

# The Metropolitan Corporate Counsel®

www.metrocorp-counsel.com

Volume 19, No. 11

© 2011 The Metropolitan Corporate Counsel, Inc.

November 2011

## The Hidden Costs Of New Federal Air Quality Regulations: Information Collection Requests And What You Can Do About Them

Les A. Oakes,  
Cynthia A. M. Stroman and  
John L. Fortuna

KING & SPALDING LLP

Everyone knows that new environmental regulations can impact a company's bottom line. This is particularly true for the U.S. Environmental Protection Agency's regulations under the federal Clean Air Act, which can impact huge numbers of facilities spanning broad sectors of the national economy. These rules can also impose staggering economic costs. Compliance with EPA's emission standards for commercial and industrial boilers, for example, has been projected to cost affected sources more than \$20 billion.<sup>1</sup> And more recently, President Obama instructed EPA Administrator Lisa Jackson to withdraw the proposed standard for

*Les A. Oakes is a Partner in King & Spalding's Environmental Practice Group. He joined the firm in 1986 following a career of over eleven years as an environmental engineer with the Environmental Protection Division, Georgia Department of Natural Resources (EPD). Cynthia A. M. Stroman is a Partner in King & Spalding's Tort and Environmental Litigation Practice, where she divides her time between the Washington and Houston offices. She utilizes her industry experience, chemical engineering training, and practical knowledge of manufacturing processes, engineering and science to assist energy and industrial clients with challenging environmental issues. John L. Fortuna is an Associate in King & Spalding's Tort & Environmental Litigation Practice Group. He has a general environmental practice with a focus on water law and water resources.*

ozone, explaining that the extraordinary costs of the regulations were simply too great for our fragile economy to bear.<sup>2</sup>

But the true cost of air quality regulations is not limited to the capital expenditures and compliance expenses required after the rules are implemented. Far from it. With increasing frequency, EPA has used its authority under Section 114 of the Clean Air Act to issue massive "information collection requests," requiring regulated businesses across the country to conduct expensive emissions testing at their facilities and to collect data about their emissions. Each facility receiving the information request must then submit the required data to EPA – ostensibly for use in developing new air quality regulations – or face the possibility of a civil enforcement action and significant civil penalties.

The costs to businesses of complying with an EPA information collection request – both in terms of lost productivity and generating the required data – can be significant. The information collection request sent to petroleum refineries in March 2011 in advance of new air quality standards for the sector is expected to take almost 70,000 hours to complete and to cost the facilities almost \$31 million.<sup>3</sup> EPA's recent information request to electrical generators was even more burdensome, with EPA estimating that compliance with this request alone would require over 86,000 hours and cost the targeted facilities over \$96.5 million.<sup>4</sup>

These are just two examples. Collectively, compliance with EPA's many information requests to support the development of new rules is expected to cost businesses across the country hundreds of millions of dollars. When these impacts are combined with EPA's other data collection and reporting mandates, the costs to business are astonishing. Right now, EPA has more than 430 ongoing information collection

requests, requiring more than 175 million hours to complete at a total annual cost of \$2.31 billion to businesses nationwide.<sup>5</sup>

### Forced Timelines, False Starts, And Flawed Regulations

Unfortunately, EPA's data collection efforts do not always result in rules that are technically sound and reasonable. All too often, EPA's regulatory agenda has been driven by litigation and court-imposed deadlines that simply do not allow enough time for either collection or analysis of the emissions data that EPA has demanded. And as a result, these expensive and burdensome demands for data have far too frequently failed to prevent regulations that EPA itself admits are flawed at the most basic level.

EPA's attempt to develop new hazardous air pollutant emission standards for commercial and industrial boilers – which have long been a source of controversy – highlights this problem. The agency initially issued standards for these sources in 2004,<sup>6</sup> but that rule was vacated by a federal appeals court in 2007.<sup>7</sup> EPA then began the process of rewriting the regulations and, as part of that process, issued an information collection request to about 3,400 facilities nationwide that EPA expected would take approximately 125,400 hours to complete and cost the targeted businesses more than \$19 million.<sup>8</sup> The agency was under a court-ordered deadline to complete its work, and the rule it proposed was again deeply flawed. After receiving thousands of comments, EPA sought more time from the court to analyze the data and address the significant issues raised by the commentators before finalizing the rules, but the court refused to extend the deadline and ordered the agency to proceed.<sup>9</sup> Left with no other option, EPA issued final rules in March 2011 as ordered.<sup>10</sup> On the very same day, however, EPA announced that it intended to reconsider fourteen different aspects of the very same rule it had just issued,<sup>11</sup> and it has

*Please email the authors at [loakes@kslaw.com](mailto:loakes@kslaw.com), [cstroman@kslaw.com](mailto:cstroman@kslaw.com) or [jfortuna@kslaw.com](mailto:jfortuna@kslaw.com) with questions about this article.*

now stayed the rule's effective date until the many legal challenges to the flawed rule have been addressed.<sup>12</sup>

The court-ordered development of new emission standards for coal- and oil-fired electrical generators suffered from similar problems. For that rule, EPA also issued a massive and expensive data demand, but again had to rush its analysis of the enormous amount of data collected to meet the court's deadlines. The result, while disappointing, is not surprising: EPA made basic mathematical errors in its calculations that caused its mercury emissions calculations to be incorrect by a factor of 1,000, as well as other errors that undermine many of the emission limits EPA proposed. Many businesses asked EPA to re-do its analysis and re-propose a corrected rule, but EPA declined their requests, instead electing to merely extend the comment period for thirty days and to proceed with a final rule apparently intended to meet the court's deadline.<sup>13</sup>

#### How Can Businesses Mitigate Bottom-Line Impacts From EPA's Data Demands?

It is clear that EPA's data collection efforts have imposed significant costs on regulated businesses. And EPA's frequent rush to comply with court-imposed deadlines has prevented the agency from thoroughly analyzing the data collected or using it to promulgate sound and defensible rules. So how can regulated businesses avoid, or at least minimize, the impacts of an unduly burdensome data request? We suggest the following:

First, it is important to understand that EPA's authority to issue data requests under the Clean Air Act is not unlimited. Thus, while Section 114 of the Clean Air Act permits EPA to request information from regulated businesses, its requests must be reasonable in light of the agency's regulatory needs.<sup>14</sup> Other federal statutes further limit EPA's data collection authority. For example, the Paperwork Reduction Act directs federal agencies to reduce the burden on the public from data collection efforts by ensuring that an information request has "practical utility" and is "necessary" for the agency to perform its functions.<sup>15</sup> It must not be "unnecessarily duplicative of information otherwise reasonably accessible to the agency"; and the agency should consider adjusted timelines, simplification or exemptions for small businesses.<sup>16</sup>

EPA also must follow specific steps before it can require businesses to respond to a data request. It must formally propose the data request, identify potentially affected sources, estimate costs and burdens associated with the request, and provide the public at least 60 days to comment on the proposal.<sup>17</sup> Once the comment period has

closed, EPA must then publish the final information request in the Federal Register and submit the request to the Office of Management and Budget for review and approval.<sup>18</sup> OMB then must accept public comments on the proposal for at least 30 days, and approve, disapprove or instruct the agency to modify the proposal within 60 days of its submission.<sup>19</sup>

Although these procedural safeguards are limited, they provide potentially affected businesses with an opportunity to influence the data collection process. Businesses should therefore monitor proposed data requests that might impact their organizations. Environmental professionals who are knowledgeable about their facilities, compliance recordkeeping, and testing should review EPA's proposal. Where the impacts could be significant, they should consider bringing in a testing expert to evaluate the methodology and estimate costs of compliance. And finally, they should engage with EPA and OMB through the comment process. EPA may revise the proposal where impacts to regulated businesses can be reduced, or where better, less burdensome testing and reporting protocols will yield the information EPA believes it needs. Believe it or not, history shows that this can bear fruit: Just last year, EPA adjusted its data request to electrical generators in response to comments it received, reducing the time and cost of compliance by more than 14,000 hours and more than \$8 million.

Another important aspect of reviewing an information collection request should not be overlooked. Careful scrutiny of the specific information EPA is seeking, its prescribed test methodologies, and its process for selecting facilities that will receive the request can often reveal flaws in EPA's underlying methods. An EPA refusal to correct these defects in its data gathering methods through the public comment process can prove valuable later and lay the groundwork for comments on any rule EPA proposes and, potentially, a legal challenge to the final rule itself.

Further, it bears mentioning that EPA uses its Section 114 authority both for information collection requests to develop new regulations and for gathering information for use in potential enforcement actions. This second type of Section 114 letter requires a very different response and can carry far greater consequences. Experienced legal counsel can assist any business receiving this second type of Section 114 letter in formulating a response that addresses not only the technical issues but also the legal ramifications.

In the end, EPA is required to issue many regulations under the Clean Air Act, and it is in everyone's interest for EPA to have good data to formulate those rules. But EPA's data

directives can have a very real impact on businesses' bottom lines. Those demands should not – and need not – unduly burden the businesses that are the economic engine of our nation, particularly when the associated rules are hastily developed and fail to make appropriate use of the information gathered. Otherwise, the data collection effort is nothing more than a waste of precious economic resources.

<sup>1</sup> See Comments of the Council of Industrial Boiler Owners on EPA Proposed Rule National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters at 3-6 (Aug. 10, 2010).

<sup>2</sup> Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2010).

<sup>3</sup> Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS and NESHAP for Petroleum Refinery Sector Residual Risk and Technology Review (RTR) (New Collection), 76 Fed. Reg. 5804 (Feb. 2, 2011).

<sup>4</sup> See Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Information Collection Effort for New and Existing Coal- and Oil-fired Electric Utility Steam Generating Units, 74 Fed. Reg. 58012 (Nov. 10, 2009).

<sup>5</sup> Office of Information and Regulatory Affairs, Inventory of Currently Approved Information Collections: Environmental Protection Agency (Oct. 17, 2011).

<sup>6</sup> See National Emission Standards for Hazardous Air Pollutants (NESHAP): Industrial, Commercial, and Institutional Boilers and Process Heaters, 69 Fed. Reg. 55218 (Sept. 13, 2004).

<sup>7</sup> See *Natural Resources Defense Council v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007).

<sup>8</sup> Information Request for National Emission Standards for Industrial, Commercial, and Institutional Boilers and Process Heaters, 72 Fed. Reg. 69213 (Dec. 7, 2007).

<sup>9</sup> See *Sierra Club v. Jackson*, Civil Action No. 1:01-cv-1537, 2011 WL 181097 (D.D.C. Jan. 20, 2011).

<sup>10</sup> See National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 76 Fed. Reg. 15608 (Mar. 21, 2011).

<sup>11</sup> See National Emission Standards for Hazardous Air Pollutants; Notice of Reconsideration, 76 Fed. Reg. 15266 (Mar. 21, 2011).

<sup>12</sup> See Industrial, Commercial, and Institutional Boilers and Process Heaters and Commercial and Industrial Solid Waste Incineration Units: Delay of Effective Dates, 76 Fed. Reg. 28662 (May 18, 2011). See also *United States Sugar Corp. v. EPA*, No. 11-1108 (D.C. Cir. filed Apr. 14, 2011) (granting EPA's motion to hold appeal in abeyance pending final decision on reconsideration).

<sup>13</sup> See Proposed National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Extension of Comment Period, 76 Fed. Reg. 38590 (July 1, 2011); Letter from Gina McCarthy, EPA assistant administrator, to Chris Hobson, Southern Company (July 11, 2011) (explaining that while EPA has extended the comment period, it is "not seeking to extend the November 16, 2011, deadline for signature of the final rule, and remain[s] committed to meeting that deadline").

<sup>14</sup> See 42 U.S.C. § 7414(a)(1).

<sup>15</sup> See 44 U.S.C. § 3506(c)(2)(A).

<sup>16</sup> See *id.* § 3506(c)(3)(C)(i)-(iii).

<sup>17</sup> See *id.* § 3506(c)(2)(A).

<sup>18</sup> See *id.* § 3506(c)(3); 5 C.F.R. §§ 1320.5, 1320.8-1320.10.

<sup>19</sup> See 5 C.F.R. § 1320.10.