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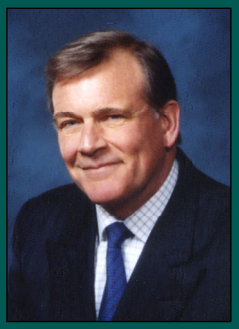
Environmental Law Update

WEB CONFERENCE SERIES

Update on Clean Air Act & Greenhouse Gas Developments

Thursday, August 11, 2011 ▪ 11:30 a.m. Central – 12:30 p.m. Central

Program Speaker



- **Richard G. Stoll**
  Partner
  Foley & Lardner LLP
  202.295.4021
  rstoll@foley.com

Program Speaker

- **Mark A. Thimke**
  Partner
  Foley & Lardner LLP
  414.297.5832
  mthimke@foley.com

Program Speaker

- **Brian H. Potts**
  Senior Counsel
  Foley & Lardner LLP
  608.258.4772
  bpotts@foley.com

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Today's Presentation

- Utility MACT
- Cross-State Air Pollution Rule (CSAPR)
- *American Elec. Power Co. v. Conn.*
- Follow-up on CISWI/Boiler MACT
- DC Circuit Medical Waste Case on CAA MACT

Utility MACT – From CAMR to MATS to …?

Background

- MACT for utilities started in late Clinton years – decision to proceed
- Bush era – CAMR rule counterpart to the transport rule (CAIR)
- Both CAIR/CAMR rejected by D.C. Circuit Court of Appeals late in Bush era
- Obama – ENGO lawsuit to require rules, leading to judicial settlement
  - Proposed by March 16, 2011 (met)
  - Final rules by November 16, 2011
  - MACT implementation schedule – 3 years/1 additional for controls
- At time where coal-based electric generation decreasing – 1st Quarter 2011; coal 46% of power production

Rule Proposal

- 1,350 affected utility units (1,200 coal/150 oil) at 525 power plants
- U.S. EPA asserts significant portion of coal fleet – uncontrolled
- Applied traditional MACT approach – pollutant-by-pollutant analysis (builds U.S. EPA's legal defense)
- Coal – numeric emissions for mercury, PM and HCL; in short, 91% mercury control required
- Workplace standards for dioxin/furans – optimal combustion
- U.S. EPA – typical control equipment includes scrubbers, activated carbon injection or baghouses
- U.S. EPA estimates 31,000 short-term construction jobs and 9,000 long-term utility jobs

Surprise, Surprise – Controversy

- Utility Air Regulatory Group (UARG) – found error in U.S. EPA database setting the "MACT floor"
  - Group of best performing plants found to be too small
  - Larger base may result in less restrictive emission standards
- Congressional heat over proposed rule, costs and reliability issues/GOP bills to delay or derail rule
- But, final rule likely to proceed

Comments – Technical Tweaks to Legal Threats

- UARG and National Rural Electric Coop Association
  - Lawsuit threats – alleged U.S. EPA procedural violations
  - Lack of adequate support for claimed health/ecological benefits
- Duke Power – more time required for controls
- Small Business Administration – seeking delay and more "innovation" rather than pollutant-by-pollutant approach

Comments – Technical Tweaks to Legal Threats

- Edison Electric Institute
  - Technical fixes
    - Compliance dates and extensions for plants being decommissioned
    - Sub-categorization extended to fluidized bed (CFB) facilities
    - Startup/shutdown work practice requirement as opposed to limits
    - Broad emission averaging
  - Overall, willingness to work with U.S. EPA to refine rule

What Does This Mean to Me?

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- Utility – means more planning with respect to repowering, shutdown or controls
  - Some utilities anticipated action, so planning, rate commission approvals underway
  - Project management of schedules/vendors/ regulatory approvals to achieve dates
  - Need to watch not only equipment installation requirements but compliance requirements

What Does This Mean to Me?

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- Non-utility
  - Rising electrical rates to compensate for controls or replacement energy source
  - Understand potential cost increases and timing
  - Review energy efficiency projects with new costs factored into analysis

Cross-State Air Pollution Rule (CSAPR)

Cross-State Air Pollution Rule (CSAPR)

- Formerly called the Transport Rule
- Replaces Clean Air Interstate Rule (CAIR)
- Based on "good neighbor" provision
  - CAA 110(a)(2)(D)(i)(I)
  - Requires states to prohibit emissions that "contribute significantly to nonattainment in, or interfere with maintenance by, any other state"

CSAPR Timelines

- Finalized on July 6
- Published in Federal Register on August 8 (76 FR 48208)
  - 60 days to appeal
- Two-phase compliance (Jan/May 2012 and Jan. 2014)

CSAPR Programs

- Three programs
  - SO2
  - Annual NOx
  - Ozone-season NOx (May-Sept)
- Focused on annual/24-hour PM2.5 and 8-hour ozone

CSAPR Coverage

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- Covers 3,632 electric generating units
- 27 states covered by one or more program
  - 23 SO2 and annual NOx states
  - 20 ozone-season NOx states
- Supp. proposal to include six additional states in ozone-season NOx
  - EPA to finalize by Oct.

CSAPR – How Does It Work?

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- Allowances are allocated to sources
- Emissions each year = held allowances
- Trading allowed but limited
  - SO2 has two groups
  - Assurance provisions

CSAPR - State Emission Budgets

- Identified contributing upwind states
- Projected base case emissions in 2012/2014
- Applied cost thresholds
  - $2300/ton for SO2 Group 1 - 2014
  - $500/ton for others
- Legal and equitable issues with approach

CSAPR Assurance Provisions

- Power sector variability (heat input)
- 1-year variability approach used (not 3-yr)
- State assurance cap
  - 18% for SO2 and annual NOx
  - 21% for ozone-season NOx
- Penalty provisions

CSAPR Implementation/Allocation

- FIP 2012/SIP 2013
- No carryover of Acid Rain, NOx SIP Call or CAIR allowances
- Unit allowance allocation based on historic heat input (but limited to maximum historic emissions)
  - New unit set-aside (state-by-state basis up to 6%)
  - State SIPs can differ

CSAPR – Challenges Likely

- Many states and sources unhappy with budgets
- Arguably did not comply with "good neighbor" provision
- Challenge to EPA's FIP authority
- Timelines - unreasonable and unworkable?
- Major EPA rules almost always get challenged
- Possible stay?

American Elec. Power Co. v. Conn. (S.Ct. June 20, 2011)

American Elec. Power Co. v. Conn. (S.Ct. June 20, 2011)

- Various states, the City of New York and environmental groups sued five utilities
- Claimed utilities' CO2 emissions = public nuisance
- Relief sought - CO2 cap ratcheted down annually

AEP Case Addressed Two Issues

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- Do plaintiffs have standing?
- Does CAA displace plaintiffs' claims?
- Supreme Court ultimately dismissed

Standing Decision

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- Standing generally requires substantial interest
- *Mass. v. EPA* case addressed standing
- 4-4 split (Sotomayor recusal)
- Lower court's decision upheld - plaintiffs had standing

CAA Displacement

- Nuisance claims were based on federal common law
- Prior S.Ct. precedent → federal common law claims disappear when issue addressed by Congressional statute
- *Mass v, EPA* found CO2 subject to regulation under CAA
- EPA working on CO2 rules for power plants
- Court held that CAA and EPA actions it authorizes displace federal common law right to seek CO2 abatement from fossil-fuel fired plants
- Court did not decide whether state law claims are preempted

Follow-up on CISWI / Boiler MACT

Recap: Environmental Law Update (February 24, 2011)

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- Last Foley Environmental Law Update (February 24, 2011) covered new final CAA rules just released day before, including:
  - CAA 129 emission limits for "Commercial and Industrial Solid Waste Incineration Units" ("CISWI");
  - CAA 112 emission limits for major source boilers ("MACT" standards).
- As covered in last update, EPA announced administrative "reconsideration" for both rules simultaneously with their issuance.
- Rules (and reconsideration notice) appear in March 21, 2011 Federal Register:
  - CISWI -- 76 FR 15704
  - Boiler MACT -- 76 FR 15608
  - Reconsideration -- 76 FR 15266

Flurry of Administrative and Judicial Activity Follows

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- Many industrial and environmental parties file administrative petitions for reconsideration on both CISWI and Boiler MACT rules under CAA 307(d)(7)(B).
- Many industrial and environmental parties file petitions for review in DC Circuit on both CISWI and Boiler MACT rules.
- In light of ongoing reconsiderations, EPA announces indefinite stay of effective date for both CISWI and Boiler Rules. May 17, 2011 (76 FR 28318). [Note: stay does NOT extend existing source compliance dates (3 years Boiler MACT, 5 years CISWI).]
- EPA seeking to have DC Circuit judicial review on both rules put on hold ("held in abeyance") because administrative reconsideration will produce revised final rules. Industry parties not objecting to abeyance, BUT Sierra Club and cohorts are.

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Sierra Hotly Contesting Indefinite Stay

- Sierra filed strong objection to EPA judicial review abeyance request, contending EPA has no authority to stay CAA rules on reconsideration for more than three months (relying on CAA 307(d)(7)(B), last sentence).
- If Sierra theory prevails, the current "indefinite" stay would become invalid as of August 18, 2011.
- In DC Circuit response to Sierra objection, EPA announces schedule for reconsideration (also announced in press release same day):
  - For CISWI and Boiler MACT Rules:
    - Propose revisions by end of October, 2011
    - Finalize revisions by end of April, 2012

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Sierra Hotly Contesting Indefinite Stay

- These dates not good enough for Sierra and cohorts. They have initiated new legal actions in both DC Circuit and in federal district court for the District of Columbia (jurisdictional uncertainties exist, so the DC Circuit filing is protective).
- They have filed motions with request for expedited action in federal district court. EPA will argue DC Circuit has exclusive jurisdiction.

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Effects of Sierra Prevailing

- If Sierra prevails, current stay could end any time after August 18, 2011. While compliance dates for existing sources are 3 years and 5 years off for Boiler MACT and CISWI, any new source commencing construction would be affected.
- Moreover, CISWI has different approach to "modifications" than MACT. Under MACT, only truly "new" sources or "reconstructions" trigger new source standards. Under CISWI, however, an existing source that has an increase in emission rate can trigger new source standards.
- Thus if Sierra prevails, any boiler, process heater, or cement kiln now combusting "solid waste" as defined in EPA's new NHSM RCRA rule could arguably become subject to CISWI new source standards if unit increases emissions after September 21, 2011.

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DC Circuit Medical Waste Case on CAA MACT

Medical Waste Inst. v. EPA, 2011 U.S. App. LEXIS 12726 (D.C. Cir., June 24, 2011)

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- Closely watched case for potential precedent on CAA Section 112 MACT standards.
- Three key issues:
  (For first two, remember MACT "floor" standards set without regard to costs – EPA authorized to issue "beyond the floor" standards, for which EPA must consider costs.)
  - MACT-on-MACT
  - Pollutant-by-Pollutant
  - Startup Shutdown Malfunction (SSM)

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MACT-on-MACT

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- MACT existing source "floor" levels based on limits achieved by best performing 12% sources. Assume EPA set floor standards for an industry ten years ago, but DC Circuit found fault with standards and -- while leaving standards in place -- required EPA to set new floor standards.
- In setting new standards can EPA again use best performing 12% floor approach, even though industry now achieving tighter standards under first-issued rules? Is this "MACT-on-MACT" approach permissible, as it portends infinite ratcheting down over decades with no consideration of costs/benefits?

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Pollutant-by-Pollutant

- MACT standards usually address several pollutants. In setting floor standards based on best performing 12%, should each standard be based on best 12% for *that pollutant?* (Pollutant-by-pollutant approach.) Or should standards be based upon 12% of the sources with best overall performance for all pollutants ("source based" approach)?
- EPA uses (and environmentalists favor) pollutant-by-pollutant approach, which results in much stricter "floors." Industry argues that approach produces excessively stringent floor standards where costs are irrelevant, and that "beyond the floor" authority of CAA (where costs must be considered) is effectively read out of CAA.

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Startup Shutdown Malfunction (SSM)

- EPA's earlier MACT rule for medical waste incinerators excused compliance during certain SSM periods. EPA new proposed rule contained same SSM exemptions.
- While proposal pending, DC Circuit issued opinion in MACT case relating to another industry, generally ruling exemptions for SSM periods not authorized by CAA. Final medical waste rule deleted SSM exemptions with no further notice/opportunity for comment.
- Did EPA violate CAA/APA notice and comment requirements?

Medical Waste Inst. v. EPA, 2011 U.S. App. LEXIS 12726 (D.C. Cir., June 24, 2011)

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- Bottom Line to 3-0 Opinion: Excellent Example of Judicial Issue-Ducking
  - MACT-on-MACT
    - Court upheld EPA use of new data reflecting tighter controls based on theory that Court had previously ruled initial floor levels deficient, thus result not *true* MACT-on-MACT
  - Pollutant-by-Pollutant
    - Court upheld rule, but not on merits. "Preclusion" invoked.
    - Petitioners COULD have raised pollutant-by-pollutant argument when earlier rule came up for judicial review (as that 1997 rule used pollutant-by-pollutant), but they failed to do so then. They therefore waived right to do so now. (***DUCK***)

Medical Waste Inst. v. EPA, 2011 U.S. App. LEXIS 12726 (D.C. Cir., June 24, 2011)

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  - Startup Shutdown Malfunction (SSM)
    - Court upheld rule but again, not on merits. "Waiver" invoked.
    - Since this issue not at play during comment period (EPA's proposal included SSM provisions and contained no suggestion they would be deleted), before proceeding with judicial review, petitioners were required to filed CAA 307(d)(7)(B) petition for reconsideration with EPA but failed to. Thus they waived right to seek judicial review on issue. (***DUCK***)

Medical Waste Inst. v. EPA, 2011 U.S. App. LEXIS 12726 (D.C. Cir., June 24, 2011)

- Petitioners filed petitions for rehearing *en banc* with the DC Circuit on August 8, 2011.

Questions & Answers

Thank You!

- A copy of the PowerPoint presentation and a multimedia recording will be available on the event Website early next week
  http://www.foley.com/news/event_detail.aspx?eventid=3631
- CLE questions? Contact Jennifer Bartz at jbartz@foley.com
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