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Environmental Law Update

WEB CONFERENCE SERIES

Tightening the Reins Under the Clean Air Act: The Jackson Approach

Thursday, October 29, 2009
11:30 a.m. – 12:30 p.m. Central



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NEW GHG RULEMAKING ACTIONS

Richard G. Stoll
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Mark A. Thimke



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New GHG Rulemaking Actions

- Obama Administration strongly supports global climate legislation
- Major reversal from Bush Administration
- Legislative process appears to be hung-up (could change) and legislation unlikely for this year
- EPA moving forward on rulemaking front



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New GHG Rulemaking Actions

- Two sources of statutory authority for current EPA GHG rulemaking activities:
 - a. Boxer/Feinstein appropriations amendment Christmas 2007 – Authority for new GHG Emissions Monitoring and Reporting Rule
 - b. Existing Clean Air Act (CAA) once CO₂ and other GHGs become “regulated pollutants” under CAA – Authority for NSR/Title V “Tailoring” and other rules coming down the pike



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MANDATORY GHG EMISSIONS REPORTING FINAL RULE

Julie Solmer Stine



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Mandatory GHG Emissions Reporting Final Rule

- Response to Congressional mandate buried in FY 2008 Omnibus Appropriations Act
- To issue final regulations for “mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy” by June 26, 2009 using existing CAA authority
- Boxer/Feinstein – “important first step” towards obtaining data needed to develop a national GHG cap and trade program



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Mandatory GHG Emissions Reporting Final Rule

- Proposed rule issued April 10, 2009 (74 FR 16448)
- Final rule signed September 22, 2009
- Will be codified at 40 CFR Part 98
- Data collection beginning January 1, 2010
- First annual reports due March 31, 2011
- Will affect approximately 10,000 facilities representing 85% of total U.S. GHG emissions
- Cost to private sector estimated at \$115 million in first year, \$72 million for subsequent years



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Mandatory GHG Emissions Reporting Final Rule

- Relies on existing CAA authority to collect information - §§ 114, 208
 - Does not rely on endangerment finding or making GHG a regulated PSD pollutant
- Does not require limits on GHG emissions
 - Data will serve as foundation for future GHG emissions control legislation/regulations
- Does not preempt states from requiring their own reporting
- Does not delegate to states - sources report directly to EPA



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Mandatory GHG Emissions Reporting Final Rule

- Does the rule apply to me? (2 elements)
 - 1. Within one of 31 source categories
 - Suppliers of fossil fuels and GHGs
 - Certain engine and vehicle manufacturers
 - Direct emitters
 - Including catch-all category “general stationary fuel combustion units” (approx. 3000 sources)
 - Heat input capacity threshold
 - Biomass emissions not counted toward 25,000 ton threshold



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Mandatory GHG Emissions Reporting Final Rule

- 31 Source Categories:

<ul style="list-style-type: none"> – Suppliers of coal-based liquid fuels – Suppliers of petroleum products – Suppliers of natural gas and natural gas liquids – Suppliers of industrial GHGs – Suppliers of CO2 – General stationary fuel combustion sources – Electricity generation – Adipic acid production – Aluminum production – Ammonia manufacturing – Cement production – Ferroalloy production – Glass production – HCFC-22 production and HCFC-23 destruction – Hydrogen production 	<ul style="list-style-type: none"> – Iron and steel production – Lead production – Lime manufacturing – Miscellaneous uses of carbonates – Nitric acid production – Petrochemical production – Petroleum refineries – Phosphoric acid production – Pulp and paper manufacturing – Silicon carbide production – Soda ash manufacturing – Titanium dioxide production – Zinc production – Municipal solid waste landfills – Manure management – Manufacturers of vehicles and engines outside of the light-duty sector
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Mandatory GHG Emissions Reporting Final Rule

- 11 source categories not promulgated:
 - Electronics manufacturing
 - Ethanol production
 - Fluorinated GHG production
 - Food processing
 - Magnesium production
 - Oil and natural gas systems
 - Sulfur hexafluoride from electrical equipment
 - Underground coal mines
 - Industrial landfills
 - Wastewater treatment
 - Suppliers of coal
- Only agricultural facilities included are manure management systems (approx. 100 sources)
- Mobile emissions covered by reports from fuel suppliers and engine manufacturers – fleets not required to report



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Mandatory GHG Emissions Reporting Final Rule

- Does the rule apply to me? (cont.)
 - 2. Emit at least 25,000 metric tons CO₂e/yr
 - Cumulative emissions for calendar year
 - Some source categories automatically included (e.g., petroleum refining, cement production)
 - 25,000 mt CO₂e = annual emissions from 2,300 homes or 4,600 passenger vehicles
 - Most commercial buildings and small businesses below 25,000 mt CO₂e



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Mandatory GHG Emissions Reporting Final Rule

- Most facilities report annually
- Facilities already reporting (e.g., under Acid Rain Program) report quarterly
- Electronic reporting system still under development
- Report at facility level, exceptions:
 - Certain suppliers of fossil fuels and industrial GHGs
 - Vehicle and engine manufacturers
- Exit program if:
 - shut down,
 - less than 25,000 mt CO₂e for 5 consecutive years, or
 - less than 15,000 mt CO₂e for 3 consecutive years



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Mandatory GHG Emissions Reporting Final Rule

- GHGs included:
 - CO₂
 - Methane
 - Nitrous oxide
 - Hydrofluorocarbons
 - Perfluorocarbons
 - Sulfur hexafluoride
 - Other fluorinated gases



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Mandatory GHG Emissions Reporting Final Rule

- Monitoring
 - Direct measurement and facility-specific calculations
 - “Best available” monitoring methods (estimation equations) may be used through March 31, 2010
 - Can seek extension if not feasible to install equipment before end of 2010
- Recordkeeping
 - Generally must maintain for 3 years
- Verification
 - Independent third-party verification not required
 - Reporters self-certify using a designated representative
 - EPA verifies data and conducts targeted audits
 - Must submit certificate of representation to EPA at least 60 days prior to deadline for submitting report

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Mandatory GHG Emissions Reporting Final Rule

- Changes from proposal:
 - Added exit mechanism
 - Allowed use of “best available” monitoring methods
 - Excluded R&D activities from reporting
 - Added provision to require submittal of revised reports to correct errors within 35 days of discovery
 - Changed records retention period
 - Did not finalize 11 source categories

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Mandatory GHG Emissions Reporting Final Rule

- Enforcement
 - Failure to report
 - Failure to collect necessary data
 - Failure to continuously monitor and test
 - Failure to retain records
 - Failure to follow emission calculation methodologies
- Each day of non-compliance may constitute separate violation

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NSR/TITLE V “TAILORING” PROPOSED RULE

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NSR/Title V “Tailoring” Proposed Rule

- Bush EPA had “punted” after 2007 Supreme Court *Massachusetts v. EPA* (549 U.S. 497) with an Advanced Notice of Proposed Rulemaking (ANPR) July 30, 2008
- Obama Administration turns things around with proposed “endangerment finding” April 24, 2009 (74 FR 18886).



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NSR/Title V “Tailoring” Proposed Rule

- EPA announces intent to promulgate GHG rules from motor vehicles based on proposed “endangerment” finding May 22, 2009 (74 FR 24007).
- EPA expects final GHG motor vehicle GHG rules by March 2010, at which point CO₂ and other GHGs would clearly be CAA “regulated pollutants,” thereby triggering NSR and Title V requirements for GHGs.



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NSR/Title V “Tailoring” Proposed Rule

- Hence, the basis for the “tailoring” proposal of September 30, 2009 (same day Boxer-Kerry introduce Senate climate bill). 74 FR 55292, October 27, 2009.
- Under assumption system would fall apart if NSR and Title V thresholds were to kick in for GHGs, EPA proposes a “two-phase” solution.



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NSR/Title V “Tailoring” Proposed Rule

- For a “first phase” (of at least five years):
- NSR
 - Instead of statutory triggers of 100 or 250 tons per year (tpy), sources of 25,000 tpy or more of CO₂e (carbon dioxide equivalent) will be considered “major sources.”
 - Modifications to major GHG sources will trigger NSR at “threshold” levels in the range of 10,000 – 25,000 tpy or more of CO₂e.



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NSR/Title V “Tailoring” Proposed Rule

- Title V
Instead of applicable statutory level of 100 tpy, sources of 25,000 tpy or more of CO₂ e will be subject to Title V permitting.

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NSR/Title V “Tailoring” Proposed Rule

- During “first phase,” EPA will study effects of tailored programs and determine whether further revisions appropriate in light of statutory tonnage levels. EPA also will work on “streamlining options” to ascertain whether programs moving towards statutory levels could be developed.

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NSR/Title V “Tailoring” Proposed Rule

- “Streamlining” options EPA is considering:
 - Moving away from “potential to emit” elements of program “to more closely approximate a source’s actual emissions”
 - Issuing “presumptive BACT” limits through rulemaking for various types of sources
 - Employing “general permit” and “permit-by-rule” concepts borrowed from CWA
 - Expedite matters through enhanced “e-permitting”

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DISCLOSURE IMPLICATIONS OF GREENHOUSE GAS RULEMAKING

Mark A. Thimke

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Management Discussion and Analysis – Item 303; Regulation S-K (MD&A)

- Purpose – “give the investor an opportunity to look at company through the eyes of management”

(Securities Act Rel. No. 6711)



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Management Discussion and Analysis – Item 303; Regulation S-K (MD&A)

- Commissioner Elisse Walter comment (10/2/2009)
 - SEC focusing on MD&A compliance; views corporate MD&A disclosures as lacking
 - Climate change
 - SEC staff meeting with experts to assess corporate risks associated with climate change
 - Interpretive guidance – time to issue guidance regarding climate change disclosures
 - In drafting current disclosures, carefully consider whether MD&A disclosure obligations exist



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Disclosure Considerations

- Climate legislation – many companies claim adverse effects in legislative battle
- Leakage – often references to facility relocation due to climate change costs
- Clean Air Act greenhouse gas permitting – costs and project delays
- Query – if statements are made in regulatory and political arena on costs and adverse effects – disclosures?



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Shareholder Action in 2009 on Greenhouse Gas Issues

- 68 shareholder resolutions in 2009 brought by large state/city funds
 - California
 - New York City
 - North Carolina
 - Connecticut
- Success with IDA CORP (Idaho Electric Utility)
- Exxon Mobil – 29% in support
- SEC Staff Legal Bulletin 14e (10/27/2009) – “friendly” to shareholder resolutions on major social issues such as climate change



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Martin Act Subpoenas Relating to Greenhouse Gas

- Martin Act – New York law with national consequences
- 5 companies pursued by New York Attorney General
 - Dynegy
 - Xcel
 - AES
 - Dominion
 - Peabody Energy
- 2 settlements – Xcel and Dynegy



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METHODS USED TO DEVELOP OR IMPLEMENT POLICIES OUTSIDE OF THE RULEMAKING ARENA

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BLOGGING FOR COMMENTS

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Traditional Method for Comments

- *Federal Register*
- Notice and comment rulemaking
- Advisory committees under Federal Advisory Committee Act (FACA)



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The New “Internet” Comments

- U.S. EPA blog – “greenversation”
 - <http://blog.epa.gov/blog>
- U.S. EPA “twitter” account
 - <http://twitter.com/greenversations>
- National priorities for enforcement “discussion forum”
 - <http://blog.epa.gov/blog/category/compliance>
- Clean Water Act enforcement
- U.S. EPA green remediation
 - <http://www.epa.gov/superfund/greenremediation/comment.html>
- Bottom line
 - Obama U.S. EPA internet friendly
 - Important for tracking policy developments



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THE NEW USE FOR TITLE V OBJECTIONS – POLICY STATEMENTS

Mark A. Thimke



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Background

- Title V process
 - State permit issued
 - U.S. EPA review
 - Objections filed with U.S. EPA by ENGOs
 - U.S. EPA decision on objections
 - State response
 - State issues acceptable revised permit or U.S. EPA issues permit

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Background

- Process can take years; Bush U.S. EPA slow to address ENGO objections; usually sided with states and permittees
- Obama U.S. EPA review faster, more complete and used for policy initiative
- Available on U.S. EPA Region 7 webpage
- U.S. EPA now publishes availability in *Federal Register*

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Policy Positions

- Greenhouse gas control under Clean Air Act – Louisville Gas & Electric permit (08/12/2009)
 - Noted adoption of greenhouse gas tailpipe standards by 03/20/2010
 - Greenhouse gas a “regulated pollutant” for PSD purposes
 - BACT requirement



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Policy Positions

- PM_{2.5}
 - Use of PM₁₀ surrogate
 - State required to show technical relationship between PM₁₀ and PM_{2.5} to use surrogacy policy
- State responses to ENGO comments
 - Must be complete and fully address objections
- Actual to future actual projections an area being targeted



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Practical Considerations

- Title V review process
 - Serious aspect to air permitting; permittees need to be engaged
 - States must fully respond to comments
 - Permittees should consider methods to enhance record and response to comments/objections
 - Participation in resolution of U.S. EPA objections



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“RECONSIDERATIONS” AND OTHER JACKSON EPA 180S

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“Reconsiderations” and Other Jackson EPA 180s

- Emission Comparable Fuel (ECF) Rule Issued in final December 19, 2008.
- Louisiana Environmental Action Network (LEAN) and Sierra filed D.C. Circuit petition for review March 18, 2009.



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“Reconsiderations” and Other Jackson EPA 180s

- April 16, 2009, EPA moves to hold case in abeyance for one year so it can reconsider rule. Court grants motion May 5, 2009.
- May 5, 2009, EPA announces it will issue a proposed rule that would withdraw the ECF rule.
- Proposal for withdrawal submitted to OMB/OIRA August 19, 2009.



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“Reconsiderations” and Other Jackson EPA 180s

- Definition of Solid Waste (DSW) Rule issued in final October 30, 2008.
- American Petroleum Institute only industry petitioner in D.C. Circuit (many industry interveners).
- Sierra and LEAN filed administrative petition for reconsideration and D.C. Circuit petition for review January 2009.



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“Reconsiderations” and Other Jackson EPA 180s

- April 2009 motion by EPA explaining new Obama team needs to review Sierra/LEAN petition for reconsideration, asks D.C. Circuit now holding litigation “in abeyance” and Court agrees.
- May 5, 2009, EPA announces full reconsideration of the DSW rule and public meetings to discuss issues. Publishes request for comments in May 27, 2009 FR.



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“Reconsiderations” and Other Jackson EPA 180s

- Since the January 20 inauguration, the Obama EPA has announced reversals or reconsiderations of scores of prior EPA regulations and policies.
- Approach to GHG perhaps prime example, with:
 - support for legislation;
 - “endangerment” finding unleashing regulatory activity.



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“Reconsiderations” and Other Jackson EPA 180s

- Approach to NSR another good example:
 - Desert Rock permit consideration, requiring integrated gasification combined cycle (IGCC) to be evaluated for BACT even if new plant design incompatible with IGCC (climate overtones here as well) (Sept. 24 09);
 - McCarthy withdrawal of Wehrum memo on “aggregation” in making major source determinations in oil and gas industries (Sept. 22 09).
 - Nine-month stay of “grandfathering” PM2.5 PSD requirements as requested by Sierra et al. (Sept, 22 09.)



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More Obama EPA 180s

- Other recent examples:
 - EPA decides not to defend Bush ozone NAAQS revisions, announces it will issue new (presumably tighter) ozone standards by August 2010, (Sept. 16 09.)
 - Assistant Administrator McCarthy announces October 26 that EPA will complete “review” of ALL current NAAQS by end of 2011.



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QUESTIONS & ANSWERS



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Thank You!

- A copy of the PowerPoint presentation and a multimedia recording will be available on our website early next week.
- CLE questions? Contact Cheryl Winkowski at cwinkowski@foley.com.



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