viability, of a large number of companies.

But one would be remiss to lose sight of the many air regulations the EPA presently is crafting that do not concern climate change or greenhouse gas emissions, yet nevertheless may pose significant compliance burdens for a wide variety of industrial sources.

This article highlights a few of the more significant air regulatory developments that environmental practitioners should not lose sight of.

New MACT Standards

The D.C. Circuit Court of Appeals has not been a friendly forum for EPA over the past several years, especially when it comes to the agency's efforts to promulgate Maximum Achievable Control Technology (MACT) standards. MACT standards, or National Emission Standards for Hazardous Air Pollutants (NESHAPs), set forth emission limits for hazardous air pollutants from specific source categories pursuant to Section 112 of the Clean Air Act.[1]

In 2007 alone, the court vacated EPA's MACT standards for brick and ceramic kilns,[2] industrial/commercial/institutional boilers and process heaters,[3] solid waste incinerators,[4] and plywood and composite wood products manufacturing facilities.[5]

In 2008, the court picked up right where it left off, and struck down the EPA's Clean Air Mercury Rule (CAMR).

CAMR, along with the accompanying delisting rule, sought to remove coal- and oil-fired electric utility steam generating units (EGUs) as a listed source of hazardous air pollutants under Section 112, and instead regulate mercury emissions from these same sources under a new market-based trading scheme. The court found the EPA's scheme to violate the plain language of the Clean Air Act.[6]

As a result of these many court decisions, the EPA has published, or will soon publish, numerous revised MACT standards. Perhaps the most anticipated proposal, simply by virtue of its broad applicability, is the revised MACT standard for industrial/commercial/institutional boilers (the Boiler MACT).

Pursuant to a court-ordered deadline, the EPA must propose a new Boiler MACT by April 15, 2010, and a final rule by Dec. 16, 2010. The forthcoming MACT standard for coal- and oil-fired steam electric generating units (the EGU MACT) is on a slightly slower track.

According to a draft consent decree, the agency will promulgate a proposed EGU MACT no later than March 16, 2011, and a final rule no later than Nov. 16, 2011. To that end, the EPA recently issued an Information Collection Request to all subject EGUs to collect data on hazardous air pollutant emissions for use in the development of the EGU MACT.

Until these MACT standards are promulgated, any new regulated sources, or existing sources undergoing certain modifications, will be required to satisfy their obligations to control hazardous air pollutants pursuant to Section 112 of the Clean Air Act by using the cumbersome case-by-case MACT analyses set forth in paragraphs (g) and (j) of the statute.[7]

SO2 and NO2 NAAQS Review and Revisions

The Clean Air Act requires the EPA to review primary and secondary national ambient air quality standards (NAAQS) every five years, and to revise those standards if it deems appropriate.[8]

As with other directives Congress has issued the EPA under the Clean Air Act, however, one would not be aware of this five-year NAAQS review requirement by looking at past agency practice. The NO2 and SO2 standards, for example, have not been reviewed since 1995 and 1996, respectively.

On Feb. 9, 2010, the EPA published a final, revised primary standard for NO2.[9] The agency expects to make designations of nonattainment areas in January 2012 based on the data collected by the existing monitoring system.

According to the EPA, it is unlikely that any of the areas currently monitored will exceed the new NO2 primary standards. However, the final rule requires the installation of new near-roadway monitors in certain metropolitan areas and it is conceivable that the number of areas in nonattainment will increase once data from the new monitors is collected.

The EPA's revised primary SO2 NAAQS is likely to have much more serious consequences. On Dec. 8, 2009, the agency proposed several revised numerical standards for SO2 which, according to the EPA's own estimates, could cause the number of counties in nonattainment to skyrocket from nine (the current number) to over 100.[10]

A nonattainment designation would place additional restrictions on the issuance of permits for new or modified industrial sources. A final rule is expected from the EPA in June 2010.

The EPA is also reviewing the secondary NAAQS for SO2 and NO2. The agency has elected to review both of these standards together on account of their similar atmospheric chemistry and environmental effects. A proposed revision to these standards is expected by July 2011.

A Multipollutant Strategy for Steam Electric Generating Units?

For those entities in the electric utility sector, a number of developments are underway at the EPA and Congress that could affect requirements for the control of SO2, NOx and hazardous air pollutants.

As a result of yet another unfavorable court decision, the EPA finds itself tasked with retooling its emissions trading program for SO2 and NOx emissions, the Clean Air Interstate Rule ("CAIR").[11]

The agency is also re-examining, and must soon re-issue, the New Source Performance Standards (“NSPS”) for EGUs that were originally promulgated in 2006. The NSPS will include standards for SO₂, NO_x and possibly particulate matter, among other pollutants.

In sum, in the coming months, EGUs can expect: (1) a new emissions trading program for SO₂ and NO_x; (2) a revised NSPS; and (3) a new EGU MACT for hazardous air pollutants.

Any one of these, alone, would be a significant development. Together they give the EPA the opportunity to completely reconstruct the regulatory framework governing air emissions from EGUs. And again, this observation holds true whether or not the agency decides to regulate greenhouse gas emissions.

Will Congress Trump EPA on Clean Air Act Regulations?

Congress is well aware of the power that it has invested in the EPA, and perhaps for that reason, has proposed legislation that may supersede many of the air regulations the agency promulgates.

For example, several weeks ago, Sens. Tom Carper, D-Del., and Lamar Alexander, R-Tenn., introduced new legislation, dubbed “The Clean Air Act Amendments of 2010,” to reduce emissions of SO₂, NO_x and mercury.[12] The bill, as currently written, would require EGUs to cut SO₂ emissions by 80 percent in 2018, NO_x emissions by 53 percent in 2015, and mercury emissions by at least 90 percent no later than 2015.[13]

As the foregoing examples demonstrate, when it comes to the regulation of air pollution by the EPA, there are numerous administrative rulemakings and legislative developments underway in addition to the regulation of greenhouse gases that deserve close scrutiny by the regulated community.

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[1] 42 U.S.C. § 7412(d).

[2] *Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007).

[3] *Natural Resources Defense Council v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007).

[4] *Id.*

[5] *Natural Resources Defense Council v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007) (NRDC II)

[6] *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

[7] 42 U.S.C. § 7412(j) & (g)(2).

[8] 42 U.S.C. § 7409(d)(1).

[9] 75 Fed. Reg. 6,474.

[10] 74 Fed. Reg. 64,810.

[11] *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

[12] Press Release, Offices of Sens. Thomas Carper and Lamar Alexander, Sens. Carper, Alexander Introduce Bill to Clean Air, Protect Public Health and Promote Job Creation (Feb. 4, 2010).

[13] *Id.*