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AIR QUALITY Letter

APRIL 2018 ISSUE

Welcome to the AIR QUALITY Letter, a periodic review and update of regulatory changes affecting air quality sources.

EPA UPDATE

CPP Repeal Comment Period Reopened

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On February 1, 2018, a notice was published in the Federal Register announcing the U.S. Environmental Protection Agency had reopened the public comment period on its proposed repeal of the Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units – commonly referred to as the Clean Power Plan – until April 26, 2018. The notice also announced three additional public listening sessions, which were held in February and March.

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Sue and Settle Update

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On October 16, 2017, EPA Administrator Scott Pruitt issued a "Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements" and accompanying memorandum entitled "Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements." The purpose of these documents was to formally

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Sue and Settle Update

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end a practice known as "sue and settle," which refers to the agency settling litigation brought by special interest groups by entering into court-ordered consent decrees. This practice has been criticized both for allowing such groups to accomplish desired regulatory changes without public participation or affected parties' involvement that would otherwise be afforded by the rulemaking process, as well as for giving the judiciary power that is the province of the executive branch.

However, it is not clear that the practice has ended. For example, in the time since the directive and memorandum were issued, a joint motion to stay was filed with the court in *Sierra Club v. Scott Pruitt*, Case No. 1:17-cv-02174 (D.D.C.) (Doc. 15) to allow the parties to "continue discussions to explore the possibility of resolving this matter without litigation."

PERMITTING

EPA Deference to States in Permit Objection Response

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Administrator Pruitt has shown an increasing willingness to defer to the state in the issuance of a Title V operating permit under the Clean Air Act. Title V operating permits are "umbrella" permits that include all Clean Air Act mandates that apply to a source. States and local permitting agencies must submit proposed Title V operating permits to EPA for review. EPA then has 45 days to object to the issuance of a proposed permit if it determines the permit does not comply with the Clean Air Act's requirements. If EPA does not object then any person may petition the EPA administrator, within 60 days of the expiration of the 45-day EPA review period, to object to the permit.

Since then, EPA has continued to defer to state Title V operating permit decisions by denying petitions from environmental groups challenging these permit decisions. Since January 1, 2018, EPA has denied seven petitions from environmental groups challenging Title V permits issued by Maryland, Tennessee, Arkansas, Wisconsin, Texas and Pennsylvania. In each case, the environmental group made several arguments for why the permit was missing required conditions and/or why the permit conditions were inadequate and the EPA has rejected each argument. Many of the arguments have related to why the Title V operating permit lacks required testing and monitoring conditions.

However, EPA is not simply rubber-stamping Title V operating permits and denying all petitions. On April 2, 2018, EPA granted in part and denied in part a petition from the Environmental Integrity Project, the Sierra Club and Air Alliance Houston challenging the Texas Commission on Environmental Quality's Title V proposed operating permit for the ExxonMobil Corporation's Baytown Refinery. The EPA granted the petition on one ground: the permit did not include or incorporate all requirements applicable to the facility because it did not have direct references to certain source-specific requirements derived from registered Permits by Rule.

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EPA Streamlining of NSR review

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EPA Administrator Pruitt recently issued another policy to help streamline the New Source Review (NSR) Program. After receiving comments from many industry sources that the NSR Program should be reformed given its heavy time and cost burden, the Trump EPA has made reforming the NSR Program a priority. As discussed in the December 2017 Air Letter, Administrator Pruitt took a first step in this process in a December 7, 2017 memorandum clarifying EPA's current understanding of certain NSR regulations, including a determination that EPA will not second-guess a source's emissions projections.

The NSR permitting process has two steps: 1) determine if the project will have a "significant emissions increase"; and 2) if yes, an evaluation is made regarding whether the project will result in a significant net emissions increase, considering any other increases and decreases in actual emissions at the source that are contemporaneous with the particular project and are otherwise creditable, referred to as "netting." EPA's second reform of the NSR Program affects the first step of the analysis. Under EPA's prior interpretation, emission decreases as part of a project were only considered at Step 2. However, on March 13, 2018, Administrator Pruitt issued a memorandum stating a source can consider a project's emission decreases in addition to the emission increases in Step 1. Decreases are not required to be creditable or enforceable by EPA or a state agency to be considered. The memorandum calls this Step 1 evaluation "project emissions accounting" rather than "netting."

By allowing a source to consider emission decreases at Step 1, it is less likely a source will reach Step 2. The Step 2 netting analysis is both time – and resource – intensive. Administrator Pruitt's March 13, 2018 memorandum notes EPA's prior interpretations that did not allow decreases to be considered at Step 1 "have had the practical effect of preventing certain projects from going forward and significantly delaying others, even though those projects would not have resulted in a significant emissions increase." If a source is undertaking a project, defined as "a physical change in, or change in the method of operation of, an existing major stationary source," the source will now be incentivized to include measures that will decrease emissions in order to avoid the Step 2 analysis. While this memorandum was only issued as guidance to every EPA Regional Administrator, EPA stated it may pursue a rulemaking to codify this interpretation in the future.

More changes are expected for the NSR Program as the EPA moves to streamline the process. In a recent presentation, Anna Marie Wood, Director for EPA's Air Quality Policy Division at the Office of Air Quality Planning and Standards, stated EPA is looking at the aggregation policy and the definitions of "common control" and "adjacent." EPA also indicated it may make changes to the definition of "ambient air" for Prevention of Significant Deterioration permitting and to the exemptions of routine maintenance, repair and replacement.

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STATE UPDATES

Kentucky Air Law Update

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Kentucky Submits Comments on Proposed Clean Power Plan Repeal

By letter dated January 12, 2018, the Energy and Environment Cabinet, on behalf of the Commonwealth of Kentucky, submitted comments supporting EPA's proposal to repeal the Clean Power Plan (CPP) rules for existing sources finalized during the Obama administration. The Cabinet was active throughout the CPP promulgation process expressing both legal and technical concerns during comment periods on EPA's proposed rules. In support of repeal, the Cabinet commented the final CPP went beyond EPA's statutory authority by expanding emission limitations beyond individual sources to limits based on the level of emission reduction each state was capable of achieving across its power sector, contrary to the plain language of Clean Air Act (CAA) Section 111(d). The Cabinet further commented the CPP treatment of modified and reconstructed sources as existing sources ignored the statutory treatment of those sources as new, rather than existing, sources.

Kentucky commented the standards of performance set by the rule were unreasonable and ignored the historical approach to rulemaking under CAA Section 111 by setting final standards for existing sources in Kentucky that are more stringent than for new sources. Further, Kentucky commented the final rule bore no resemblance to the proposed rule and placed more stringent standards on Kentucky in an arbitrary and capricious manner. Thus, Kentucky was not provided the opportunity to comment on what became the final rule. In fact, Kentucky commented, the final rule "eerily" included the elements from a 2013 environmental group study that analysis revealed would have shuttered all coal-fired generation in Kentucky by 2025. "Congress never intended for EPA to establish unreasonable standards of performance for the purpose of shutting down particular sources or industries." The Cabinet raised concerns regarding contradictions between the proposed and final rule regarding assessment of the standards and also raised concerns regarding EPA's Regulatory Impact Analysis, given the rule's impact on Kentucky.

On February 1, 2018, EPA provided notice in the Federal Register that it would hold three public listening sessions, the last in March, and that the public comment period for the proposed repeal would be reopened through April 26, 2018. As of April 12, the federal rulemaking website reported a total of 567,025 comments received by EPA. We will continue to monitor and report on CPP repeal developments. The full Cabinet comments can be read at http://air.ky.gov/SiteCollectionDocuments/Proposed%20CPP%20Repeal%20Comments_1-12-18.pdf.

Kentucky Regulatory Amendments

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On March 13, 2018, the Division for Air Quality submitted regulations to incorporate the federal Cross-State Air Pollution Rules (CSAPR) as published by EPA on July 1, 2017. 401 KAR 51:240 will incorporate by reference 40 CFR 97.401 through 97.435, Subpart AAAAA for Kentucky sources subject to the NO_x annual trading program. 401 KAR 51:250 will incorporate by reference 40 CFR 97.801 through 97.835, Subpart EEEEE for Kentucky sources subject to the NO_x ozone season group two trading program. 401 KAR 51:260 will incorporate by reference

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Kentucky Regulatory Amendments

(cont. from p4)

40 CFR 97.601 through 97.635, Subpart CCCCC for Kentucky sources subject to the SO_2 group 1 trading program. The public comment period closed April 18, 2018. Written comments will be accepted by the division until April 30, 2018. Once the regulations are effective, the Division will submit a request to EPA for inclusion into the State Implementation Plan.

On April 18, 2018, EPA published a proposed rule to approve Kentucky's February 28, 2018 draft State Implementation Plan (SIP) submission pertaining to the "good neighbor" provision of the Clean Air Act for the 2008 eight hour ozone National Ambient Air Quality Standard (NAAQS). The Kentucky submission demonstrates no additional emission reductions are necessary to satisfy the good neighbor provisions beyond the requirements of the Cross-State Air Pollution Rule. The comment period for the proposed rule ends on May 18, 2018.

West Virginia Air Law Update

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Three recent Final Rules published in the Federal Register announced the EPA's approval of certain proposed revisions to West Virginia's State Implementation Plan (SIP) under the Clean Air Act. The approved revisions include the removal of state regulations for the annual nitrogen oxide and sulfur dioxide trading programs pursuant to the Clean Air Interstate Rule (CAIR), which has been replaced by the Cross-State Air Pollution Rule (effective March 12, 2018); the removal of source-specific SIP requirements for five facilities that have permanently ceased operation (effective April 18, 2018); and an update to the effective date by which the West Virginia regulations must incorporate by reference the National Ambient Air Quality Standards, additional monitoring methods and additional equivalent monitoring methods (effective April 23, 2018).

Senate Bill 163, commonly referred to as the West Virginia Department of Environmental Protection (DEP) legislative rules "bundle," was passed by the Legislature and approved by the Governor during the most recent legislative session. This legislation authorized DEP to promulgate updates to several state environmental regulations, including those pertaining to Ambient Air Quality Standards, 45 CSR 8; Control of Air Pollution from Combustion of Solid Waste, 45 CSR 18; Control of Air Pollution from Municipal Solid Waste Landfills, 45 CSR 23; Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities, 45 CSR 25; and Emissions Standards for Hazardous Air Pollutants, 45 CSR 34. The new rules become effective June 1, 2018.

Senate Bill 395 also became law during the most recent legislative session. This legislation revises the procedures for appeals of certain decisions by certain state environmental boards, including the Air Quality Board (AQB). Previously, under W.Va. Code § 22B-2-3, AQB permitting decisions were required to be filed with the Circuit Court of Kanawha County, West Virginia. The new statute provides such decisions must be filed in the Supreme Court of Appeals (the state's highest court) within 30 days of the AQB Order, but the proceedings may continue in the Circuit Court of Kanawha County if all parties provide their consent. The bill became effective upon passage on March 6, 2018.

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NAAQS

EPA Close to Completing Area Designations for 2015 8-Hour Ozone Standard

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On November 16, 2017, EPA published a final rule establishing its initial air quality designations for most areas of the United States for the 2015 primary and secondary national ambient air quality standards (NAAQS) for ozone. In that action, EPA designated 2,646 counties as attainment or attainment/unclassifiable for the 2015 ozone standard. The 2015 ozone standard reduced the 8-hour ozone NAAQS from 75 parts per billion (ppb) to 70 ppb. The designation process will be completed when EPA issues its final rule designating nonattainment areas for the 2015 ozone standard.

EPA was required by the Clean Air Act to promulgate final designations for the 2015 ozone standard by October 1, 2017. EPA initially sought to delay implementation of the ozone standard by one year in a formal notice published in the *Federal Register* in June 2017. Litigation ensued and a court order in the ozone designation litigation, entered March 12, 2018, required EPA to promulgate final designations for the remainder of the country (with the exception of the San Antonio area) by no later than April 30, 2018. Final designations for the San Antonio area are required by July 17, 2018. While EPA ultimately withdrew the plan for the delay in implementation, it originally sought the delay in part to provide time for new agency officials to review and potentially reconsider the 2015 ozone NAAQS. At this time, EPA is reportedly still evaluating whether it will formally reconsider the 2015 Ozone Standard.

On March 8, 2018, EPA issued a final rule establishing the air quality thresholds that define the classifications that will be assigned to nonattainment areas for the 2015 ozone NAAQS. The final rule also establishes the attainment deadlines for each nonattainment area classification. Ozone nonattainment areas are being classified into five classifications ranging from "marginal" to "extreme" dependent on severity of the ozone problem based upon monitoring data. Attainment deadlines for each nonattainment area classification will range from three years from the effective date of the designation for marginal areas to 20 years from the effective date of the designation for extreme areas. The final nonattainment designations that will be made by EPA by April 30 will place each designated area within one of these five classifications.

EPA must also finalize an implementation rule for states to use in developing implementation plans for designated nonattainment areas. In conjunction with the implementation rule, EPA has indicated it will develop important permitting guidance on significant impact levels (SILs) for nonattainment area modeling use and for modeling emission rates for ozone precursors used to determine the ozone level impacts from emission of precursors such as nitrogen oxide. The implementation and permitting guidance was initially proposed by the Obama EPA in 2016.

President Trump Issues Memorandum to EPA to Ease NAAQS Implementation Impacts on Industry

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On April 12, 2018, President Trump issued a memorandum to Administrator Pruitt to promote domestic manufacturing and job creation through policies intended to streamline implementation of national ambient air quality standards (NAAQS). The memorandum directs the EPA "to take specific actions to ensure efficient and cost-effective implementation of the NAAQS program, including with

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President Trump Issues Memorandum to EPA to Ease NAAQS Implementation Impacts on Industry

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regard to permitting decisions for new and expanded facilities, and with respect to the regional haze program."

Section 1 of the memorandum directs EPA, as practicable and consistent with law, to take final action on state implementation plans (SIPs) within 18 months of the date of submission of a SIP.

Section 2 directs EPA to undertake a process to review all full or partial federal implementation plans (FIPs) issued under the 2007 planning period of the Regional Haze Program to develop options at the request of states to replace FIPs with approved SIPs.

With respect to preconstruction permit applications, Section 3 of the memorandum directs EPA to endeavor to take final action on applications within one year of the date of receiving a complete application. EPA is also directed to endeavor to provide prompt technical support, reviews and determinations in order to assist states in the timely issuance of preconstruction permits.

Section 4 addresses petitions submitted pursuant to Sections 319 and 179B of the CAA relating to emissions beyond the state's control that are contributing to or causing NAAQS exceedances. For exceptional event demonstrations, EPA is directed to endeavor to take final action within four months of a complete submission. For petitions relating to international transport of criteria pollutants, EPA is directed not to limit its consideration of demonstrations or petitions to states located on borders with Mexico or Canada. Rather, all states can consider impacts of emissions that emanate from any location outside the United States, including Asia. EPA is directed to continue to assess background concentrations and sources from areas outside the control of states and natural events.

With respect to monitoring and modeling data, EPA is directed in Section 5 to rely on data from EPA-approved air quality monitors for nonattainment designations to the extent feasible and permitted by law. The clear implication is that modeling is disfavored as a basis for making nonattainment designations. EPA is also directed to ensure its applicable modeling tools are sufficiently accurate for their intended application and is to seek to streamline the process for approving alternative models and to provide other methods that promote innovative state approaches. EPA is also directed to develop significant impact levels (SILs) and related values to identify source permitting and related decisions that do not require modeling or that can rely on streamlined modeling approaches for permitting. EPA is also directed in Section 6 of the memorandum to provide flexibility to states with regard to identifying and achieving offsets, including by allowing intrastate and regional inter-precursor trading.

When revising NAAQS, EPA is directed in Section 7 to concurrently issue regulations and guidance necessary for implementing the new or revised standards. As noted elsewhere in this issue of the Air Quality Letter, EPA has not yet finalized implementation guidance for the 2015 ozone standard.

Finally, Section 9 of the President's memorandum directs EPA to evaluate existing rules, guidance, memoranda and other public documents relating to the implementation of NAAQS to determine whether any such documents should be revised or rescinded to ensure more timely permitting decisions under the NAAQS.

The President's memorandum is welcomed by industry in that it addresses many of the most critical delays and stringency concerns associated with new source review and NAAQS nonattainment designations.

AIR QUALITY Letter
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PERFORMANCE STANDARDS

Kentucky Revises Requirements for New and Existing Heat Exchangers

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On March 9, 2018, revisions to the requirements for new and existing indirect heat exchangers contained in 401 KAR 59:015 and 401 KAR 61:015 became effective. Indirect heat exchangers with a heat input capacity greater than one million Btu/hour (MMBtu/hour) are subject to either 401 KAR 59:015 (new sources) or 401 KAR 61:015 (existing sources). The classification as new or existing depends upon when the indirect heat exchanger was installed. Based on input from the regulated community, both regulations have been revised to establish work practice standards that apply during startup and shutdown in lieu of the numeric emission limits contained in the regulations.

Since these regulations were adopted, federal standards under 40 CFR Part 63 have been issued for certain types of indirect heat exchangers. Specifically, National Emission Standards for Hazardous Air Pollutants (NESHAP) for industrial, commercial and institutional boilers and process heaters have been issued at Subpart DDDDD. A NESHAP for the same category of boilers and process heaters at area sources has been issued at Subpart JJJJJJ. (Area sources are sources that emit less than 10 tons of a single HAP and less than 25 tons of combined HAP.) Finally, a NESHAP was issued for coal- and oil-fired electric utility steam generating units in Subpart UUUUU (also known as MATS).

The impetus for the modification of 401 KAR 59:015 and 61:015 to establish work practice standards in lieu of numeric emission limits during startup and shutdown events was EPA's SIP call in 2015. At that time EPA made a determination that Kentucky's State Implementation Plan (SIP) was inadequate based on a finding that 401 KAR 50:055 Section 1(1) impermissibly allowed excess emissions during startup and shutdown events to be excused. In November 2016, Kentucky submitted a SIP revision to remove Section 1(1) and (4) of the regulation from the SIP, although the provisions remain effective as a matter of state law. Due to concerns about how startup and shutdown events for boilers would be handled, the regulated community sought addition of work practice standards for startup and shutdown to the indirect heat exchanger regulations.

For sources that are subject to 40 CFR 63 Subpart DDDDD, UUUUU or JJJJJJ, the startup and shutdown definitions in the applicable subpart are controlling. Units that are subject to these NESHAP regulations will satisfy their obligations under 401 KAR 59:015 and 61:015 if they comply with the work practices specified in the applicable standard.

Sources that are not subject to one of the referenced NESHAP are expected to comply with certain general requirements during startup and shutdown. The source must comply with the provisions of Section 2(5) of 401 KAR 50:055 which establishes a general obligation to maintain and operate affected facilities and associated air pollution control equipment consistent with good air pollution control practice for minimum emissions. The source must also minimize the frequency and duration of startups and shutdowns and must take all reasonable steps to minimize the impact of emissions during startup and shutdown on ambient air quality. The source must document the actions it is taking including noting the length of startup and shutdown, through signed, contemporaneous logs or other relevant evidence. In addition, startups and shutdowns must be conducted according to either the manufacturer's recommended procedures or recommended procedures for a similar unit for which manufacturer's recommended procedures are available, as approved by the Cabinet based on documentation provided. This provision was included in recognition that some facilities may no longer have available the manufacturer's recommended procedures for their units and as long as the procedures for a similar unit are used and the Cabinet has an opportunity to review and approve those, compliance with those work practices should be deemed sufficient.

Also for sources that are not subject to one of the above-listed NESHAP, the Kentucky regulations were revised to contain a definition of startup and a definition of shutdown. Startup is defined as the period beginning with either (a) combustion of fuel for the purpose of supplying useful thermal energy for heating, cooling, process purposes or to generate electricity, or (b) combustion of fuel for any purpose after a shutdown. The regulation specifies that startup ends after the longest manufacturer-recommended time required to engage all control devices applicable to the pollutant, not to exceed

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Kentucky Revises Requirements for New and Existing Heat Exchangers

(cont. from p8)

four hours after any of the useful thermal energy from the affected facility is supplied for any purpose. In response to a comment that the imposition of the four hour time limit on startup was inappropriate and should be deleted, the Cabinet stated the general definition only applied to a subset of area sources which are not covered by the 40 CFR Part 63 regulations. The Cabinet when on to state: "The startup periods for these area sources are typically shorter in duration than the 4-hour time limit. Therefore, the Cabinet retains the 4-hour limit to be consistent with startup requirements in federal regulations." The Cabinet also declined to revise the startup definition by deleting the phrase "applicable to the pollutant" regarding a control device. The Cabinet's reasoning was that control devices are pollutant specific and therefore the time necessary to fully engage the control device based on manufacturer's specifications will vary.

For sources not subject to one of the above-listed NESHAP, shutdown was also separately defined as beginning when whichever occurs first: (a) the affected facility no longer supplies useful thermal energy for heating, cooling, process purposes or generation of electricity, or (b) fuel is not being combusted in the affected facility. Shutdown ends when both of the following conditions exist: (a) the affected facility no longer supplies useful thermal energy for heating, cooling, process purposes or generation of electricity; and (b) fuel is not being combusted in the affected facility.

The proposed amendments to the regulations were published in the October 1, 2017 Kentucky Administrative Register. In response to comments, the Cabinet made revisions and published the amended regulations in the January 1, 2018 Kentucky Administrative Register. As noted above, the changes became final as a matter of state law on March 9th.

However, they are not yet effective as part of the SIP until EPA approves a revision of the SIP at which time they will become federally enforceable. In response to comment, the Cabinet stated it does not intend to reopen permits based on the changes to 401 KAR 59:015 or 401 KAR 61:015. Instead, the Cabinet expects to incorporate these requirements as applications for revisions and renewals are processed even before EPA approval of the amended regulations into the SIP.

D.C. Circuit Approves Use of CSAPR to Meet Regional Haze

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On March 20, 2018, the D.C. Circuit Court of Appeals issued an opinion upholding the Obama EPA's policy that compliance with the Cross State Air Pollution Rule (CSAPR) satisfies the Best Available Retrofit Technology (BART) requirement for SO_2 and NO_x under the Regional Haze Rule. Under the Regional Haze Rule, states must evaluate different measures that could help achieve "reasonable progress" toward a national goal of eliminating impairment in certain national parks. Further, states must assess and identify BART for a specified set of facilities.

However, the Regional Haze Rule allows states to adopt emissions trading programs or other alternative programs as long as the alternative provides greater reasonable progress towards improving visibility than BART. In June 2012, the Obama EPA issued a final rule finding that the CSAPR trading rule achieves "greater reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas than source-specific" BART. This is not the first time EPA allowed a trading program to satisfy BART. The Bush EPA held that CSAPR's predecessor program, the Clean Air Interstate Rule (CAIR) satisfied BART requirements.

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D.C. Circuit Approves Use of CSAPR to Meet Regional Haze

(cont. from p9)

On September 29, 2017, shortly before oral argument in the case, EPA finalized a rule reaffirming its decision that CSAPR satisfies BART requirements in light of another D.C. Circuit opinion remanding certain CSAPR trading budgets. EPA concluded that "changes to CSAPR's geographic scope resulting from the actions EPA has taken or expects to take in response to the D.C. Circuit's remand do not affect the continued validity of participation in CSAPR as a BART alternative, because the changes in geographic scope would not have adversely affected the results of the air quality modeling analysis upon which the EPA based the 2012 determination."

Both environmental groups and industry challenged EPA's June 2012 rule. While the environmental groups challenged the determination that CSAPR satisfies BART, industry groups challenged the portion of the rule finding that states can no longer rely on CAIR as a BART alternative. The D.C. Circuit panel unanimously upheld the rule against all challenges. However, litigation over CSAPR as a BART alternative continues as environmental groups have challenged EPA's September 2017 rule.

GREENHOUSE GAS EMISSIONS

EPA to Reduce GHG Standards for Mobile Sources

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A notice was filed in the Federal Register announcing the EPA is withdrawing its previous Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation, and that it will initiate notice and comment rulemaking to consider appropriate standards for such vehicles in partnership with the National Highway Traffic Safety Administration. The notice states "the current standards are based on outdated information, and that more recent information suggests that the current standards may be too stringent." The notice relied on comments and information submitted by industry groups such as the Alliance of Automobile Manufacturers and Global Automakers and other individual automakers. However, Global Automakers is reportedly working on a proposal to keep the standards in place while adding flexibility to how automakers can comply with them, including through off-cycle technology and alternative vehicle credits.

AIR TOXICS

MACT "Once In Always In" Withdrawn by EPA

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Consistent with the Trump administration agenda, on January 25, 2018, EPA issued a memorandum withdrawing its 1995 policy that set timeframes before which facilities were required to take an enforceable limit to avoid being considered major for purposes of maximum achievable control technology (MACT) standards to control hazardous air pollutants (HAP) under Clean Air Act (CAA) Section 112.

MACT "Once In Always In" Withdrawn by EPA

(cont. from p10)

The 1995 policy also determined sources considered major on the first compliance date were required to permanently comply with the applicable MACT standard. The current administration has determined the 1995 policy is contrary to the plain meaning of the CAA and therefore had to be withdrawn.

CAA Section 112 defines a major source as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit (PTE) considering controls, in the aggregate, 10 tons per year (tpy) or more of any hazardous air pollutant or 25 tpy or more of any combination of hazardous air pollutants." 42 U.S.C. Section 7412(a)(1). Area source is defined as "any stationary source of hazardous air pollutants that is not a major source." 42 U.S.C. 7412(a)(2). Technical standards are generally more stringent for major sources than for area sources. Major sources of a HAP are also subject to Title V permitting.

The 1995 memorandum acknowledged the CAA does not "directly address a deadline for a source to avoid requirements applicable to major sources through a reduction of potential to emit" but found the EPA interpretation at the time was consistent with the language and structure of the CAA. EPA thus determined an existing source would be allowed to switch to area source status at any time until the first date it was required to comply with an emission limitation or other regulatory requirement in the applicable MACT. Because the CAA requires new sources to be in compliance with a MACT standard on the promulgation date of the standard or upon startup, whichever is later, EPA determined new sources would be required to obtain a federally enforceable limit prior to the promulgation date of the standard or startup, whichever is later.

Once the facility was a major source on the first compliance date, the 1995 policy required it to permanently comply with the MACT standard to assure permanent reductions and not undermine the health and environmental protection provided by the MACT standards. "In many cases, application of MACT will reduce a major emitter's emissions to levels substantially below the major thresholds. Without a once in, always in policy, these facilities could 'backslide' from MACT control levels by obtaining potential-to-emit limits, escaping applicability of the MACT standard, and increasing emissions to the major-source threshold (10/25 tons per year)." EPA believed this "once in always in" (OIAI) policy flowed naturally from the language and structure of the CAA. In contrast the 2018 memorandum notes that two prior regulatory actions, neither finalized, proposed to eliminate the 1995 guidance and noted comments that the OIAI was a disincentive for facilities to identify and undertake HAP emission reduction projects. EPA sees the current action as a meaningful incentive to undertake such projects.

The 2018 EPA analysis finds any reference to compliance dates of a MACT standard "notably absent" from the CAA definitions of "major source" and "area source." EPA believes since the definition of major source includes consideration of controls, the definition indicates a source should be able to change to an area status regardless of the time the controls are added. "Congress placed no temporal limitations on the determination of whether a source emits or has the PTE HAP in sufficient quantity to qualify as a major source. To the extent the OIAI policy imposed such a temporal limitation (i.e., before the "first compliance date"), EPA had no authority to do so under the plain language of the statutes." EPA reads the CAA definitions for major and area sources to be unambiguous and thus the agency is without authority to expand the definitions to include an "artificial" time frame. Thus, EPA now reads the CAA as not requiring a source to take an enforceable limit prior to the first compliance date in order to be determined an area source or that a major MACT standard should continue to apply should a source take an enforceable limit to reduce PTE after the first compliance date.

The 2018 memorandum withdrawing the 1995 policy became effective on February 8, 2018 when it was published in the Federal Register. EPA expects to publish a Federal Register notice to take comment on regulatory language to reflect its reading of the statutory definitions. "EPA has now determined that a major source which takes an enforceable limit on its PTE and takes measures to bring its HAP emissions below the applicable threshold becomes an area source, no matter when the source may choose to take measures to limit its PTE. That source, now having area source status, will not be subject thereafter to those requirements applicable to the source as a major source under CAA section 112, including, in particular, major source MACT standards—so long as the source's PTE remains below the applicable HAP emission thresholds."

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MACT "Once In Always In" Withdrawn by EPA

(cont. from p11)

Environmental groups filed a petition for review of the agency's action with the Court of Appeals for the D. C. Circuit on March 26, 2018. California, through its Air Resources Board and attorney general, also filed a petition for review on April 9, 2018. While facilities can choose to take actions relying on the 2018 interpretation, the litigation outcome or a future change in administration could result in a reversal of or amendment to this rollback. Facilities choosing to reduce their PTE in reliance on the 2018 memorandum should consider working with their state agency to develop adequate monitoring and recordkeeping to fully document their reductions should the federal policy shift once more.

Boiler MACT Remanded to EPA

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The Boiler MACT rulemaking saga continues as a result of the March 16, 2018 D.C. Circuit decision in *Sierra Club v. EPA*. The Sierra Club had challenged revisions to certain requirements in 40 CFR 63 Subpart DDDDD that were promulgated on November 20, 2015. The two issues addressed by the court were: (1) whether the 130 ppm limits on carbon monoxide (CO) as a surrogate for hazardous air pollutants (HAP) were sufficiently supported, and (2) whether the startup and shutdown work practice standards were arbitrary and capricious and contrary to the Clean Air Act. The court remanded the 130 ppm CO limits to EPA for reconsideration but rejected the Sierra Club's challenge to the startup and shutdown work practice standards.

First, with respect to the CO limits, the court had previously agreed that CO was a suitable surrogate for organic HAP. However, the court had not yet addressed the question of whether the 130 ppm CO limits were appropriate. The court noted that regulation by surrogate is an available tool but the agency decision will be evaluated in terms of whether reducing surrogate emissions will "invariably" and "discriminately" reduce the corresponding HAP. In prior litigation over the rule (*United States Sugar Corp. v. EPA*, 830 F.3d 579 (D.C. Cir. 2016)), the court found EPA had sufficiently demonstrated a strong correlation between CO and organic HAP but identified a gap in the record over whether the best performing boilers might be using additional controls that reduce organic HAP emissions beyond that achieved by only regulating CO. In the subsequent rulemaking, the agency evaluated the relationship between CO emissions and emissions of formaldehyde and found that aspects of the data were untrustworthy. However, EPA relied on the same data to justify its conclusion that lower CO limits would not yield further reductions in organic HAP. The court remanded the 130 ppm CO limits to the agency for re-evaluation but did not vacate them.

With respect to the revised startup and shutdown work practice standards that were included in the 2015 amended rule, the court found EPA's decision was adequately supported. The startup definition in the revised rule provided that startup ended four hours after the boiler first supplies useful thermal energy. The court upheld the definition over Sierra Club's objection that the four-hour window for startup was too lax. The court noted that the revised rule established additional requirements, including use of clean fuels during startup and development of written startup and shutdown plans. A faster startup definition, with the incentive of reduced recordkeeping and reporting obligations, was included as an option for boilers that were capable of earlier stabilization. In upholding the revised provisions, the court noted that EPA's authority to resort to a work practice standard does not require it to establish its appropriateness for every single source to which a work practice applies, rather EPA is entitled to look at the class of sources in issue. Additionally, the court found EPA's approach was a reasonable accommodation of legitimate safety concerns in deciding what work practices were achievable. The requirement for written plans that are subject to public inspection and enhanced recordkeeping requirements provide an additional check on the accuracy of boiler operators' assertions about what is possible. The court also rejected Sierra Club's attack on the shutdown provisions of the rule.

In summary, the startup and shutdown work practice standards in the rule have been upheld. EPA must take another look at its support for adopting the 130 ppm CO limits but the existing regulatory limits remain in effect in the interim.

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ENFORCEMENT

DOJ Enforcement Update

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Settlement Payments to Third Parties

As previously reported in the Dinsmore Air Quality Letter, on June 5, 2017 the United States Attorney General signed a memorandum that disallowed settlement payments to third-party organizations that were neither victims nor parties to lawsuits brought by the Department of Justice (DOJ). On January 9, 2018, a memorandum was issued to Environment & Natural Resources Division Assistant Attorneys General and Section Chiefs that clarified the June 5, 2017 memorandum for exceptions to the general policy that may apply to environmental cases. Included in the June 5th memorandum is an exception for payments that directly remedy the harm that is sought to be addressed in the lawsuit "including, for example, harm to the environment." The January 9th memorandum specifies "that third-party payment provisions must incorporate specific requirements to ensure that the payment will directly remedy the harm that is sought to be redressed."

Examples for Clean Air Act enforcement cases included payments which would be used to reduce the same type of harm through the funding of actions at the source where the facility is located or in the area reasonably expected to have been affected by or where remedial action should have been taken to remedy harm from the violations for which mitigation is being sought. For cases involving mobile sources, DOJ specified that the scope of a mitigation project undertaken by third-parties nationwide would require additional care "to ensure that the project directly remedies environmental harm, which should include assurances that the project does not mitigate harm out of proportion with the harm that resulted from the unlawful conduct."

The memorandum specified payments to government entities, while not restricted, must have a clear nexus to the environmental harm that is sought to be remedied. Also, the policy does not apply to administrative enforcement actions not referred to DOJ or that require DOJ consent or agreement. The memorandum also clarified that Supplemental Environmental Projects (SEP) undertaken by a defendant in an enforcement action are not prohibited as long as the SEP conforms to EPA's supplemental environmental projects policy.

Agency Guidance Documents Limited in Civil Enforcement Cases

On January 25, 2018, DOJ issued a memorandum directing DOJ attorneys that they may not use "non-compliance with guidance documents as a basis for proving violations of applicable law" in civil enforcement cases. The memorandum specified that guidance documents may be used for "proper purposes" as "some guidance documents simply explain or paraphrase legal mandates from existing statutes or regulations, and the Department may use evidence that a party read such a guidance document to help prove that the party had the requisite knowledge of the mandate." The memorandum goes on to say that a party's non-compliance with agency guidance documents should not be treated as presumptive or conclusive evidence that the party violated the applicable statute or regulation. The intent of the memorandum is to protect the tenant that guidance documents cannot create requirements where requirements do not exist in the statute or regulation. However, it remains to be seen how DOJ will implement the directive for agencies such as EPA who depend in large part on guidance documents to specify appropriate means for meeting regulatory requirements.

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AIR QUALITY Letter
APRIL 2018

EPA Enforcement Update

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In January and March, 2018, Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA) Susan Bodine issued two interim memoranda for enforcement procedures. The first, issued January 22, 2018, was issued "in order to immediately begin the movement toward a more collaborative partnership between EPA and authorized states." This interim guidance will be updated after EPA and a work group of state representatives develop principles and best practices for state and EPA collaborative efforts. Procedures for periodic joint EPA and state work planning, state primacy in authorized programs and evaluation of the interim procedures are set out in the memorandum.

The interim guidance calls for meetings between EPA regions and each state therein to discuss specific inspections and enforcement actions and specifically states that EPA will generally defer to authorized states for day-to-day implementation of authorized/delegated programs. Exceptions that could warrant EPA involvement, after close communication between the upper management of EPA and the states, include: a need for EPA to fill a gap identified by program audits; emergency situations or situations presenting a significant risk to public health and the environment; significant non-compliance that has not been timely or appropriately addressed by the state; actions requiring specialized EPA equipment and/or expertise; federal and state owned and operated facilities; actions to consistently address widespread non-compliance problems for companies with facilities in multiple states or where cross-boundary impacts affect other states, tribes or nations; program oversight inspections; a state request for assistance in a specific situation; or serious violations that need to be investigated and addressed by EPA's criminal enforcement program.

The interim guidance also specifies that "where the EPA identifies violations at a facility, but the State requests that it take the lead for remedying the violations, the Region should defer to the State except where the EPA believes that some EPA involvement is warranted according to the exceptions listed above." If a state is the lead in an enforcement action the interim guidance requires a clear understanding between EPA and the state of what EPA considers a timely and appropriate response, documentation by the region of the understanding, and a record of decisions and periodic assessment as to how well the collaboration is working. If a state and region do not agree on a particular aspect of the enforcement action, it should be elevated to the assistant administrator level for a decision.

In evaluating the interim guidance and limitations OECA will solicit input from states and EPA will review the interim guidance in fiscal year 2019.

On March 23, 2018, Assistant Administrator Bodine issued interim procedures requiring early notice of cases recommended for referral to the Department of Justice (DOJ) for enforcement action. The stated purpose for early notice is to promote efficient referral to DOJ and to assure timely compliance. The memorandum sets procedures for providing said notice and states that efficient referrals to DOJ is in furtherance of EPA's objective to reduce the amount of time from violation to correction.

Critics have expressed concerns that deference to states for enforcement and review of referrals to DOJ in conjunction with reduced enforcement numbers from 2017 signals a shift by EPA to overall reduce enforcement of environmental statutes and regulations. However, on their face, the interim measures in the two memoranda promise to provide better communication between enforcement agencies and EPA, which should further collaborative enforcement goals.

AIR QUALITY Letter

Readers are invited to provide comments, suggestions or newsworthy materials to the editors of the newsletter listed below. All input is welcome.

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