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Environmental Law Update

WEB CONFERENCE SERIES

EPA Under the Second Obama Administration

Thursday, January 24, 2013

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Agenda

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- Key Posts Being Vacated and Possible Choices for EPA Administrator
- Recent Final Rules Issued by EPA in Late December, 2012
- What to Look For Now? Major Policy Initiatives and Rules in Second Obama Administration



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From President Obama's Inaugural Address on January 21, 2013

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"We will respond to the threat of climate change, knowing that the failure to do so would betray our children and future generations. Some may still deny the overwhelming judgment of science, but none can avoid the devastating impact of raging fires, and crippling drought, and more powerful storms. The path towards sustainable energy sources will be long and sometimes difficult. But America cannot resist this transition; we must lead it."



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Key Environmental/Energy Posts Being Vacated

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- EPA Administrator Jackson departure announced (but not leaving until after State of Union, February 12)
- Interior Secretary Salazar departure announced (leaving in March)
- Energy Secretary Chu expected to announce departure soon



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Possible Choices for EPA Administrator

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- Most mentioned names:
 - Christine Gregoire, former Washington governor
 - Gina McCarthy, current EPA Air Assistant Administrator



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Possible Choices for EPA Administrator

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- Bob Perciasepe, currently EPA Deputy Administrator
- Others:
 - Kathleen McGinty, Clinton CEQ Chair and Pennsylvania's environment secretary
 - Mary Nichols California Air Resources Board Chair
 - Daniel Esty, Connecticut DEP Chair



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Four Key Final Rules Signed December 20, 2012

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- Major Source Industrial Boiler NESHAP (CAA 112)
 - [United States EPA | Emissions Standards for Boilers and Process Heaters and Commercial/Industrial Solid Waste Incinerators](#)
- Non-Hazardous Secondary Material (NHSM) Rule (RCRA)
 - [United States EPA | Non-Hazardous Secondary Materials](#)
- Commercial & Industrial Solid Waste Incinerator (CISWI) Rule (CAA 129)
 - [United States EPA | Emissions Standards for Boilers and Process Heaters and Commercial/Industrial Solid Waste Incinerators](#)
- Portland Cement NESHAP Revisions (CAA 112)
 - [United States EPA | Portland Cement Manufacturing](#)



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MACT Standards for Boilers – U.S. EPA’s Final Rules Finally Emerge

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- A little history for context
 - Rule was initially “forced” to be released in March 2011
 - Court refused to grant U.S. EPA its requested extensions
 - U.S. EPA actively sought reconsideration petitions
 - Granted reconsideration/stayed rule
 - January 2012 – court reversed U.S. EPA’s stay, but U.S. EPA issued No Action Assurance letters
 - December 2012 – final rules emerge



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Boiler MACT – Initial Impressions

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- Viewed as “relaxation of 2011 rule” but prior rule not really U.S. EPA’s choice
- Of 1.5 million boilers, 86% or 1.3 million boilers **NOT** subject to rule
 - Heating units at schools, churches, hospitals
- 13% (197,000 units) subject to “work practice” standard – tune-up
- >1% (2,300 units) subject to numeric standards and detailed regulation



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Changes to Proposed Rule

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- Rule is consistent with U.S. EPA combustion strategy
 - promote use/conversion to natural gas
- Existing coal-based units – natural gas conversion alternative favorable
- New units – natural gas “promoted”
- Those electing coal/control approach can obtain 4-year option (3 years plus 1 year for controls)
- SEC disclosure updates – companies need to reassess prior disclosures to reflect new rule
- In future, compliance with rule – enforcement priority



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Natural Gas – Work Practice Standards (Clean Air Act § 112(h))

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- Work practice standards allowed where emission standards not feasible
- Periodic tune-ups for 10 MMBtu or more (except limited use units)
 - Annually, except –
 - Entry to process equipment required; only when planned entries (facility shutdown)
 - Units that sell electricity (36-month cycle)
 - Boilers with continuous oxygenation (every 5 years)
 - Tune-up – follow manufacturer specifications and any NO_x related requirements for permit
 - Query – manufacturer specifications available? Best to specify procedures in permit



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Startup/Shutdown

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- MACT standards apply to all situations, including startup/shutdown
- Startup/shutdown definition key to compliance
 - Startup – cold fire to when steam used for process or electrical generation or when heat used for heating
 - Shutdown – no steam used for process/electricity or heat used for heating
- During startup/shutdown, work practice applies unless controls in place and controls useful in limiting emissions
 - Startup must use “clean fuels” (*i.e.*, natural gas)
- Documentation important



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Averaging Period

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- Rule allows for 10-day/30-day rolling averaging
- Approach to averaging may standardize calculation of averaging periods in other situations
- 30-day rolling average based on previous **720 hours of valid** data
 - Exclude startup/shutdown hours
 - Exclude unit downtime



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Affirmative Defense

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- U.S. EPA included a malfunction affirmative defense in the prior rule
- Refined affirmative defense to address ambiguities in situations where it applied
- Now U.S. EPA clear, only applies to “violations” as opposed to exceedances or other situations where alleged violation is arguable
 - Essentially up to company to decide whether to assert affirmative defense or rely on other enforcement position



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Affirmative Defense

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- Burden on permittee asserting defense to show
 - Sudden, infrequent and unavoidable event
 - No preventable through “careful planning,” proper design or better operation and maintenance
 - Not part of pattern of noncompliance
 - Duration minimized
 - All **possible** steps taken to minimize impact
 - Written “root cause” analysis prepared
 - Written report documenting event and basis for affirmative defense



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Energy Assessment

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- Major sources – scope of assessment depends on size of boiler/process heater at facility
 - 0.3 TBtu
 - 8 on-site technical hours
 - Focus on boiler and onsite systems that constitute 50% of energy use
 - 0.3 to 1.0 TBtu
 - 24 on-site technical hours
 - Boiler and 33% of on-site energy use
 - > 1.0 TBtu
 - 24 hours for first 1 TBtu and 8 hours for every additional 1 TBtu up to a maximum of 160 hours
 - Boiler and 20% of energy use



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NHSM Rule Under RCRA

- Follows same rulemaking track as Major Source Boiler NESHAP and CISWI
- Defines which materials in which situations will be deemed "solid waste when combusted" to draw jurisdictional lines under CAA
- Focus on growing use of "secondary materials" (biomass, tires, plastics) that can serve as substitutes for fossil fuels and that are not hazardous under RCRA definitions
- Facilities that combust "solid waste" will be regulated by CAA 129 CISWI (if CISWI standards set for those facilities)
- Facilities that combust NHSM that escapes the "solid waste" designation will be regulated by CAA 112 NESHAP standards



NHSM Rule Under RCRA

- CISWI standards cover: boilers (both utility and industrial), energy recovery units, incinerators, and industrial furnaces such as cement and aggregate kilns
- Most owners/operators of these facilities strongly prefer CAA 112 NESHAP to CAA 129 CISWI
- Therefore, industry advocacy on NHSM Rule has pushed EPA to let NHSMs "out" of the definition of solid waste
- Industry advocacy has been generally successful: since NHSM rulemaking process started in 2010, trend has been for more and more materials to get "out"





NHSM Rule Under RCRA

- New (December 2012) rule clearly follows that trend:
 - More materials listed as "traditional fuels" or "categorical non-waste"
 - For facilities that must comply with "legitimacy criteria," EPA has made it much easier to comply
 - One issue EPA gave no ground on: "processing" -- landfill tires an example
 - "Streamlined" site-specific petition process and new national petition process



Traditional Fuels

- (1) Fuels that have been historically managed as valuable fuel products rather than being managed as waste materials, including fossil fuels (e.g., coal, oil and natural gas), their derivatives (e.g., petroleum coke, bituminous coke, coal tar oil, refinery gas, synthetic fuel, heavy recycle, asphalts, blast furnace gas, recovered gaseous butane, and coke oven gas) and cellulosic biomass (virgin wood); and
- (2) alternative fuels developed from virgin materials that can now be used as fuel products, including used oil which meets the specifications outlined in 40 CFR 279.11, currently mined coal refuse that previously had not been usable as coal, and clean cellulosic biomass.





“Categorical” Non-Waste

- (1) Scrap tires that are not discarded and are managed under the oversight of established tire collection programs, including tires removed from vehicles and off-specification tires;
- (2) Resinated wood;
- (3) Coal refuse that has been recovered from legacy piles and processed in the same manner as currently generated coal refuse; and
- (4) Dewatered pulp and paper sludges that are not discarded and are generated and burned on-site by pulp and paper mills that burn a significant portion of such materials where such dewatered residuals are managed in a manner that preserves the meaningful heating value of the materials.



CISWI

- Follows same rulemaking track as Major source boilers and NHSM
- Covers boilers (utility and industrial), energy recovery units, incinerators, and industrial furnaces such as cement and aggregate kilns IF combusting "solid waste" as defined in NHSM Rule
- Does NOT (at this time) cover many other types of units that might combust solid waste, such as "burn-off ovens," drum reclamation units, many other types of furnaces
- -Does NOT cover facilities that combust RCRA hazardous waste





Few Changes from March 2011 CISWI Rule

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- Extends compliance date for existing sources to 2018
- Reaffirms longstanding "contained gas" definition -- to be a solid waste, a gas must be in a portable container like a canister when combusted (extremely important issue for many industries)
- Some emission standards relaxed, some tightened (PM standard for existing cement kilns goes way down)
- Removes definition of "homogeneous waste" -- (affects exemption for certain small power producers and cogeneration facilities)
- Clarifies "ingredients" used in cement kilns are not "combusted" (therefore not subject to CAA 129)



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Revised Portland Cement NESHAP

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- EPA issued revised final NESHAP (CAA 112) standards for portland cement kilns September 2010.
- Established compliance date for existing sources of September 2013.
- Industry and environmental groups filed administrative petitions and judicial review petitions.



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Revised Portland Cement NESHAP

- *PCA v. EPA*, 665 F.3d 177 (D.C. Cir. December, 2011) largely upheld 2010 rule against industry and environmentalists challenges, but remanded rule to EPA to more cleanly define the "MACT floor pools" for CISWI kilns vs. NESHAP kilns.
- Strong "concurring" opinion by Judge Brown suggested prior D.C. Circuit precedent wrong for failing to accommodate levels of toxics in feedstocks.



Revised Portland Cement NESHAP

- *PCA* and various members threatened to file en banc petition for rehearing on feedstock issue, began negotiating with EPA on agreement to postpone September 2013 compliance date and revise particulate matter (PM) in exchange for holding off on en banc petition.
- When re-examining 2010 rule on remand (and when considering numerous technical issues subject to administrative reconsideration petitions), EPA concluded that the compliance methodology adopted for the particulate matter (PM) standards was inappropriate.





Revised Portland Cement NESHAP

- EPA decided to propose PM standards based on new compliance methodologies and negotiated a settlement agreement with PCA and members under which EPA would propose a 2-year compliance date extension for all pollutants and propose adjustments to PM standard.
- In final rule signed December 20, 2012 EPA extended compliance date for all pollutants to September 2015 and adjusted PM standard based on new compliance methodology.



Revised Portland Cement NESHAP

- EPA also issued revisions on various technical grounds, and refused to delete affirmative defense for malfunctions as requested by public interest groups.
- Once rule published in FR (probably late January or early February) more litigation likely to follow, as public interest groups strongly opposed compliance date extensions and malfunction affirmative defense.





National Ambient Air Quality Standards

- Applies to air pollutants which “may reasonably be anticipated to endanger public health or welfare” § 108(a)(1)
- EPA sets maximum concentration § 109
- Revise every 5-10 years
- Pollutants include:
 - SO₂
 - NO_x
 - Particulates (PM₁₀, PM_{2.5})
 - CO
 - Ozone
 - Lead



Recent EPA NAAQS

- 2008 – 8-hour ozone standard – .075 ppm
 - 1997 standard still in place – .08 ppm
- 2010 – 1-hour SO₂ – 75 ppb
- 2010 – 1-hour NO₂ – 100 ppb
 - NO₂ annual of 53 ppb (1996)
- 2011 – 8-hour CO – 9 ppm
 - 1-hour CO – 1 ppm





Final Revised PM2.5 Standards – 78 Fed. Reg. 3086 (Jan. 15, 2013)

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- Response to D.C. Circuit remand of 2006 standards (*American Farm Bureau Federation v. EPA*, 559 F.3d 512 (D.C. Cir. 2009))
- 2006 primary standards
 - Annual – 15 ug/m³
 - 24-hour – 35 ug/m³
- New PM2.5 primary standards
 - Annual – 12 ug/m³
 - 24-hour – 35 ug/m³
- Eliminated spatial averaging provisions for annual standard
- Retained PM10 standards and secondary standards



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NAAQS In Second Term

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- Various (and significant) implementation issues
 - Timing and technical issues with SO₂/NO₂/PM_{2.5} modeling
 - PM_{2.5} SIL to be revisited (remanded in *Sierra Club v. EPA*, No. 10-1413 (Jan. 22, 2013))
 - PM_{2.5} implementation rules remanded in *NRDC v. EPA*, No. 08-1250 (January 4, 2013)
 - PM_{2.5} area designations by Dec. 2014
- 8-hour Ozone in 2013?
 - 0.060 to 0.070 ppm possible
- PM_{2.5}?



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What to Expect?

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- More focus/action on greenhouse gases (GHGs).
 - Public interest groups pushing hard.
 - See quote from President's inaugural address.
 - New source utility GHGs final due in March 2013.
 - Existing utility sources far behind?
 - Other types of sources (petroleum, cement, etc.) far behind?
 - Rumors of enforcement office (OECA) gearing up for GHG role.



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What to Expect?

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- Fracking controls (slowly but surely?)
 - EPA "guidance" under SWDA apparently going nowhere fast.
 - Interior (BLM) proposed rule just rescinded for "rework."
 - EPA "study" moving slowly.
 - EPA just announced (January 16, 2013) reconsideration of CAA fracking rules issued August 2012.
 - Environmentalists "beyond natural gas" campaign promising petitions, suits. Sierra Club Website on fracking: "Dirty, dangerous, and run amok . . . a violent process."
<http://content.sierraclub.org/naturalgas/content/beyond-natural-gas>



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Plus (To Name Just a Few)

- Cross-State Rule follow-up
- Long-delayed RCRA rules: (a) coal combustion residues; (b) Subtitle C Definition of Solid Waste
- Crisis in state environmental agency budgeting with each new "fiscal cliff"?
- Utility coal plants' concerns shifting to CWA, RCRA?
- More EPA or judicial confusion over extent of CWA jurisdiction?



Questions & Answers





Thank You!

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