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Air Quality Letter

DINSMORE & SHOHL LLP • LEGAL COUNSEL • DINSMORE.COM/ENVIRONMENTAL

October 2016 Issue

PERMITTING

Kentucky Startup Shutdown Malfunction Update

Carolyn M. Brown • (859) 425-1092 • carolyn.brown@dinsmore.com

As previously reported in the Dinsmore Air Quality Letter in June of last year, the Environmental Protection Agency (EPA) found that the State Implementation Plans (SIPs) of 36 states were substantially inadequate due to their regulatory treatment of excess emissions associated with startups, shutdowns and malfunctions at regulated facilities. The agency issued a SIP Call to each of those states to correct the deficiencies. For Kentucky, the SIP Call was directed at §1 of 401 KAR 50:055. More than a year later, the deadline of November 22, 2016 for Kentucky, and the other states to respond, is rapidly approaching.

Kentucky has reportedly been evaluating a number of different options, including amendment of 401 KAR 50:055 to remove the provisions EPA found objectionable, amendment of the regulation to provide for enforcement discretion, removal of the regulation for the SIP while keeping it in effect as a matter of state law, or revision of the regulation to establish work practice standards that would apply during startup and shutdown in lieu of numeric emission limits. The Division ultimately proposed to respond to the SIP Call by removing §1 (1) and (4) from the SIP without any amendments of 401 KAR 50:055 itself. Thus, the regulation would remain in effect in its entirety as a matter of state law. A public hearing on the Division's proposal was held on September 14, 2016.

Other states in Region 4 have been dealing with these issues as well, and EPA has provided preliminary feedback on options being explored by some of the states. Both Georgia and North Carolina were proposing revised regulations that provided for establishment of work practice standards that would apply during startup and shutdown events, instead of numeric emission limits. Reports of preliminary federal feedback are that establishment of alternative emissions limitations for periods of startup and shutdown would require a source category specific analysis of the

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need for the alternative, its stringency and enforceability and that any alternative limits would need to be included in a source-specific SIP provision. In other words, even if the standards were included in a federally enforceable permit issued pursuant the state permitting program that is part of the SIP, the alternate limits would have to be separately approved into the SIP.

Meanwhile, briefing in the D.C. Circuit litigation challenging EPA's final decision to issue the SIP Call proceeds. Seventeen states, including Kentucky, filed suit. That suit, along with others filed by industry and trade associations, has been consolidated with the lead case being *Walter Coke, Inc. v. U.S. EPA*, Case No. 15-1166. As previously reported, the briefing will not be completed until October 19, 2016 based on the schedule established by the court, so a final ruling will not occur before the November 22 deadline for the states' response to the SIP Call.

AQL

Ohio Begins Startup, Shutdown or Malfunction Rulemaking

Michael J. Gray • (513) 977-8361 • michael.gray@dinsmore.com

Ohio EPA has begun the rulemaking process for establishing new startup, shutdown or malfunction (SSM) and scheduled maintenance (SM) rules. The impetus for this rulemaking is the final determination published in the June 12, 2015 *Federal Register* (80 Fed. Reg. 33850) by EPA finding that Ohio's SIP was "substantially inadequate" due to its treatment of SSM events. The purpose of the rulemaking is to address specifically the deficiencies noted in EPA's final determination.

Ohio EPA concluded its early stakeholder outreach regarding the rulemaking on July 28, 2016 and now is making any changes that it concludes necessary to the rule. Ohio EPA will make the draft rule language available for a 30-day public review period upon completion of its work.

As discussed in the last Dinsmore Air Quality Letter, Ohio has filed suit in the United States Court of Appeals for the District of Columbia Circuit challenging EPA's final determination. See *Walter Coke, Inc. v. US EPA*, Case No. 15-1166. The outcome of this litigation could affect the rulemaking process. Final briefs in that case are due on October 19, 2016. We will continue to follow the rulemaking as it progresses.

AQL

EPA to Remove Affirmative Defense Permitting language

Clay Larkin • (859) 425-1095 • clay.larkin@dinsmore.com

EPA has proposed a revision to its Title V operating permit regulations that would eliminate the affirmative defense for emissions occurring during "emergency" events. Published in the *Federal Register* on June 14, 2016, the proposed modification would delete 40 CFR 70.6(g), applicable to state operating permit programs, and 40 CFR 71.6(g), applicable to federal operating permit programs. The 60-day public comment period closed on August 15, 2016.

In the proposal, EPA claims that the removal of the "emergency" affirmative defense is required by a recent decision of the D.C. Circuit Court of Appeals in *NRDC v. EPA*, in which the court struck down the affirmative defense provision for malfunction events contained in the Clean Air Act (CAA) §112 NESHAP for Portland cement facilities. EPA interprets the court's holding in the *NRDC* case to apply broadly to most affirmative defense provisions.

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EPA to Remove Affirmative Defense Permitting language

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The removal of the "emergency" affirmative defense is part of a larger effort by EPA to remove affirmative defenses from regulations across a variety of CAA regulatory programs. As discussed by EPA in the preamble to this proposal, in June 2015 the agency issued a "SSM SIP Call," which found 36 state Title V regulatory programs deficient because they contained affirmative defenses for emissions occurring during periods of startup, shutdown or malfunction. EPA has consistently either removed or omitted affirmative defenses from the NSPS and NESHAP standards it has promulgated since 2014.

EPA anticipates that many states will be required to amend their Title V permitting regulations to conform with the proposed removal of the emergency affirmative defense from the federal Title V permitting regulations. EPA has compiled a "tentative" list of affirmative defense provisions in state permitting regulations that may require revision and placed this list in the rulemaking docket related to the proposal (EPA-HQ-OAR-2016-0186). EPA anticipates that states will need 12 months after the effective date of the final rule to make conforming changes but is soliciting comment on whether additional time may be required, particularly in states that may require legislation in order to make changes to their Title V permitting programs. With respect to individual permits that contain emergency affirmative defense provisions, EPA's proposal directs states to remove affirmative defense provisions from existing permits at the "first situation in which the permitting authority must act on an individual permit after state program revisions are approved by EPA."

AQL

EPA Promulgates Final Rule for Source Determination for Oil and Gas Operations

Jack C. Bender • (859) 425-1093 • jack.bender@dinsmore.com

In the June 3, 2016 *Federal Register*, EPA published a final rule that will be used to define the scope of a stationary source consisting of oil and gas operations for the purposes of the New Source Review and Title V Operating Permit Programs. Specifically, the final rule will define the term "adjacent," which is used to determine the scope of an oil and gas operation stationary source.

The determination of what constitutes a stationary source for New Source Review and Title V Operating Permit Programs requires all activities to belong to the same industrial grouping, to be under the control of the same person (or persons under common control), and be located on one or more contiguous or adjacent properties. Under the final rule, EPA is defining the term "adjacent" for the purposes of the oil and gas extraction sector to mean the pollutant emitting activities are located on the same surface site or they are located on surface sites that are within 1/4 mile of one another (measured from the center of each site) and they share equipment. Shared equipment includes, but is not limited to, storage tanks, phase separators or emission control devices. With respect to the concept of "shared equipment," EPA noted it was intended to establish that the two sites have a relationship that meets the common sense notion of a single plant.

While the proposed rule would have defined the term "adjacent" even more broadly and would have included facilities at greater distances that had a functional interrelatedness or operational dependence, the final rule still departs from a common sense notion of when sites are adjacent. Many commenters on the

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EPA Promulgates Final Rule for Source Determination for Oil and Gas Operations

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proposed rule cited the United States Court of Appeals for the Sixth Circuit's decision in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012) for the proposition that a plain English dictionary definition of adjacent should be used to determine whether facilities are part of the same source. In *Summit Petroleum*, the Sixth Circuit found that EPA could not interpret the term "adjacent" to mean all equipment within a specified radius on the basis that EPA's interpretation would "permit the agency, under the guise of interpreting the regulation, to create *de facto* a new regulation."

EPA disagreed with those commenters and explained that EPA retained authority despite the *Summit Petroleum* decision, to define the term "adjacent" by a rulemaking. EPA contends that such a specialized definition can be established by a rulemaking, even if it could not be established through a regulatory interpretation that was inconsistent with the plain meaning of the term.

Regardless of whether EPA can define a term in a rulemaking to vary from the plain meaning of the term, it still needs to ensure the definition is consistent with the CAA. The question that remains is whether the definition of "adjacent" as adopted by EPA is consistent with the concept of a source or plant site as envisioned under the Act. See *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979).

Multiple states, including Kentucky, Ohio and West Virginia, have filed suit in the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) challenging the rule. *West Virginia v. EPA*, Case No. 16-1264.

AQL

STATE REGULATIONS

Kentucky Updates

Sulfur Dioxide Update: EPA Finalizes Round Two Designations

Robin B. Thomerson • (859) 425-1094 • robin.thomerson@dinsmore.com

On July 12, 2016, EPA published the final designations for areas included in the second round of designations for the 2010 one-hour sulfur dioxide (SO_2) national ambient air quality standard (NAAQS). 81 Fed. Reg. 45039 (July 12, 2016). For this NAAQS EPA is designating areas in multiple rounds. The first round was completed in 2013 when EPA designated 29 areas in 16 states as being in nonattainment with the standard. A Consent Decree entered by EPA and environmental groups set a schedule for the remaining second through fourth rounds of designations. The second round was completed with this final action. Two groups of areas were designated: 1) areas with newly monitored violations of the 2010 SO_2 NAASQ and 2) areas with sources not announced for retirement as of March 2, 2015 and that emitted in 2012 either more than 16,000 tons of SO_2 or more than 2600 tons of SO_2 with an annual average emission rate of at least 0.45 lbs SO_2/mmBtu. EPA designated 61 areas in 24 states as either unclassifiable/attainment, unclassifiable or nonattainment. Forty-one areas were designated as unclassifiable/attainment, 16 areas were designated as unclassifiable and four areas were designated as nonattainment. Alton Township, Illinois, Williamson County, Illinois, Anne Arundel and Baltimore Counties Maryland and St. Clair, Michigan were designated as nonattainment.

In Kentucky, Pulaski County and Ohio County were designated as unclassifiable. In Ohio, Gallia County and part of Miegs County were designated as unclassifiable. Clermont County, Ohio, excluding Pierce Township, was designated as unclassifiable attainment. No areas in West Virginia were designated during this round.

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STATE REGULATIONS

Kentucky Updates

Sulfur Dioxide Update: EPA Finalizes Round Two Designations

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By December 31, 2017, EPA is required to complete the third round of designations for any remaining undesignated areas where states did not install and begin operation by January 1, 2017 of a new SO_2 monitoring network according to the specifications in the Data Requirements Rule. The fourth round must be completed by December 31, 2020 and must designate all remaining areas.

AQL

Ohio Updates

Akron Regional Air Management District Petitions EPA for Ultra-Low Standards for Heavy-Duty Trucks

Michael J. Gray • (513) 977-8361 • michael.gray@dinsmore.com

On June 3, 2016, the Akron Regional Air Management District joined 10 other regional air agencies in petitioning EPA to adopt stringent new restrictions on emissions from heavy-duty trucks. The petitioners asked EPA to revise the on-road heavy-duty engine exhaust emissions standards for nitrogen oxide (NO_x) from 0.2 grams per brake horsepower-hour (g/bhp-hr) to 0.02 g/bhp-h. The petitioners claim that such controls are necessary to achieve compliance with the 2015 8-hour NAAQS for ozone and to protect public health, as NO_x is a precursor to ozone.

The petitioners asked EPA to take the following actions:

- Develop a rule for an ultra-low NO_x exhaust emissions standard of 0.02 g/bhp-hr for on-road heavy-duty truck engines by July 2017 and adopt a final rule by December 31, 2017;
- Require ultra-low NO_x truck engines to meet the 0.02 g/bhp-hr standard by January 1, 2022;
- Phase in full implementation of the ultra-low NO_x standard if the standard is not feasible for certain classes of vehicles and establish, if necessary, an intermediate NO_x emissions standard no higher than 0.05 g/bhp-hr. Full implementation of the new ultra-low NO_x standard would occur no later than January 1, 2024; and
- Develop guidelines under the federal Diesel Emissions Reduction Act to provide incentives to truck owners to upgrade from a truck meeting the current 2010 NO_x engine standard to a truck meeting the ultra-low NO_x engine standard. Guidelines would allow for the sale and use of the older truck only in areas in attainment of the federal ozone standard.

The petition in its entirety is available at: **http://www.aqmd.gov/home/library/public-information/2016-news-archives/nox-petition-to-epa**

AQL

West Virginia Updates

West Virginia's Annual Environmental Legislative Rules Bundle Passes in Special Sessions

John S. Gray • (304) 357-9954
john.gray@dinsmore.com

The last issue of the **Dinsmore Air quality Letter** reported that the West Virginia Department of Environmental Protection's (WVDEP) annual rules bundle failed to pass during the regular legislative session due to controversy surrounding enforcement of federal standards reducing air pollution emissions from new wood-burning stoves and furnaces. To maintain regulatory stability, Governor Tomblin, added the environmental rules bundle to the call of a special session. A new rules bundle was introduced without the controversial rule and was quickly passed on June 2, 2016 and signed by the governor on June 8, 2016. The legislation will implement more than a dozen new or amended environmental rules including:

- Repeal of 45 CSR 29 requiring the submission of emission statements for volatile organic compound emissions and oxides;

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STATE REGULATIONS

West Virginia Updates

West Virginia's Annual Environmental Legislative Rules Bundle Passes in Special Sessions

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- Repeal of 45 CSR 39 and 41 relating to the state's Clean Air Interstate Rule (CAIR) for NO_X and SO_2 now replaced by the Cross State Air Pollution Rule (CSAPR);
- Amendment of 45 CSR 40 relating to the control of ozone season nitrogen oxides emissions. This amended rule, effective July 1, 2016, sets forth new Ozone season NO_X emission limitations, monitoring, recordkeeping, reporting, excess emissions, and NO_X budget demonstration requirements in accordance with 40 CFR §51.121. It applies to any owner or operator of a unit that has a maximum design heat input greater than 250 mmBtu/hr, except for any unit subject to the federal Cross-State Air Pollution Rule NO_X Ozone Season Trading Program established under 40 CFR Part 97, Subpart BBBBB, or an equivalent trading program established as a state implementation plan revision pursuant to 40 CFR §52.38(b)(5);
- Amendment of 45 CSR 25 regarding air pollution control of hazardous waste treatment, storage and disposal facilities. The rule adopts new EPA emission standards, procedures and criteria promulgated in 40 CFR Parts 260-262, 264-266, 270 and 279, as listed in Table 25-A of the rule, including associated appendices, reference methods, performance specifications and test methods; and
- Passage of 45 CSR 34 through which WVDEP adopted and incorporated by reference, with specified exceptions, the provisions of 40 CFR Parts 61, 63 and 65. WVDEP will now have the general procedures and criteria to implement emission standards for stationary sources that emit (or have the potential to emit) one or more of the substances listed as hazardous air pollutants in 40 CFR §61.01(a) or §112(b) of the CAA.

AQL

NAAQS

EPA Proposes to Approve KY Infrastructure Requirements

Timothy R. Wiseman • (859) 425-1030 • timothy.wiseman@dinsmore.com

EPA has proposed to approve portions of a Kentucky SIP submission from the Kentucky Division for Air Quality (KDAQ) related to the 2010 one-hour nitrogen dioxide (NO_2) NAAQS. 81 Fed. Reg 41488 (June 27, 2016). The CAA requires each state to adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS, called an "infrastructure" SIP, which is distinct from a SIP intended to address other SIP requirements under the CAA. EPA's proposed approval of the Kentucky infrastructure SIP is based on compliance with the requirements of CAA §110(a)(1) and §110(a)(2). EPA had previously approved several of the infrastructure SIP provisions and will consider Kentucky's provisions related to regulation of minor sources and minor modifications in separate action.

EPA specifically stated that it was not proposing to approve or disapprove any existing provision related to excess emissions during SSM events or address any existing Kentucky rules with regard to director's discretion or variance provisions. Those provisions are being addressed in the SSM SIP calls finalized by EPA on June 12, 2015 and discussed **above**.

The comment period for this proposed rule ended July 27, 2016. The federal website at **www.regulations.gov** indicates no comments were received.

AQL

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NAAQS

EPA Disapproves Elements of SIP submissions from Ohio

Michael J. Gray • (513) 977-8361 • michael.gray@dinsmore.com

EPA has disapproved the interstate transport elements of the SIP for Ohio for the 2008 ozone NAAQS. 81 Fed. Reg. 38957 (June 15, 2016). Previously, on December 27, 2012, Ohio submitted its infrastructure SIP to EPA including portions concerning interstate transport. On October 16, 2014, EPA approved other portions of the SIP but did not act on the interstate transport portions. EPA issued its disapproval of the Ohio SIP, as well as Indiana's, for failing to meet the following "prongs" of CAA §110(a)(2)(D)(i):

- Prong one: The SIP must include provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment of NAAQS in another state;
- Prong two: The SIP must include provisions prohibiting any source or other type of emissions activity in one state from interfering with the maintenance of the NAAQS in another state; and
- Prong three: The SIP must include provisions prohibiting any source or other type of emissions activity in one state from interfering with measures required to protect visibility.

EPA identified that Ohio did not meet the requirements for four reasons. First, EPA stated that the Ohio SIP submission lacked any technical analysis evaluating or demonstrating how emissions in Ohio impact air quality in other states under the 2008 ozone NAAQS. Second, EPA concluded that Ohio's SIP did not demonstrate how state programs and rules provide sufficient controls on emissions to address interstate transport. Third, EPA criticized Ohio EPA's reliance on CAIR, which was designed for the 1997 ozone NAAQS and which the D.C. Circuit recently held to be invalid. See EME Homer City Generation, L.P. v. EPA, 795 F.3d 118, 133 (D.C. Cir. 2015). Finally, EPA noted that it recently released technical data that it claims contradicts Ohio EPA's conclusion that its SIP provides adequate protections to address interstate transport concerns. *See* August 4, Notice of Data Availability, 80 Fed. Reg. 46271.

This disapproval triggers the obligation under CAA §110(c) for EPA to promulgate a federal implementation plan (FIP) within two years of the disapproval if SIP revisions that address the deficiencies have not been approved. We will monitor Ohio's response to this disapproval.

AQL

NAAQS

House Passes Bill to Delay Implementation of 2015 NAAQS

Michael J. Gray • (513) 977-8361 • michael.gray@dinsmore.com

Congress is pressing ahead with a bill to delay implementation of the 2015 ozone NAAQS. The bill, H.R. 4775 introduced by Rep. Pete Olson (R-TX-22), passed the House on June 8, 2016 by a vote of 234 – 177.

The bill extends until October 26, 2024, the deadline for states to submit designations to implement the 2015 ozone NAAQS and extends until October 26, 2025, the deadline for EPA to designate areas as attainment, nonattainment or unclassifiable with respect to the 2015 ozone NAAQS. Under the bill, states would have to submit a SIP by October 26, 2026 to implement, maintain and enforce the 2015 ozone NAAQS.

Additionally, if the EPA Administrator, in consultation with the independent scientific review committee, determines that a range of air quality levels protect public health with an adequate margin of safety, technological feasibility is a permissible secondary consideration. Prior to revising the NAAQS, EPA must also request advice regarding adverse public health, welfare, social, economic or energy impacts that may result from its strategy.

The bill would also require EPA to publish regulations and guidance for implementation of the NAAQS concurrently with the final standard. New or revised NAAQS would not apply to review of preconstruction permit applications for constructing or modifying a major source until EPA has published those regulations and guidance.

The bill extends the deadlines for science-based reviews for all NAAQS from five to 10 years. The bill also requires EPA to submit to Congress a report on the extent to which foreign sources of air pollution impact designations of nonattainment, attainment or unclassifiable. EPA must also conduct a study on the atmospheric formation of ozone. The study must be peer-reviewed, and EPA must incorporate the results of the study into any federal rules and guidance implementing the 2015 ozone standard.

On June 7, 2016, the Obama administration issued a statement indicating that the president would veto H.R. 4775 if he was presented with the bill. The Obama administration had previously come under criticism from environmental groups for not making the standard more stringent in 2015.

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NAAQS

House Passes Bill to Delay Implementation of 2015 NAAQS

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In addition to H.R. 4775, two bills are pending in the Senate that could affect the implementation of the ozone NAAQS. Sen. Shelly Moore Capito (R-WV) introduced S.2882, which would also delay implementation of the 2015 ozone NAAQS similar to H.R. 4775. Utah Sen. Orrin Hatch introduced S.2072, which would direct EPA to implement a program deferring nonattainment designations based on a voluntary early action compact plan allowing communities to enter into voluntary, cooperative agreements with EPA to craft local solutions that improve air quality in compliance with federal standards.

AQL

PERFORMANCE STANDARDS

EPA Rulemaking for the Remainder of 2016

Timothy R. Wiseman • (859) 425-1030 • timothy.wiseman@dinsmore.com

Despite the waning days of the administration, EPA continues to promulgate significant regulations. On August 3, 2016, EPA published changes to the regional consistency rules at 40 CFR 56 that require EPA regulations and policies to be consistently applied nationwide. 81 Fed. Reg. 51102 (August 3, 2016). Pursuant to a finding by the D.C. Circuit, when EPA responded to an adverse federal court of appeals decision in one judicial circuit, it was required to apply the change nationwide. EPA has responded by revising its regulations to allow a "narrow exception" by which adverse decisions only from the U. S. Supreme Court and the United States Court of Appeals for the D.C. Circuit Court that arise from challenges to nationally applicable regulations or final actions will apply uniformly. Adverse decisions from other federal courts of appeals will apply only in the states where the deciding court has jurisdiction. Regional offices will no longer have to request concurrence from EPA headquarters to inconsistently apply EPA national policy if the inconsistent application is required to act in accordance with a federal court decision. The new EPA rule has been challenged in the U. S. Court of Appeals for the D.C. Circuit.

On August 24, 2016, EPA published a final rule setting requirements air agencies must meet to implement the current and future NAAQS for PM2.5, including specific SIP requirements for non-attainment areas. 81 Fed. Reg 58010 (August 24, 2016). On the same day, EPA published proposed revisions to the procedures for filing petitions for objections to Title V permits. According to EPA the proposed revisions would streamline and clarify the submission and review process in five ways: 1) clarify how petitions are to be submitted; 2) describe the expected format and content of petitions; 3) clarify that permitting authorities are required to respond to public comments during the public comment period and provide the comments and response to EPA for its 45-day review period; 4) provide recommended practices for stakeholders to assure EPA has a complete record; and 5) provide information and EPA's interpretation of steps to be taken after an EPA objection is granted. Comments will be taken on the proposed rule until October 24, 2016. 81 Fed. Reg. 57822 (August 24, 2016).

On September 14, 2016, EPA issued a final decision regarding reconsideration of certain aspects of the NESHAP for area sources of industrial, commercial and institutional boilers. The decision includes retention of the subcategory for limited use boilers and technical corrections. Also included is removal of the affirmative defense for malfunction events. 81 Fed. Reg. 63112 (September 14, 2016). On the same day, EPA published notice of the availability of units eligible for allocation of emission allowances for the Cross State Air Pollution Rule (CSAPR). 81 Fed. Reg. 63156 (September 14, 2016).

On October 3, 2016, EPA released a final rule regarding the process states and EPA will use when determining whether to include or exclude air quality monitoring data influenced by an "exceptional event," such as wildfires, in the data set used for regulatory decisions regarding the ozone NAAQS. 81 Fed. Reg. 68216 (October 3, 2016).

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PERFORMANCE STANDARDS

EPA Rulemaking for the Remainder of 2016

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Along with the rule, EPA issued a guidance document entitled Guidance on the Preparation of Exceptional Events "Demonstrations for Wildfire Events that May Influence Ozone Concentrations." The guidance document can be found at **https://www.epa.gov/sites/production/files/2016-09/documents/exceptional_events_guidance_9-16-16_final.pdf.**

EPA has said the new rule could be beneficial to states having difficulty meeting the new 70 ppb NAAQS ozone standard issued in October, 2015 by streamlining the process for determining events that qualify. However, the rule has been criticized as too restrictive to adequately address contributions to background ozone that are outside of regulatory control, especially in western states.

Also on October 3, 2016, EPA published proposed revisions to the PSD and Title V GHG permitting regulations and established a significant emissions rate (SER) for GHG emissions under the PSD program. 81 Fed. Reg 68110 (October 3, 2016). The rule revisions include definition changes, changes to plant-wide applicability limitations and other changes necessary to ensure that neither the PSD or Title V rules would require a source to obtain a permit solely because the source emits or has the potential to emit GHGs above applicable thresholds. These changes are in response to the 2014 U. S. Supreme Court and United States Court of Appeals for the D. C. Circuit rulings vacating provisions of EPA's tailoring rule.

In response to the recognition by the Supreme Court of EPA's authority to set a de minimis levels when requiring BACT requirements in PSD permitting, EPA proposed a GHG SER of 75,000 tpy CO_{2e}. Sources with emissions below this amount would not be required to perform a BACT analysis for GHGs. The public comment period on the proposed rule ends December 2, 2016.

Additional rules are expected through the final months of 2016:

- A final rule to streamline regional haze reduction requirements;
- An update to EPA's "Guideline on Air Quality Models," which was sent to the White House for Office of Management and Budget (OMB) review on September 2, 2016;
- Guidance on Title V program and state permit fees; and
- A rule to allow for public notice requirements to be met with online notices rather than printed newspaper notices.

AQL

PERFORMANCE STANDARDS

EPA Proposes Amendments to the Regional Haze Rule

Jack C. Bender • (859) 425-1093 • jack.bender@dinsmore.com

On April 25, 2016, EPA proposed revisions to its requirements for state plans submitted under the CAA for protection of visibility in mandatory Class I federal areas in order to assure continued steady progress in reducing regional haze in national parks. States are required to submit periodic plans that demonstrate how they will continue to make progress towards achieving their visibility improvement goals. The first state plans covered the 2008 to 2018 planning period. The proposed rule will address the requirements for ensuring reasonable further progress during the second planning period from July 31, 2018 to 2028. The first phase focused on applying best available retrofit technology (BART) to large sources of NO_x, fine PM and SO_2. The proposed rule appeared in the May 4, 2016 Federal Register, and the public comment period ended on August 10, 2016.

With respect to SIP requirements, EPA is proposing to extend the deadline for submittal of the SIPs for the second implementation period from July 31, 2018 to July 31, 2021.

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EPA Proposes Amendments to the Regional Haze Rule

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EPA explains the extension will allow states to consider emission reductions achieved under other federal programs in conducting their regional haze planning, such as the 1-Hour SO2 NAAQS, the 2012 Annual $PM_{2.5}$ NAAQS, and the Clean Power Plan. EPA is also proposing to adjust interim progress report submission deadlines and is removing the requirement for progress reports to take the form of SIP revisions. The proposed rule would require states to consult with Federal Land Managers (FLMs) and obtain public comment on their progress reports before they are submitted to EPA. The proposed rule would also enhance the role of FLMs in the state planning process and clarify that FLMs alone have the power to certify that a source or group of sources is causing impairment at a Class I Area under the reasonably attributable visibility impairment provisions.

EPA is also proposing clarifications to the regulations to reflect its long standing interpretations applied under the 1999 Regional Haze Rule. The proposed rule clarifies that all states, not just states with Class I Areas, are responsible for developing reasonable progress plans for emissions that contribute to impairment in Class I Areas. States would be responsible for assessing reduction and control requirements to respond to a FLM reasonable attributable visibility impairment certification. The proposed rule would also clarify that states must conduct additional analysis to demonstrate that no additional emission reduction measures are reasonable for making further progress where a state is not on track within the 10-year regional haze planning period to attain natural conditions in Class I areas by 2064.

AQL

GREENHOUSE GAS EMISSIONS

Clean Power Plan Update

Carolyn M. Brown • (859) 425-1092 • carolyn.brown@dinsmore.com

The litigation over EPA's Carbon Pollution Emission Guidelines for Existing Electric Generating Units (Carbon ESPS) continues to take surprising turns. As previously reported in the Dinsmore Air Quality Letter, the U.S. Supreme Court stayed implementation of the rules pending judicial review by an Order issued February 9, 2016. Then on May 16, 2016, the D.C. Circuit Court of Appeals entered an Order in *West Virginia v. EPA* directing that oral argument in the consolidated cases would be heard *en banc*. Normally, cases are heard by a three-judge panel and the losing party may then seek *en banc* review before petitioning the U.S. Supreme Court to hear the case. A three-judge panel had already been assigned, and oral argument was set to occur on June 2, 2016. The Order directing en banc review rescheduled the oral argument to September 27, 2016. As a result, a decision on the appeal is not expected until after the November presidential election. Whatever the decision, a petition to the Supreme Court to hear the case will undoubtedly occur.

In related developments, disagreements continue over the effect of the Supreme Court's stay on deadlines in the rule and the permissible scope of EPA regulatory activities related to the Carbon ESPS. Statements by EPA officials indicate the agency intends to move forward with certain actions to provide support to states that are continuing to work on compliance plans despite the stay. Those activities include continued work on the Clean Energy Incentive Program (CEIP), which is intended to encourage energy efficiency projects as part of the agency's early action incentive program. In June, EPA published a supplemental proposal addressing certain design elements of the program. Critics argue that the proceeding with rulemaking that is integrally tied to the stayed rule requires potentially affected parties to expend resources to protect their rights – actions that should not be required in light of the stay. The proposed model trading rule also remains pending despite pushes by some for action. Senator Inhofe, Chair of the Senate Committee on Environment and Public

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GREENHOUSE GAS EMISSIONS

Clean Power Plan Update

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Works, disagrees with EPA's position on the effect of the stay and in a June 9 letter to Acting Assistant Administrator McCabe, requested responses to questions related to EPA's continued implementation activities.

With respect to the New Source Performance Standard, EPA denied five petitions for reconsideration. EPA deferred action on the petitions filed by the Biogenic CO_2 Coalition and Wisconsin regarding treatment of biomass. Following EPA's denial of reconsideration, the D.C. Circuit issued an Order on June 24 that suspended the existing briefing schedule in the litigation over the New Source Performance Standard, *North Dakota v. EPA*, No. 15-1381. A new schedule has now been set with final briefs due February 6, 2017.

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Utility MATS Update

Robin B. Thomerson • (859) 425-1094 • | robin.thomerson@dinsmore.com

As reported in the last issue of the Dinsmore Air Quality Letter, EPA has issued a final supplemental appropriate and necessary finding for regulating emissions of air toxics from power plants. The supplemental finding was in response to the United States Supreme Court decision in *Michigan v. EPA* that found EPA unreasonably interpreted the CAA when it failed to consider cost in determining whether the Mercury Air Toxics Standards (MATS) was appropriate and necessary, a finding required by CAAt §112. The final finding was published in the *Federal Register* on April 25, 2016. 81 Fed. Reg. 24420 (April 25, 2016). On June 13, 2016, the Supreme Court denied a petition by 20 states, including Kentucky, Ohio, and West Virginia, to review a ruling by the U.S. Court of Appeals for the D.C. Circuit to leave MATS in place while EPA completed the supplemental finding. The states had asked the Supreme Court to review the process of remanding regulatory rules while leaving the rule in place arguing a remand without vacatur leaves in place provisions that a court has found unlawful. EPA argued that its revised finding, that included costs, addressed the deficiency in the rule rendering the states' case moot. The Supreme Court's denial was issued with no explanation provided.

While the Supreme Court's denial ends litigation concerning continuation of MATS during remand, appeals concerning the supplemental finding will proceed. Meanwhile, EPA's April 6, 2016 final technical revisions to MATS have been challenged by both environmental and utility groups. These lawsuits are in the early stages, and we will continue to track the litigation as it progresses.

Finally, EPA has proposed to amend MATS to revise and streamline electronic data reporting for owners and operators who use either performance testing or continuous monitoring to demonstrate compliance. 81 Fed. Reg.67062 (September 29, 2016). According to EPA, the revisions would "ease burden, increase MATS data flow and usage, make it easier for inspectors and auditors to assess compliance and encourage wider use of continuous emissions monitoring (CEMS) for MATS compliance." Comments will be accepted on the proposal until October 31, 2016.

AQL

AIR TOXICS

EPA Proposes to Remove NESHAP's CERCLA and RCRA Exemptions

John S. Gray • (304) 357-9954 • john.gray@dinsmore.com

EPA has taken comments on a proposed rule that would remove an exemption from the NESHAP for Site Remediation, 40 CFR 63, Subpart GGGGG (Site Remediation Rule), for activities performed under the Comprehensive Environmental Response and Compensation Liability Act (CERCLA) and for activities performed under a Resource Conservation and Recovery Act (RCRA) corrective action or other RCRA required order. 81 Fed. Reg. 29821 (May 13, 2016).

The exemption was finalized on October 8, 2003. Sierra Club and other environmental groups challenged the rule first with a petition for reconsideration to EPA and by petition for judicial review in the United States Court of Appeals for the D.C. Circuit. The petitioners claimed that EPA lacked the statutory authority to exempt site remediation activities conducted under the authority of CERCLA or RCRA from NESHAP requirements and that EPA had a duty to set standards for each listed HAP emitted from a source category. The petition for judicial review was filed on December 5, 2003 and held in abeyance by order dated January 22, 2004 to allow for settlement discussion. The case lay dormant with no action on petitioners' claims for almost a decade, despite revisions to the rule in 2006, which did not address the exemption. On October 14, 2014 the court ordered the parties to show cause why the case should not be administratively terminated and the parties began exploring what EPA termed "a new approach."

On March 25, 2015, EPA granted the petitioners' request for reconsideration, despite its finding in 2003 that RCRA and CERCLA served as the "functional equivalents of the establishment of NESHAP under CAA §112." 81 Fed. Reg. at 29824. EPA stated, "this conclusion was based on the requirements of these programs to consider the same HAP emissions that we regulate under the NESHAP and that these programs provide opportunities for public involvement through the Record of Decision process for Superfund cleanups and the RCRA permitting process for corrective action cleanups," and, upon further consideration of petitioners' claims, proposed to remove the exemption.

Under the proposed rule, the recordkeeping and reporting requirements of 40 CFR 63.7590-7953 and 63.7955 would be applicable to new and existing affected sources conducting site remediation under CERCLA or RCRA on the effective date of the final rule removing the exemption. For existing sources (those sources that commenced construction or reconstruction before May 13, 2016 and conduct remediation under CERCLA or RCRA overseen by EPA or an authorized agency), the compliance date for the process vent, remediation material management unit and equipment leak requirements would be 18 months from the effective date of the rule removing the exemption. For new sources (those sources that commenced construction or reconstruction after May 13, 2016 and conduct remediation under CERCLA or RCRA overseen by EPA or an authorized agency) the compliance date for the process vent, remediation material management unit and equipment leak requirement would be the effective date of the final rule removing the exemption.

EPA extended the comment period for the proposed rule and accepted comments on the rule until July 27, 2016. Comments from various entities and trade groups, including the National Association of Manufacturers, the National Groundwater Association and the U.S. Department of the Navy can be accessed at **www.regulations.gov**, Docket No. EPA-HQ-OAR-2002-0021.

AQL

AIR TOXICS

Persistent Litigation: EPA's Air Toxics Completion Rule

John S. Gray • (304) 357-9954 • john.gray@dinsmore.com

Litigation that began in 1998 over EPA's compliance with CAA requirements for seven air toxic pollutants and continues today provides an example of the persistent litigation that has become the normal course for regulatory promulgation.

Article continues ›

AIR TOXICS

Persistent Litigation: EPA's Air Toxics Completion Rule

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The 1990 amendments of the CAA, 42 U.S.C. §7412(c)(6), set deadlines requiring EPA to list categories and subcategories of sources of seven specific hazardous air pollutants (HAP) – alkylated lead compounds, polycyclic organic matter (POM), hexachlorobenzene (HCB), mercury, polychlorinated biphenyls (PCB), 2,3,7,8-tetrachlorodibenzofurans, and 2,3,7,8-tetrachlorodibenzo-p-dioxin. These pollutants were specified for their persistent and bioaccumulative nature. EPA was required to list source categories and subcategories to account for 90 percent of the emissions of these pollutants to assure they would be subject to maximum achievable control technology (MACT) standards. The statute required EPA to complete this requirement by November 15, 2000.

In 1998, EPA published an initial list of source categories and subcategories it anticipated would have to be subject to MACT standards to meet the 90 percent threshold. EPA found that the 90 percent threshold had been met for five of the seven pollutants and added two more source categories to assure standards would be set for all seven pollutants. The EPA finding was challenged in the D.C. Circuit Court but was dismissed after the court found that the CAA specifically precluded review of the agency's source-listing until after the agency had issued emissions standards. Sierra Club then filed petitions for review with EPA requesting additional standards for the pollutants because existing standards were allegedly inadequate. EPA denied the petitions on the ground that the standards challenged by Sierra Club were sufficient to meet the requirements necessary to be counted towards meeting the 90 percent threshold.

In 2001, Sierra Club sued EPA in the U.S. District Court for the District of Columbia asserting that EPA had failed to meet the November 15, 2000 statutory deadline. EPA asserted that it intended, once emissions standards for remaining source categories were complete, to "issue a notice that explains how it has satisfied the requirements of § 112(c)(6) in terms of issuing standards for source categories that account for the statutory thresholds identified in §112(c)(6)." The district court set a deadline for EPA to complete its obligations, which was extended.

On March 21, 2011, EPA published a notice in the *Federal Register* that it had completed sufficient standards to meet the 90 percent requirement based on a technical memorandum that documented EPA actions to meet the CAA requirements. 76 Fed. Reg. 15308 (Mar. 21, 2011).

In 2012, Sierra Club petitioned the D.C. Circuit for review of EPA's 2011 notice claiming that it was unreasonable, arbitrary, capricious and otherwise unlawful and asked that it be vacated. In addition, Sierra Club argued that the notice was legislative rulemaking and EPA failed to comply with the requisite notice-and-comment requirements. The court agreed with Sierra Club that EPA failed to meet its notice and comment obligations; therefore, it vacated the determination in 2012 and ordered EPA to fulfill its notice and comment obligations without ruling on Sierra Club's substantive claims.

Subsequently, Sierra Club returned to the district court arguing that EPA had not complied with that court's deadline. The district court required EPA to initiate a notice and comment rulemaking. On December 16, 2014, EPA published its proposed "Completion of Requirement to Promulgate Emissions Standards," *See* 79 Fed. Reg. 74656 (Completion Rule). Sierra Club submitted extensive comments, and on June 3, 2015, EPA finalized the Completion Rule as proposed and declined to respond to most of Sierra Club's comments dismissing them as "a belated, backdoor attack" on decades-old rules. *See* 80 Fed. Reg. 31,471.

In 2015, Sierra Club sued EPA again in the D.C. Circuit, this time limiting its suit to three of the seven HAPs –PCBs, POM, and HCB. In its March 2016 opening brief, Sierra Club argued that EPA's use of pollutants for which it has already set MACT standards as "surrogates" for emissions of the listed pollutants was improper, unlawful, unreasonable and arbitrary for many reasons, including that EPA does not claim that the surrogates identify "the best achieving sources, and what they can achieve" as required by the CAA. Finally, Sierra Club argued that instead of defending the claimed surrogates in its final rule, EPA set up obstacles to judicial review by claiming that legal challenges to the reasonableness of these surrogacy claims are time-barred; a position Sierra Club claims was already rejected by the court in earlier litigation. EPA responded in its June 2016 brief that Sierra Club presents "little or no direct challenge" to the agency's determination that it met its obligations, relying on prior regulations setting emission standards for various industry sectors. Moreover, EPA claims that Sierra Club's challenge to the previously-promulgated underlying standards used as surrogates is untimely. Final briefs were filed on July 29, and oral arguments have not yet been set.

AQL

ENFORCEMENT

EPA Publishes Civil Penalty Inflation Adjustment Rule

Lloyd "Rusty" R. Cress, Jr. • (502) 352-4612 • rcress@dinsmore.com

On July 1, 2016, EPA published an interim final rule to adjust the level of statutory civil monetary penalty amounts for all statutes it administers. 81 Fed. Reg. 43091. The action was taken pursuant to the Federal Civil Penalties Inflation Adjustment Act (Act), which prescribes a formula for adjusting statutory civil penalties to reflect inflation, maintain the deterrent effect of statutory civil penalties, and promote compliance with applicable laws. This rule marks the fifth time EPA has adjusted civil penalties since the Act was enacted in 1990.

As required by an additional 2015 legislative mandate, the agency is attempting to translate originally-enacted statutory civil penalty amounts to today's dollars and rounding statutory civil penalties to the nearest dollar. The rule does not necessarily revise the penalty amounts that EPA may choose to seek under its civil penalty policies in a particular case. Those decisions will continue to take into account a number of fact-specific considerations, such as the seriousness of the violation, the violator's good faith efforts to comply, any economic benefit gained by the violator as a result of its noncompliance, and a violator's ability to pay.

Following the effective date of the rule, maximum penalties for EPA enforcement actions under the CAA will nearly double the amount originally prescribed by the Act. Since the 2015 legislative mandate dictates exactly how agencies must adjust maximum civil penalties, EPA has no discretion to vary the amount of the adjustments based upon public comment. Consequently, the rule became effective on August 1, 2016 without a public comment period.

AQL

Did You Know?

OTHER EVENTS OF INTEREST DURING THIS REPORTING PERIOD OF THE "DINSMORE AIR QUALITY LETTER:"

EPA published a direct final rule making technical amendments to the performance specifications and test procedures for hydrogen chloride (HCl) continuous emission monitoring systems (CEMS) and amendments to the quality assurance procedures for HCl CEMS (Performance Specification 18 and Procedure 6) originally published in the *Federal Register* on July 7, 2015. 81 Fed. Reg. 31515 (May 19, 2016). **https://www.gpo.gov/fdsys/pkg/FR-2016-05-19/pdf/2016-10989.pdf**

EPA accepted comments on a proposed rule that would allow for rescission of new source review (NSR) permits where the requirements of the permit are no longer necessary. EPA stated the proposal was in response to the need for permit rescissions after the United States Supreme Court determined that NSR Prevention of Significant Deterioration (PSD) permits were not required for new or modified sources that only emit greenhouse gases. EPA accepted comment on the proposed rule through July 14, 2016. 81 Fed. Reg.38640 (June 14, 2016). **https://www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13303.pdf**

EPA issued a final rule that allows manufacturers of nonemergency certified non-road engines to provide operators additional options during qualified emergency situations. Many Tier 4 engines are equipped with selective catalytic reduction (SCR) to reduce NO_x emissions and with controls called inducements that limit operation of the engine if the SCR system is not properly operating. This rule allows manufacturers to also give operators the option to override emission control inducements during qualified emergency situations, such as those where operation of the engine is needed to protect human life. 80 Fed. Reg. 44212 (July 7, 2016). **https://www.gpo.gov/fdsys/pkg/FR-2016-07-07/pdf/2016-16045.pdf**

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.

EDITOR
Robin B. Thomerson
Lexington Financial Center
250 W. Main St., Suite 1400
Lexington, KY 40507
(859) 425-1094
robin.thomerson@dinsmore.com

ASSISTANT EDITOR
Michael J. Gray
255 East Fifth Street
Suite 1900
Cincinnati, OH 45202
(513) 977-8361
michael.gray@dinsmore.com