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Air Quality Letter

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APRIL 2017 ISSUE

SPECIAL ARTICLE

New Administration, New EPA: President Trump – The First 60 Days

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Since taking office on January 20, 2017, President Trump has signaled a new approach to environmental protection under his administration through issuance of Executive Orders, Presidential Memoranda and his initial budget. This article highlights some of those actions.

Infrastructure

President Trump has sent a message about the importance of infrastructure projects under his administration. Executive Order 13766, issued on January 24, 2017, provides for streamlining and expediting environmental reviews and approvals for infrastructure projects, particularly for projects classified as "high priority." Under the Executive Order, high priority projects include those for improving the electric grid and telecommunication systems, as well as repairing and upgrading critical facilities at ports, airports, pipelines, bridges and highways. A governor or the head of any executive department or agency may make a request for an infrastructure project to be classified as high priority. The request is made to the Chairman of the White House Counsel on Environmental Quality (CEQ), who must decide within 30 days whether to grant the request after considering the project's importance to general welfare, value to the nation, environmental benefits and any other relevant factors. The Chairman may also on his own initiative classify a project as a high priority infrastructure project. For a high priority project, the Chairman of the CEQ is to coordinate expedited procedures and deadlines for completion of environmental reviews and approvals with the head of the relevant agency. If the deadlines established are not met, the agency head is required to provide a written explanation of the delay and concrete steps that will be taken to complete reviews and approvals as expeditiously as possible. Consistent with statements in other Executive Orders, the order is to be implemented consistent with applicable law and subject to available appropriations and is not intended to impair or affect authority granted by law to agencies.

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On January 30, 2017, the President issued three related memoranda regarding pipeline projects. One of the Presidential Memoranda addresses construction of the Dakota Access Pipeline (DAPL). The memorandum noted that the DAPL is a substantial multi-billion dollar private investment in energy infrastructure, which is more than 90 percent complete. The 1,100 mile pipeline will carry 500,000 barrels per day of crude oil. The President directs the Army Corps of Engineers, through the Secretary of the Army, to take all actions necessary to review and approve in an expedited manner requests for approvals to construct and operate the DAPL, including easements and rights of way under the Mineral Leasing Act, permits and approvals under Section 404 of the Clean Water Act or under Section 14 of the Rivers and Harbors Act, and any other necessary federal approvals. The memorandum also directs the Corps to consider whether to rescind or modify its December 4, 2016 memorandum addressing the pipeline crossing at Lake Oahe in North Dakota and whether to withdraw the Notice of Intent to Prepare an Environmental Impact Statement. The memorandum further directs the Corps to consider prior reviews and determinations, including the July 2016 Environmental Assessment for the DAPL, as satisfying the requirements of the National Environmental Policy Act, as well as any other legal requirement for executive agency consultation or review. The Corps is also to review and grant, to the extent permitted and warranted, requests for waivers of notice periods related to Army Corps real estate policies and regulations and to issue any approved easements or rights-of-way immediately after notice is provided to Congress under the Mineral Leasing Act.

A second Presidential Memorandum published on January 30, 2017 deals with the Keystone XL Pipeline. In that memorandum the President invited TransCanada Keystone Pipeline to "promptly re-submit its application" to the State Department for a Presidential Permit for Construction/Operation of the Pipeline for importation of petroleum from Canada to the United States. Under Executive Order 11423 (August 16, 1968), as amended, and Executive Order 13337 (April 30, 2004), the Secretary of State receives applications for Presidential Permits for cross-border pipeline projects that serve the national interest. In the January 2017 memorandum, the President directs the Secretary of State to take all actions necessary and appropriate to facilitate expeditious review of an application if submitted by TransCanada, including a final permitting determination within 60 days of submittal of the permit application. The memorandum also directs that to the maximum extent permitted by law, the Final Supplemental EIS issued in January 2014 regarding the pipeline should be considered as satisfying the requirements for NEPA review and any other consultation or review requirement. To the extent permitted by law, any permits or authorizations issued prior to the date of the memorandum are to remain in effect until completion of the project. The memorandum also directs the Army Corps of Engineers and Department of Interior to expedite reviews and requests for authorization, including permitting and rights of way. TransCanada submitted its application and, according to the State Department website, the Presidential Permit was issued on March 24, 2017.

Consistent with President Trump's public statements encouraging retention of manufacturing jobs in the United States, the third of the pipeline memoranda directs the Secretary of Commerce, in consultation with other relevant departments or agencies, to develop a plan for all new pipelines, as well as retrofits, repairs or expansions, inside the United States to use materials and equipment produced in the United States to the maximum extent possible. For purposes of the Presidential Memorandum, "produced in the United States" means, with regard to iron or steel products, all manufacturing processes from the initial melting stage through application of coatings occurred in the United States. Steel or iron materials or products manufactured abroad from semi-finished steel or iron from the United States do not meet the definition of "produced in the United States." Steel or iron material or products manufactured in the United States from semi-finished steel or iron of foreign origin also do not meet the definition of "produced in the United States."

Regulatory Reform

In addition to infrastructure development, President Trump is focused on reducing regulations, streamlining permitting and reducing regulatory burdens. Executive

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Order 13771 (also referred to as the "2 for 1" order), issued January 30, 2017, directs an agency proposing or issuing a new regulation to identify two regulations to be repealed. The Executive Order also addresses regulatory costs. It sets a cap of zero on the total incremental cost of new regulations, including repealed regulations for fiscal year 2017, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (OMB). Beginning with fiscal year 2018, the head of each agency is to identify, for each regulation that increases incremental costs, the offsetting regulations and provide the best approximation of total costs or savings associated with each new regulation or repealed regulation. Each year, the Director of OMB will identify the incremental cost allowance for each agency. The Executive Order does not apply to regulations issued with respect to the military, national security or foreign affairs, regulations related to agency organization, management or personnel, or any other category of regulations exempted by the Director of OMB. However, the Executive Order notes that these restrictions apply unless prohibited by law or the regulations are otherwise required by law. A lawsuit challenging this Executive Order was filed by Public Citizen, Inc., the Natural Resources Defense Council and the Communications Workers of America in the U.S. District Court for the District of Columbia on February 8, 2017. *Public Citizen, Inc., et al. v. Trump, et al.,* Case No. 1:17-cv-00253-GK.

On February 24, 2017, President Trump issued Executive Order 13771, "Enforcing the Regulatory Reform Agenda." This order directs each agency within 60 days to designate a Regulatory Reform Officer (RRO) to oversee implementation of regulatory reform initiatives and policies. The RRO is also to oversee identification of programs and activities that derive from Executive Orders, guidance, policy memoranda or other sources that have been rescinded. Within each agency a Regulatory Reform Task Force is to be established in which the RRO, along with other designated personnel, will participate. Entities staffed by officials from multiple agencies are to form a Joint Regulatory Reform Task Force with representatives from constituent agencies. These Task Forces are to evaluate existing regulations and make recommendations to agency heads regarding repeal, replacement or modification consistent with applicable law. Each Task Force is to seek input from entities affected by the regulations including state, local and tribal governments, businesses, non-governmental organizations and trade associations. The agency head is to prioritize the regulations that the Task Force has identified as outdated, unnecessary or ineffective. Within 90 days of the issuance of the Executive Order, each Task Force is to provide a report to the agency head on the status of improving implementation of regulatory reform initiatives and identifying regulations for repeal, replacement or modification. Certain subject agencies will be required to incorporate these action items into their annual performance plans under the Government Performance and Results Act. The Director of OMB is to provide guidance on implementation of these requirements.

In a related action, on January 24, 2017, the President issued a Presidential Memorandum to the heads of executive departments and agencies addressing streamlining permitting and reducing regulatory burdens on domestic manufacturers. The Secretary of Commerce is to conduct outreach to stakeholders concerning the impact of federal regulations and solicit comments within 60 days concerning actions that would streamline permitting and reduce regulatory burdens. The Secretary of Commerce is to coordinate these activities with the Secretary of Agriculture, Secretary of Energy, the EPA Administrator, the Director of OMB and the Administrator of the Small Business Administration as well as others as appropriate. The Secretary of Commerce is to submit a report to the President within 60 days of the initial work and include a plan to streamline permitting processes and reduce regulatory burdens. Recommendations for changes to policies, practices or procedures to promote more expeditious action are also to be included.

Waters of the U.S.

The new administration has taken specific action with respect to the waters of the United States final rule that was published in the June 29, 2015 Federal Register. Executive Order 13778, which was signed on February 28, 2017, directs EPA and the Army Corps to review the rule as well as all orders, guidelines, rules,

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regulations or policies implementing or enforcing the rule. With respect to litigation over the final rule, the Executive Order also directs the Attorney General to be notified of the pending review of the rule so that the Attorney General may, as appropriate, inform any court of such measures pending completion of further administrative proceedings. The Executive Order directs EPA and the Corps to review the final rule and publish for notice and comment a proposal to rescind or revise it "as appropriate and consistent with law." The Executive Order specifically directs the Administrator and the Corps to consider interpreting the term "navigable waters" in a manner consistent with the opinion of Justice Scalia in *Rapanos v. United States,* 547 U.S. 715 (2006). Newly appointed EPA Administrator Scott Pruitt has announced the agency's intent to review and rescind or revise the rule in a notice that was published in the March 6, 2017 Federal Register.

Clean Power Plan

On March 28, 2017, President Trump issued a much anticipated Executive Order for review of President Obama's Clean Power Plan, related rules and agency actions. Executive Order 13783, among other things, directs EPA to immediately review and, if appropriate, revise, suspend or rescind (a) the emission guidelines for existing electric generating units, (b) the performance standards for new, modified, or reconstructed electric generating units, and (c) the proposed federal plan requirements for greenhouse gas emissions from electric generating units. (Those proposed requirements were withdrawn on April 3, 2017, at 82 Fed. Reg. 16144.) The EPA Administrator was directed to immediately notify the Attorney General of the actions taken so that the Attorney General could, as appropriate, notify the court in pending litigation over the rules to seek a stay or otherwise delay further litigation. The guidance and technical support documents issued by the Interagency Working Group on Social Cost of Greenhouse Gases are withdrawn as no longer representative of governmental policy. All moratoria on coal leasing of Federal land are to be lifted. The June 3, 2016 final rule regarding emissions standards for new, modified and reconstructed sources in the oil and natural gas sector are to be reviewed and, if appropriate, suspended, revised, or rescinded.

Other Regulatory Actions

In addition to these Executive Orders and Presidential Memoranda, the Trump administration has taken steps to delay effective dates and to extend comment periods for rules that were either finalized or proposed by the prior administration shortly before leaving office. The new administration has imposed a regulatory freeze on new regulations being sent for publication. Regulations that have been sent but not yet published are to be withdrawn from the Office of the Federal Register. The effective date of regulations that have been published but not yet effective is to be delayed for 60 days to allow review by the new administration. In some instances the time period has been extended even longer. For example, amendments to the Risk Management Plan Requirements pursuant to Section 112(r) of the Clean Air Act were initially to become effective on March 14, 2017, but the effective date was extended to June 19, 2017. A proceeding for reconsideration of those amendments is being convened by EPA Administrator Pruitt. Additionally, Kentucky (through Governor Bevin), Louisiana, Arizona, Arkansas, Florida, Kansas, Texas, Oklahoma, South Carolina, Wisconsin and West Virginia petitioned EPA to reconsider the rule and defer the effective date to September 2018. EPA is now proposing to extend the effective date to February 19, 2019.

Finally, the new administration has proposed a budget that would result in approximately a 30 percent cut in EPA's budget for the next fiscal year. Despite rumors of its demise, the Office of Enforcement and Compliance Assurance (OECA) has not yet been eliminated but has been the subject of substantial cuts. Elimination of two EPA regional offices is under consideration. If adopted, the budget cuts will undoubtedly result in a reduction in federal regulatory development and a shift of more responsibility to the states, many of which face their own financial challenges.

Conclusion

It is clear that President Trump is intent on changing the approach to regulatory development and implementation of environmental programs at EPA. There will be strong opposition to this regulatory roll-back and battles will continue to be fought in the courts. For the time being, the environmental regulatory landscape is in a state of flux. We will continue to follow these developments in future issues of the *Air Quality Letter.*

AQL

PERMITTING

EPA Updates Air Modeling Guideline

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On January 17, 2017, EPA published a final rule updating its Guideline on Air Quality Models (Guideline) codified at 40 CFR Part 51 Appendix W. The effective date of the final rule was delayed until March 21, 2017 in accordance with an executive order of the President and has been further delayed until May 22, 2017. 82 Fed. Reg. 14324 (March 20, 2017). EPA, states, air quality control agencies and industry use the Guideline when conducting modeling to estimate ambient concentrations of pollutants for purposes of permitting new or modified sources under the New Source Review (NSR) program, including permit actions under the Presentation of Significant Deterioration (PSD) program, as part of State Implementation Plan (SIP) submittals and revisions and conformity or other assessments required by regulation. The Guideline was first incorporated into the PSD program regulations in 1978 and has been periodically updated with the last update in 2005.

Although effective in 2017, reviewing agencies are given one year to integrate changes to EPA's preferred models and revisions to the requirements and recommendations of the Guideline. Transportation conformity changes have to be integrated within three years. In the interim one year period, modeling protocols based on the 2005 Guideline may be approved at the discretion of the reviewing agency. Any refined analyses started before the end of the interim three-year period with a preferred model based on the 2005 Guideline version can be completed after the end of the transition period.

The 2017 Guideline includes enhancements to the EPA preferred model, which continues to be the American Meteorological Society/ EPA Regulatory Model (AERMOD) and incorporation of a tiered approach for the secondary chemical formation of ozone and fine particulate matter (PM2.5) associated with precursor emissions from single sources. Several models have been removed from the Guidelines and EPA changed the preferred status of some models. Included is EPA's final action to codify a screening approach to address long-range transport for assessing NAAQS and PSD increments, removal of the California Puff model (CALPUFF) as a preferred model and confirmation of the recommendation to consider CALPUFF as a screening technique.

One enhancement to AERMOD is the adoption of an option (ADJU*) into the AERMET meteorological processor for AERMOD to address issues with model over prediction of ambient concentrations from some sources during light wind, stable conditions.

In addition to other enhancements to AERMOD, EPA incorporated a program, AERSCREEN, as the recommended screening model for AERMOD, which may be used in applications across all types of terrains and for applications involving building downwash.

Other changes to the Guideline include certification of EPA's practice of consulting and coordinating with EPA's Model Clearinghouse prior to approval of alternate models; updated procedures to clarify the factors to be considered in conducting both a single source and cumulative impact analysis; updated use of meteorological input data for regulatory dispersion modeling; and editorial changes to update and reorganize information in the Guideline.

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LEARN MORE

The 2017 Guideline can be found at https://www.gpo.gov/fdsys/pkg/FR-2017-01-17/pdf/2016-31747.pdf

STATE REGULATIONS

Kentucky Update

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Kentucky Regulatory Amendments Become Effective

As reported in the last issue of the Air Quality Letter, the Division for Air Quality filed amendments to 401 KAR 60:005 and 401 KAR 63:002 to update the existing regulations through July 1, 2016 by incorporating changes to 40 CFR Parts 60 and 63 since the last state regulatory amendments. Also included were amendments to 401 KAR 63:060, which sets out the list of hazardous air pollutants and the hazardous air pollutant source categories. The amendments became effective March 4, 2017.

EPA Delays Action on Maryland Petition Regarding Kentucky Sources

As reported in the last Air Quality Letter, the Kentucky Energy and Environment Cabinet requested EPA deny a Maryland petition pursuant to Section 126(b) of the Clean Air Act requesting EPA abate emissions from 36 coal-fired electric generating units in five states, including Kentucky, that allegedly contribute to Maryland's nonattainment of the 2008 ozone National Ambient Air Quality Standard (NAAQS) of 0.075 ppm. The Maryland petition identified three Kentucky emission sources as purportedly contributing to ozone non-attainment in Maryland and requested more stringent NOX limits be imposed on those sources. On January 3, 2017, EPA extended the deadline for acting on the petition to no later than July 15, 2017. **https://www.gpo.gov/fdsys/pkg/FR-2017-01-03/pdf/2016-31258.pdf**

Proposed Denial of 2013 Petition Requesting EPA Add Kentucky to the Ozone Transport Region

On January 19, 2017, EPA proposed to deny the December 9, 2013 petition filed by the states of Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island and Vermont under the Clean Air Act that requested the states of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, West Virginia and Virginia be added to the Ozone Transport Region. Comments on the proposal were accepted until February 21, 2017. The proposed denial states that the CAA provides other provisions for addressing the interstate transport of ozone besides the petition process and is not based on a technical review of the petition. The Kentucky Energy and Environment Cabinet submitted comments in support of the proposal dated February 21, 2017 and requested that EPA "find that the technical analysis of the section 176A petition is outdated, technically-flawed, and fails to support the petition." Because the petition used modeling information with emission inventories developed on a 2005 base year and emissions from fossil fuel-fired electric generating units, the Cabinet asserted that the petition failed to account for significant emission reductions that have occurred in Kentucky and did not provide a statistical relationship between the emissions from Kentucky and the impacts on ambient air monitors in Maryland. Per the information provided, localized sources, rather than Kentucky sources, are responsible for Maryland's nonattainment status.

EPA Approves Kentucky Redesignation

Effective March 10, 2017, EPA approved several requests regarding the Kentucky portion of the Campbell-Clermont, Kentucky-Ohio 2010 1-hour SO_2 nonattainment area.

> EPA is approving the Commonwealth's RACM determination; the base year emissions inventory for the Kentucky portion of the Area; the Commonwealth's request for a clean data determination; and the Commonwealth's plan for maintaining attainment of the 2010 1-hour SO_2 NAAQS; and is redesignating the Kentucky portion of the Area to attainment for the 2010 1-hour SO_2 NAAQS.

https://www.gpo.gov/fdsys/pkg/FR-2017-03-10/pdf/2017-04781.pdf

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STATE REGULATIONS

Ohio Update

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EPA Proposes $PM_{2.5}$ Attainment Designation for Greater Cincinnati Area

On January 4, 2017, EPA proposed to redesignate the Ohio portion of the Cincinnati-Hamilton, OH-IN-KY, nonattainment area to attainment for the 1997 fine particulate matter ($PM_{2.5}$) annual National Ambient Air Quality Standard (NAAQS). The Ohio portion of the Cincinnati-Hamilton area includes Butler, Clermont, Hamilton and Warren Counties. EPA has determined the Cincinnati-Hamilton area is attaining the annual $PM_{2.5}$ standard and is proposing to redesignate the area to attainment.

On July 14, 2015, the United States Court of Appeals for the Sixth Circuit vacated EPA's redesignation of the Indiana and Ohio portions of the Cincinnati-Hamilton area to attainment of the 1997 $PM_{2.5}$ NAAQS in Sierra Club v. EPA, 793 F.3d 656 (6th Cir. 2015). In that case, the Sixth Circuit held that EPA erred when it designated the Ohio and Indiana portions as in attainment without adequately addressing Reasonably Available Control Measures (RACM) and Reasonably Available Control Technology (RACT). Ohio subsequently provided more information and modeling data to EPA regarding why RACM and RACT were unnecessary. EPA agreed with Ohio's RACM/RACT analysis in its Cincinnati-Hamilton area attainment plan. EPA now proposes to approve an update to the Ohio State Implementation Plan (SIP) for maintaining the 1997 annual $PM_{2.5}$ NAAQS through 2027.

EPA Proposes Removal of Gasoline Vapor Pressure Requirements for Cincinnati and Dayton

EPA has proposed approval of a State Implementation Plan (SIP) revision, submitted by the Ohio EPA on December 19, 2016, to remove gasoline volatility standards in the Cincinnati and Dayton areas. The proposed revision removes the 7.8 psi low Reid Vapor Pressure (RVP) fuel requirements for the Cincinnati and Dayton areas as a component of the Ohio ozone SIP. In 2004, EPA had designated Butler, Clark, Clermont, Clinton, Greene, Miami, Montgomery, Hamilton and Warren counties as nonattainment for the 8-hour ozone standard. If approved, Ohio would revert to the federal 9.0 psi RVP requirement.

While higher RVP gasoline is often necessary in the winter for starting engines in cold weather, in summer, evaporative emissions from gasoline can contribute to increased ground-level ozone levels. At the same time, special low RVP blends of gasoline are more expensive to consumers and no longer have as substantial of an environmental benefit because of generally improved blends of gasoline and improved evaporative emissions control systems in automobiles.

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West Virginia Update

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On March 10, 2017, EPA acknowledged in the Federal Register that last October it delegated its authority to West Virginia to implement and enforce National Emissions Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS) that had been updated since the previously approved delegation. This latest delegation came after last year's rule package included incorporating by reference federal NESHAP and NSPS modifications by EPA now found in 45 CSR 34—"Emission Standards for Hazardous Air Pollutants," and 45 CSR 16—"Standards of Performance for New Stationary Sources." Those revised Rules became effective on July 1, 2016.

As part of its annual rules package, WVDEP asked the legislature to approve the following proposed rules changes affecting state air quality:

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STATE REGULATIONS

West Virginia Update

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45CSR1 – Alternative Emission Limitations During Startup, Shutdown and Maintenance (SSM) Operations: This proposed rule sets forth the criteria for establishing an alternative emission limitation during SSM periods. The rule was developed in response to EPA's June 2015 State Implementation Plan (SIP) call informing 36 states, including West Virginia, that certain SIP provisions are substantially inadequate to meet federal Clean Air Act (CAA) requirements concerning periods of startup, shutdown or malfunction. It authorizes the state to establish an alternative emission limitation as a practically enforceable permit. A numerical limitation, a technological control requirement or a work practice requirement would apply during periods of SSM as a component of the continuous allowable emission limitation.

45CSR8 -- Ambient Air Quality Standards: This proposed rule establishes and adopts ambient air quality standards for sulfur oxides, particulate matter, carbon monoxide, ozone, nitrogen dioxide and lead equivalent to the national primary and secondary ambient air quality standards established under Section 109 of the CAA and promulgated by the EPA under 40 CFR Part 50, and 40 CFR Part 53

45CSR13 -- Permits for Construction, Modification, Relocation, and Operation of Stationary Sources of Air Pollutants, Notification Requirements, Administrative Updates, Temporary Permits, Permission to Commence Construction, and Procedures for Evaluation: This proposed rule sets forth (1) the procedures for stationary source reporting, (2) the criteria (a) for obtaining a permit to construct and operate a new stationary source, which is not a major stationary source, (b) to modify a non-major stationary source, to make modifications, which are not major modifications to an existing major stationary source, and (c) to relocate non-major stationary sources within West Virginia, and (3) to set forth procedures to allow facilities to commence construction in advance of permit issuance.

45CSR14 -- Permits for Construction of and Major Modifications of Major Stationary Sources for the Prevention of Significant Deterioration of Air Quality: This proposed rule establishes pre-construction permit emission limitations and such other measures as may be necessary for the prevention of significant deterioration of air quality and adopts a preconstruction permit program in accordance with the policy of Section 101(b)(1) of the Clean Air Act (CAA), the purposes of Section 160 of the CAA, and the Prevention of Significant Deterioration of air quality requirements of 40 CFR 51.166.

45CSR16 -- Standards of Performance for New Stationary Sources: This proposed rule establishes and adopts standards of performance for new stationary sources promulgated by the EPA pursuant to section 111(b) of the CAA. It codifies general procedures and criteria to implement the NSPS set forth in 40 CFR Part 60 except for Subparts B, C, Ca, Cb, Cc, Cd, Ce, Ea, Eb, Ec, WWW, AAAA, BBBB, CCCC, DDDD, EEEE, FFFF, LLLL and MMMM. It also specifically excludes the 2015 amendments to subpart AAA and Subpart QQQQ relating to wood-burning heaters and appliances.

45CSR25 -- Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities: This proposed rule establishes and adopts a program of regulation over air emissions and emission standards for the treatment, storage and disposal of hazardous waste promulgated by EPA pursuant to the Resource Conservation and Recovery Act (RCRA), as amended by codifying general procedures and criteria to implement emission standards set forth in the 40 CFR Parts 260, 261, 262, 264, 265, 266, 270 and 279 as listed in Table 25-A.

45CSR34 -- Emission Standards for Hazardous Air Pollutants (HAP): This proposed rule establishes and adopts a program of national emission standards for HAPs and other regulatory requirements promulgated by EPA pursuant to 40 CFR Parts 61, 63 and section 112 of the CAA, as amended. It codifies general procedures and criteria to implement emission standards for stationary sources that emit (or have the potential to emit) one or more of the eight substances listed as HAPs in 40 CFR 61.01(a), or Section 112(b) of the CAA with the exception of the following subparts: (1) E of 40 CFR Part 63 and any provision related to Section 112(r) of the CAA, (2) DDDDDD, LLLLLL, OOOOOO, PPPPPP, QQQQQQ, TTTTTT, WWWWW, ZZZZZ, HHHHHH, BBBBBB, CCCCCC, WWWWWW, XXXXXX, YYYYYY, ZZZZZZ, AAAAAAA, BBBBBBB, CCCCCCC, and DDDDDDD of 40 CFR Part 63; and (3) B, H, I, K, Q, R, T, and W; Methods 111, 114, 115 and Appendix D and E of 40 CFR Part 61.

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NAAQS

Risk and Exposure Assessment Planning Document for SO_2 NAAQS Released

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On February 22, 2017, EPA released a Risk and Exposure Assessment (REA) planning document as part of its review process of the existing one-hour Sulfur Dioxide (SO_2) National Ambient Air Quality Standard (NAAQS) to determine whether to retain, weaken or tighten the existing SO_2 NAAQS. The document demonstrates that EPA is again going to place heavy emphasis on the short-term public health impacts of exposure to SO_2 air emissions. EPA placed a similar emphasis on the short-term public health impacts of SO_2 in 2009 when it last reviewed the SO_2 NAAQS. This focus on the short-term in 2009 resulted in EPA tightening the standard to 75 parts per billion using a one-hour averaging time to control for short-term exposure that EPA found impacted human health.

The new REA planning document attempts to bolster the emphasis on the short-term with better emissions data and modeling techniques improved as a result of the 2009 review and tightened SO_2 NAAQS. The short-term standard required the creation of a new monitoring network and new monitoring techniques. In particular, EPA required monitoring agencies submit five-minute SO_2 measurements. The approach for the new REA "will be based on linking the health effects information to population exposure estimates that draw on this improved understanding of 5-minute concentrations of SO_2 in the ambient air." EPA hopes this improved data will help reduce scientific uncertainties that were inherent in the earlier SO_2 review.

In addition to the planning REA, EPA issued two drafts of its Integrated Science Assessment (ISA) for its review of the SO_2 NAAQS. The second draft ISA weakened several findings of adverse human health effects from the original draft based on concerns from science advisers. In the original draft, EPA classified the relationship between short-term SO_2 exposure and certain health effects as "suggestive." The health effects at issue were short-term cardiovascular effects, reproductive and developmental effects, total mortality from long-term exposure, and cancer from long-term exposure. Members of the Clean Air Scientific Advisory Committee, which counsels EPA on how to set NAAQS, expressed concern this classification resulted in an overstatement of health effects. The second ISA draft now classifies the relationship between short-term SO_2 exposure and these health effects as "inadequate," potentially undermining the case for any strengthening of the NAAQS.

It is unclear when EPA will issue the revised NAAQS. Under the NAAQS's five-year review cycle, EPA should have issued a new SO2 NAAQS in 2015, but it is several years behind schedule. While EPA did not provide a timeline for when the REA will be completed, the information gained in the REA will eventually help influence whether EPA will seek to change the SO_2 NAAQS in the future.

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GREENHOUSE GAS EMISSIONS

Clean Power Plan Litigation Update

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The future of the Clean Power Plan is still in question as the D.C. Circuit Court of Appeals has not yet issued its opinion in the case and the Trump administration is debating how to move forward. The U.S. Supreme Court stayed implementation of the Clean Power Plan pending judicial review on February 9, 2016. The D.C. Circuit Court of Appeals, sitting en banc, heard oral arguments in the case on September 27, 2016.

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GREENHOUSE GAS EMISSIONS

Clean Power Plan Litigation Update

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The D.C. Circuit could issue its decision on the existing rule at any time and has not provided any estimated date of when it will rule. Four power sector groups challenging the Obama EPA's denials of their administrative petitions regarding the Clean Power Plan recently asked the D.C. Circuit to move their pending challenges into the already-argued litigation, raising the potential that the decision could be further delayed. However, environmental groups are fighting this request. Regardless of the D.C. Circuit's decision, a petition for review to the Supreme Court will likely occur.

President Trump's March 28, 2017 Executive Order directs EPA to review the Clean Power Plan and suspend, revise or rescind the rule as appropriate and consistent with law. EPA filed a motion asking the D.C. Circuit to hold the Clean Power Plan case in abeyance while it conducted its review pursuant to the Order. Environmental groups are expected to oppose this motion.

Other agency actions suggest EPA will likely assert it has authority to quickly change regulations related to the Clean Power plan. In a March 6 Federal Register notice regarding the Obama Clean Water Rule, EPA stated that Supreme Court precedent supports giving EPA the freedom to quickly revise and that agencies have inherent authority to change past decisions so long as the change is permitted by law and supported by a reasoned explanation, even without a change in facts or circumstances. Citing a 2012 decision from the United States Court of Appeals for the D.C. Circuit, EPA stated that a "change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." EPA may choose to rely on this same precedent to quickly revise or revoke the Clean Power Plan.

Given the unknown future of the Clean Power Plan, both supporters and opponents of the rule have begun to prepare for future action. For example, in December 2016, EPA withdrew its draft final model trading rules for the Clean Power Plan from interagency review and publicly released the model and related guidance documents so states would have the information in developing their own climate initiatives. A group of Republican officials has launched an effort to build support for a carbon tax plan that could potentially revoke EPA's authority to regulate greenhouse gases. As these examples demonstrate, the futures of the Clean Power Plan and, more generally, the regulation of greenhouse gases, are deeply in flux.

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EPA Withdraws ICR for Existing Oil and Gas Operations

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On March 2, 2017, EPA announced it was withdrawing its Information Collection Request (ICR), sent to more than 15,000 owners and operators in the natural gas industry, seeking information on equipment and emissions at existing oil and gas operations. Formal notice of the withdrawal announcement was published in the Federal Register on March 7. See 82 FR 12,817. The withdrawal of the ICR was effective upon its announcement and those who received the ICR do not need to respond to it.

The final ICR was issued on November 16, 2016. According to EPA, the purpose of the ICR was to obtain information to help inform the agency's "next step" in regulating emissions of methane from the oil and gas industry sector from existing operations. At the time the ICR was issued, EPA had already finalized a series of regulations aimed at methane emissions from new oil and gas operations, and those regulations remain under challenge in a series of cases filed by industry and impacted states.

The ICR, which was revised on two occasions in response to public comment, imposed substantial reporting obligations on the oil and gas sector and was viewed by industry and many oil and gas producing states as unduly burdensome. On March 1, 2017, the attorneys general of nine states, along with the governors of Mississippi and Kentucky, wrote to new EPA Administrator Scott Pruitt, urging him to withdraw the ICR. In the letter, the states called the ICR "unnecessary and onerous" and stated that the industry's costs of responding to the ICR, which EPA estimated at approximately $42 million, would far exceed its benefits. EPA cited this letter and the concerns it raised in the agency's announcement of the withdrawal of the ICR, stating that it "takes these concerns seriously and is committed to strengthening its partnership with the states."

AQL

AIR TOXICS

RMP Update

EPA's Risk Management Rules Are Finalized and Reconsideration Process Begin

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On January 13, 2017, EPA published a final rule amending its Risk Management Program (RMP) in response to an Executive Order from former President Obama ordering enhanced safety procedures in the wake of the West Texas fertilizer fire in 2013. As discussed in the May 2016 issue of the Air Quality Letter, EPA's proposed rule added numerous requirements for certain facilities, including root cause analyses after incidents or "near misses"; independent third party audits; safer technology and alternatives analysis; significantly enhanced coordination with first responders (including field and tabletop exercises); and making publically available a host of information, including regulated substance information and emergency response program information. EPA proposed that the public information be in an "easily accessible" format such as a website.

EPA received criticism on the proposed rule from industry, especially regarding the requirements for public access to information that could be used by persons inclined to cause a catastrophic release to select a target and exploit emergency response plans for any perceived vulnerabilities. Security issues raised by the proposed rule were of major concern during the public comment period. Also of concern was the requirement for totally independent public audits, whether the proposed requirement for a safer technology and alternatives analysis for some facilities provided any practical benefit and whether the proposed requirement for field and tabletop exercised would provide significant benefit.

In the final rule, EPA attempted to address security concerns by removing the requirement to post hazard information on websites and instead requiring facilities to make information available on request regarding the names of regulated substances in the operating process, safety data sheets, a summary of the emergency response program, a list of coordination exercises scheduled with emergency responders, and local emergency responder contact information. The final rule also required a facility to provide a local emergency planning committee (LEPC) with any information related to emergency planning the LEPC deems relevant and requests. Further revisions in response to comments included removal of the certification requirement for auditors and allowing other participants to be involved in the audit process.

EPA's changes to the final rule did not satisfy criticism and various actions have been taken in response since publication. On February 1, 2017, a joint resolution under the Congressional Review Act (CRA) was filed in the House of Representatives that would disapprove the rule. A joint resolution for the same purpose was introduced in the Senate on March 2, 2017. However, competing priorities could overtake the CRA resolution to stop this rule.

On February 28, 2017, a coalition of industry groups consisting of the American Chemistry Council, the American Forest and Paper Association, the American Fuel and Petrochemical Manufacturers, the American Petroleum Institute, the United States Chamber of Commerce, the National Association of Manufacturers and the Utility Air Regulatory Group petitioned EPA Administrator Scott Pruitt for review of the rule. The petition requests the rule be reviewed and rescinded and the effective date be stayed. Along with other final rule provisions, the petition identifies the LEPC disclosure requirements as a new provision that should have gone through additional public notice and comment as it poses a security threat. The petition also asserts that the finding that the West Texas incident was an intentional criminal act of arson, released two days prior to the end of the public comment period, made it impractical for commenters to fully consider the impact of the finding or how the proposed rule may change based on the finding (e.g., more focus on enhanced security measures for facilities).

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AIR TOXICS

RMP Update

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By letter dated March 13, 2017, Administrator Pruitt responded that one or more objectives in the petition arose after the public comment period or were impracticable to raise during the public comment period, are central to the rule and thus a proceeding for reconsideration is being convened. The letter also found the cause of the West Texas incident is of central relevance to the rule. Further, on March 16, 2017, EPA published notice of the reconsideration and administrative stay of the effective date of the rule until June 19, 2017. 82 Fed. Reg. 13968 (March 16, 2017). Having considered the issues raised in the coalition petition, EPA stated that reconsideration is appropriate and the agency will provide the petitioners and the public opportunity to comment on the issues in the petition meeting the requirements for reconsideration "as well as any other matter we believe will benefit from further comment."

Finally, on March 14, 2017 a group of 11 states, including Kentucky and West Virginia, also petitioned for reconsideration of the rule. In addition, the states requested the stay be extended for 15 months to "prevent needless expenditures by states and localities in order to meet their obligations under provisions of the rule that are potentially subject to change." The states assert the final rule will burden emergency responders as well as state and local governments without commensurate benefit and requires disclosures of facility information that is a security threat when the states believe existing regulations are adequate to prevent accidental releases. On April 3, 2017, EPA proposed to delay the effective date of the final rule to February 19, 2019 to allow EPA to review the petitions and address comments. EPA will accept comments on the proposed extension through May 19, 2017. **https://www.gpo.gov/fdsys/pkg/FR-2017-04-03/pdf/2017-06526.pdf**

We will continue to monitor and report on the final rule during the reconsideration process.

AQL

EPA Withdraws ICR for Existing Oil and Gas Operations

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Uncertainty regarding boiler Maximum Available Control Technology (MACT) rules persists after a series of rulings from the Court of Appeals for the District of Columbia. On July 29, 2016, the D.C. Circuit issued an opinion vacating the emissions standards for certain subcategories under the major source rules for industrial, commercial and institutional boilers. **(https://www.cadc.uscourts.gov/internet/opinions.sf/01A29CE03015718085257FFF0054E-FA9/$file/11-1108-1627694.pdf)**

The D.C. Circuit's opinion vacated the boiler MACT standards "that would have been affected had the EPA considered all sources included in the subcategories." EPA subsequently objected to vacature, as it would make the impacted MACT rules unenforceable. EPA then petitioned the D.C. Circuit to reinstate the MACT rules and remand them to EPA for revision.

On December 23, 2016, the D.C. Circuit agreed with EPA, reinstated the boiler MACT rules, and remanded the rules to EPA for revision consistent with its earlier opinion. The D.C. Circuit concluded that "[v]acating the standards at issue here would unnecessarily remove many limitations on emissions of hazardous air pollutants from boilers and allow greater emissions of those pollutants until EPA completes another rulemaking and implements replacement standards." **(https://www.cadc.uscourts.gov/internet/opinions.nsf/B075443F3591D83D852580920056C5D7/$file/11-1108-1652742.pdf).** The remand of the boiler MACT rules gives the Trump administration the opportunity to draft standards more favorable to industry, leaving the rules in effect while EPA decides how to proceed. At the same time, environmental groups continue to pursue litigation against EPA seeking to force the agency to make its restrictions on boiler CO emissions more stringent.

AQL

AIR TOXICS

EPA Proposes National Emission Standards For Hazardous Air Pollutants For Publicly Owned Treatment Works

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On December 27, 2016, EPA proposed amendments to its National Emission Standards for Hazardous Air Pollutants (NESHAP) for Publicly Owned Treatment Works (POTW) to comply with the residual risk and technology review provisions of the Clean Air Act. EPA initially promulgated a NESHAP for the POTW source category on October 26, 1999 and amended it on October 21, 2002. While EPA does not find any unacceptable residual risk from hazardous air pollutant (HAP) emissions associated with POTWs in its newly proposed rule, EPA is proposing certain amendments to the applicability provisions of the NESHAP, as well as the underlying standards. The public comment period on the proposed rule was extended until March 29, 2017.

The POTW NESHAP applies to owners and operators of a POTW (primarily municipalities) that is either a major source of HAP emissions or accepts waste streams from an industrial facility subject to another NESHAP. Additionally, to be subject to the NESHAP, such POTWs must also develop and implement a pretreatment program as defined by 40 CFR 403.8. EPA estimates that currently only six POTWs are subject to the 2002 NESHAP out of approximately 16,000 POTWs in the United States. The primary reason is domestic wastewater generally does not contain significant concentrations of HAPs. But EPA notes in the preamble that it is concerned some POTWs may not be accounting for HAP emissions from collection systems that are required to be considered under the existing rule, in addition to HAP emissions from treatment plants, in determining whether HAPs exceed the major source threshold. That would include HAPs from pump stations, manholes and vents on collection systems emitted to the atmosphere.

As a result, EPA is proposing clarifications to the applicability criteria for the POTW NESHAP. Specifically, EPA is proposing to clarify that regulated POTWs include those having a design capacity to treat at least five million gallons of wastewater per day and receive wastewater from an industrial or commercial facility, and are either: (1) are a major source of HAPs emissions from the POTW and collection system as a whole (i.e., a Group 2 POTW); or (2) receive a wastewater stream regulated by another NESHAP from an industrial/commercial facility (i.e., Group 1 POTW). Even with these clarifications and revisions, it is not expected that the proposal would significantly increase the universe of POTWs subject to the NESHAP.

As noted above, no amendments are proposed to further reduce HAPs based upon residual risk. However, EPA is proposing the addition of several other control standards to the NESHAP. First, EPA is adding a requirement that all POTWs subject to the standard implement pretreatment programs for industrial/commercial dischargers as defined by 40 CFR 403.8. EPA is also requesting comment on requiring POTWs to develop pretreatment requirements specifically designed to reduce HAP emissions from the POTW by establishing local limits for volatile organic HAP. For Group 1 POTWs, EPA is proposing to amend the NESHAP to require existing POTWs to meet the requirements of the existing Group 2 POTW NESHAP and any other applicable NESHAP for the industrial waste streams that make it a Group 1 POTW. For Group 2 POTWs, which are independently major sources of HAP, EPA is proposing existing POTWs must operate with an annual rolling average HAP fraction emitted from primary treatment units of 0.08 or less. (Fraction emitted means the fraction of the mass of HAP entering the POTW wastewater treatment plant which is emitted prior to secondary treatment.) EPA is also taking comment on alternatives to the 0.08 HAP fraction standard for existing POTWs, such as installing covers on primary clarifiers and treatment units. Finally, EPA proposed other changes to the NESHAP regarding startup-shutdown-malfunction plans, performance testing and annual reporting.

AQL

OTHER NEWS OF INTEREST

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2/15/2017 • 82 FR 10,711

Notice of Data Availability

EPA has completed its final calculations for the second round of new unit set-aside allowance allocations (NUSA) for the 2016 compliance year for the Cross-State Air Pollution Rule (CSAPR) NOx, Annual, SO_2 Group 1, and SO_2 Group 2 Trading Programs. EPA has posted spreadsheets showing these allocations, as well as the allocations to existing units of the remaining CSAPR NOx Annual, SO_2 Group 1, and SO_2 Group 2 allowances not allocated to new units in either round of the 2017 NUSA allocation process. EPA recorded the allocated CSAPR NOx Annual, SO_2 Group 1, and SO_2 Group 2 allowances in sources' Allowance Management System accounts by February 15, 2017. The spreadsheets are available here: **https://www.epa.gov/csapr/csapr-compliance-year-2016-nusa-nodas.**

AQL

2/9/2017

D.C. Circuit Court Decision

On February 9, 2017, the U.S. Court of Appeals for the District of Columbia issued a per curiam order denying requests from states and utilities opposed to EPA's power plant air toxics rules to delay briefing in two cases, *ARIPPA v. EPA and Murray Energy v. EPA,* over the regulation. *ARIPPA v. EPA* involves challenges to EPA's rejection of petitions for reconsideration of some provisions of the rule. Murray *Energy* contests the agency's review of costs for the rule as part of its updated finding that the rule was "appropriate and necessary" under the Clean Air Act. The court rejected the argument that the delay was necessary because the Trump administration could potentially rescind the rule.

AQL

3/13/2017

D.C. District Court Decision

On March 13, 2017, Judge Tanya Chutkan of the U.S. District Court for the District of Columbia ordered EPA to complete reviews of existing air toxics rules for 20 industrial sectors within three years and determine whether to revise them. The environmental groups who brought the suit wanted an order compelling EPA to complete these reviews within two years while EPA wanted five years to complete the reviews. The 1990 Amendments to the Clean Air Act directed EPA to initially set technology based standards (MACT) for HAP source categories. Under the Act, EPA has eight years after the issuance of the initial MACT standard to conduct the review. EPA has fallen behind this eight-year schedule in several industrial sectors. The 20 industrial sectors affected are: Solvent Extraction for Vegetable Oil; Boat Manufacturing; Surface Coating of Metal Coil; Cellulose Products Manufacturing; Ethylene Production; Paper and Other Web Coating; Municipal Solid Waste Landfills; Hydrochloric Acid Production; Reinforced Plastic Composites Production; Asphalt Processing & Roofing Manufacturing; Integrated Iron & Steel Manufacturing; Engine Test Cells/Stands; Site Remediation; Miscellaneous Organic Chemical Manufacturing; Surface Coating of Metal Cans; Surface Coating of Miscellaneous Metal Parts and Products; Organic Liquids Distribution; Stationary Combustion Turbines; Surface Coating of Plastic Parts and Products; and Surface Coating of Automobiles & Light Duty Trucks.

AQL

OTHER NEWS OF INTEREST

(Continued from page 14)

3/15/2017 • 82 FR 10,711

EPA Notice

EPA released a formal notice announcing its intent to issue a new determination on whether to retain or change its greenhouse gas standards for light-duty vehicles. Prior to President Trump taking office, the Obama EPA decided in January 2017 to retain its light-duty greenhouse gas standards for model years 2022-2025. In the notice, EPA justified its decision by arguing that the Obama EPA did not consult with the National Highway Traffic Safety Administration (NHTSA) in making its decision. EPA intends to make a determination on the appropriateness of the model year 2022-2025 greenhouse gas standards no later than April 1, 2018.

AQL

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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