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Environmental Law Update

WEB CONFERENCE SERIES

Significant Clean Air Act Developments – What You Need to Know

Thursday, July 10, 2014

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Agenda

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- Greenhouse Gas (GHG) Developments
- Maximum Achievable Control Technology (MACT) Developments
- Additional Clean Air Act (CAA) Developments

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GREENHOUSE GAS (GHG) DEVELOPMENTS

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EPA's Clean Power Plan

- Based on Section 111(d) of CAA:
  - "each State shall submit . . . a plan which (A) establishes standards of performance for any existing source . . . which is not . . . emitted from a source category which is regulated under section [112] . . ."
- EPA has only set five of these in the past
- NSPS is a pre-requisite!

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State Compliance

- Rate-based limits (pounds of CO2/MWh)
- Covered units:
  - >73 MW or >25 MW?
  - Coal
  - NGCC
  - Other
- Limits: 2020-2029 and 2030 and beyond

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State Compliance

- State plans due June 30, 2016 but can get extension
- States given significant flexibility
  - State cap-and-trade
  - Regional cap-and-trade
  - Unit level requirements
  - System-wide averages
- Confusion about treatment of new NGCC
- New renewables/energy efficiency/nuclear main focus
- Problem for existing nuclear?
- No out-of-sector offsets

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How Did EPA Set The State Limits?

1. Improve coal plant efficiency by 6%
2. Re-dispatch existing natural gas combined cycle units in the state to offset coal (70% CF)
3. Increase the percentage of renewables used to between 2% and 25% (depending on the state), and assume that nuclear plants under construction will be built and that 5.8% percent of all existing nuclear capacity does not retire
4. Increase energy efficiency programs to reduce electricity consumption by 9% to 12% by 2030

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EPA's Bold Assumptions

EPA Assumes The Following States Will Close All Of Their Existing Coal Plants By 2020 To Comply With The Clean Power Plan	Existing Coal Generation in 2012 (MWh)
Alaska	215,407
Arizona	24,335,930
California	933,157
Connecticut	99,461
Massachusetts	2,268,133
Mississippi	7,503,114
Nevada	4,133,662
New Hampshire	1,281,341
New Jersey	2,602,990
New York	4,156,143
Oregon	2,640,259
Washington	3,735,730

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A Federal RPS?

EPA Assumes The Following States Will Implement A Renewable Portfolio Standard That Is More Stringent Than The State's Current RPS

Alabama	North Dakota
Alaska	Oklahoma
Arkansas	Pennsylvania
Florida	South Carolina
Georgia	Tennessee
Idaho	Texas
Indiana	Utah
Kentucky	Virginia
Louisiana	West Virginia
Mississippi	Wisconsin
Nebraska	Wyoming
New Mexico	

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Are EPA's Building Blocks Lawful?

- Block 1 – Increase Coal Efficiency By 6% (Inside Fence-Line)
  - Likely lawful
- Block 2 – Re-dispatch NGCC (Outside Fence-Line)
  - State-wide v. utility footprint basis
  - Legally questionable as written
- Block 3 – Renewables / Nuclear (Further Outside Fence-Line)
  - Re-define source?
  - If court allowed, where would it end?
  - Likely unlawful
- Block 4 – Demand-side EE (Outside Utilities'/States' Control)
  - Most legally suspect

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What Happens If Blocks Overturned?

MISO State	Block One (Coal -6%)	Block Two (Re-dispatch)	Block Three (Add Nuke and RE)	Block Four (Add EE)
Illinois	6%	15%	22%	33%
Indiana	6%	8%	11%	20%
Iowa	6%	16%	5%	16%
Kentucky	6%	9%	10%	18%
Michigan	5%	17%	21%	31%
Minnesota	5%	32%	29%	41%
Missouri	6%	11%	13%	21%
Montana	6%	6%	14%	21%
Nebraska	6%	10%	18%	26%
North Dakota	6%	6%	6%	11%
Ohio	5%	10%	18%	28%
South Dakota	6%	35%	21%	35%
Wisconsin	5%	19%	25%	34%
US Total	4%	16%	24%	33%

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Three Major Legal Challenges to ESPS

- Challenge building blocks
- Challenge the NSPS and win
  - EPA's nifty 111(b) argument
- Does 112 trump?
  - Senate version: EPA can't adopt ESPS for listed HAP
  - House version: EPA can't adopt ESPS if source category is regulated under 112
  - Lawsuit pending in D.C. Cir. – WV argument
  - Courts generally will try to read provisions together (and here they can)

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Other Legal Issues

- Can EPA even set BSER for states?
  - 111(d) language says states shall establish
- Can ESPS/NSPS be more stringent than EPA's past BACT determinations?
  - EPA's past BACT determinations range from 2-5%
- Federalism issues
- Cap-and-trade + Federal RPS + Energy Efficiency Bill
- Who needs Congress?

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New Source Review for GHG/Supreme Court – Clarity & Confusion

- Background
  - Post-*Massachusetts v. EPA*, Agency adds GHG to list of pollutants triggering new source review
  - However, Clean Air Act set threshold for new source review at 250 tpy
  - U.S. EPA used "Tailoring Rule" (2010) to limit scope of GHG new source review permitting to larger GHG emitters (75,000/100,000 tpy)
  - At issue, whether U.S. EPA could set GHG limits above statutory threshold to avoid "absurd result"

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New Source Review for GHG/Supreme Court – Clarity & Confusion

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- Background (continued)
  - D.C. Circuit Court of Appeals
    - Allowed GHG threshold to remain in place
    - Used procedural issues – lack of standing – to uphold rule (threshold increased, not decreased so challengers not harmed)
    - Did not need to reach substantive issue of U.S. EPA increasing threshold from 250 to 75,000/100,000

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Supreme Court Decision

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- Very divided court
  - 5-4 holding U.S. EPA cannot "tailor" the statutory threshold requirements
  - 7-2 holding U.S. EPA can require GHG BACT for sources already subject to new source review
- Open issues – not clearly decided
  - Scope of BACT for GHG – court did not address directly but broad energy efficiency requirement possibly suspect
  - Threshold for GHG BACT uncertain
  - Uncertain whether U.S. EPA needs to issue new rule with new threshold

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Practical Implications

- Most GHG BACT eligible sources remain in program – 83% versus 86%
- Existing BACT determinations for "anyway" sources remain in effect
- Energy efficiency BACTs need to be met
- Future permitting – may be able to scale back full facility GHG BACT requirements
- State SIP revisions likely to conform to Supreme Court decision

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MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY (MACT) DEVELOPMENTS

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Utility MATS Background

- Lots of detail in past webinars
- Final Rule – Feb. 16, 2012 (77 FR 9304)
- MACT implementation schedule – 3 yrs plus 1 yr extension
- Applies to EGUs >25 MW that burn coal or oil
- 1,350 affected utility units (1,200 coal/150 oil)
- Coal – numeric emissions for mercury, PM and HCL; in short, approx. 91% mercury control required
- Hits high-sulfur coal units harder

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White Stallion Energy Center v. EPA – D.C. Cir. (4/15/14)

- Upheld MATS rule in its entirety
- Main issue: EPA's determination of whether rules were "appropriate and necessary"
  - EPA didn't consider costs → Court said that was ok
- Numerous other issues decided in EPA's favor, e.g.:
  - EPA was not required to distinguish between large ("major") and small ("area") sources in setting standards;
  - EPA did not unfairly use a biased dataset to establish mercury limit;
  - EPA was not required to set a health based standard for acid gas emissions.

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What's Next?

- Decision not a huge surprise
- Most utilities have been planning to comply
- Industry didn't ask for rehearing
- Deadline for filing w/Supreme Court is July 14th
- ClearView Energy Partners
  - Total of 24 to 40.3 GW of coal-fired capacity shut down by 2016 b/c of MATS
- EIA 2014 Projections (MATS and other causes)
  - 50 GW (or 16%) retired by 2020

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NRDC v. EPA, 749 F.3d 1055 (D.C. Cir. April 18, 2014)

- CAA §112 NESHAP final portland cement rules September 2010
- Compliance date: September 2013
- On judicial review D.C. Circuit remands standards (CISWI/NESHAP data pools crossed over) – *PCA v. EPA,* 665 F.3d 177 (D.C. Cir. 2011)

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NRDC v. EPA, 749 F.3d 1055 (D.C. Cir. April 18, 2014)

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- New final rule February 2013:
  - Revised particulate matter (PM) standard
  - Other standards (Hg, HCl, HC) not changed
  - Extended September 2013 compliance date to September 2015 for *each* pollutant
  - Included "affirmative defense" provision for malfunctions

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NRDC v. EPA, 749 F.3d 1055 (D.C. Cir. April 18, 2014)

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- NRDC challenges February 2013 rule in D.C. Circuit
- Several issues with industry-wide implications
- NRDC lost on all issues except "affirmative defense"

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NRDC v. EPA, 749 F.3d 1055 (D.C. Cir. April 18, 2014)

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- Court (3-0) ***rejected*** these NRDC arguments:
  - CAA §112(d)(7) an"anti-backsliding" provision prohibiting EPA from revising a NESHAP standard to make it less stringent
  - CAA §112 prohibits EPA from extending NESHAP compliance dates (including when not all pollutant standards are revised) – Court: "irrational and absurd to have different compliance dates for different pollutants"
  - CAA §112 prohibits EPA from considering cost-effectiveness when considering whether to "go beyond the MACT floor"

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NRDC v. EPA, 749 F.3d 1055 (D.C. Cir. April 18, 2014)

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- Court (3-0) ***agreed*** with this NRDC argument:
  - CAA does not authorize EPA regulation providing an affirmative defense for malfunctions
  - CAA leaves to federal courts the sole authority to determine remedies for violations
  - CAA §113(e)(1) sets forth mitigating factors for *courts* to use when assessing penalties

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NRDC v. EPA, 749 F.3d 1055 (D.C. Cir. April 18, 2014)

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- Time has expired for any petition for rehearing or certiorari
- SO . . . . . .

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Sierra "Affirmative Defense" Deletion Petition

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- Same malfunction "affirmative defense" regulation vacated by D.C. Circuit 3-0 in *NRDC v. EPA* (April 2014) appears in many recent EPA CAA rules.
- June 17, 2014, Sierra files rulemaking petition with EPA seeking deletion of regulation in each such CAA rule.
- As protective tactic, Sierra also files D.C. Circuit petition for review of each such rule. (D.C. Cir. No. 14-1110.)

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Sierra "Affirmative Defense" Deletion Petition

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- Petition covers wide swath of recent EPA CAA standards. Essentially anything issued since March 2011:
  - New Source Performance Standards (§111 only):
    - Electric Utility Steam Generating Units
    - Nitric Acid Plants
    - Kraft Pulp Mills
    - Crude Oil and Natural Gas Production, Transmission and distribution

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- Incinerator New Source Performance Standards & Emission Guidelines (§§111, 129):
  - Commercial and Industrial Solid Waste Incineration Units
  - Sewage Sludge Incineration Units

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- National Emission Standards for Hazardous Air Pollutants (§112):
  - Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks
  - Pulp and Paper Industry
  - Group I Polymers and Resins
  - Secondary Lead Smelting
  - Marine Tank Vessel Tank Loading Operations ·
  - Oil and Natural Gas Production Facilities
  - Shipbuilding and Ship Repair (Surface Coating)

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Sierra "Affirmative Defense" Deletion Petition

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- National Emission Standards for Hazardous Air Pollutants (Continued):
  - Wood Furniture Manufacturing Operations
  - Printing and Publishing Industry
  - Steel Pickling-HCl Process Facilities and Hydrochloric Acid Regeneration Plants
  - Pharmaceuticals Production
  - Natural Gas Transmission and Storage Facilities
  - Group IV Polymers and Resins
  - Pesticide Active Ingredient Production
  - Polyether Polyols Production

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Sierra "Affirmative Defense" Deletion Petition

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- National Emission Standards for Hazardous Air Pollutants (Continued):
  - Primary Lead Smelting
  - Major Industrial, Commercial, and Institutional Boilers and Process Heaters
  - Industrial, Commercial, and Institutional Boilers Area Sources
  - Coal- and Oil-Fired Electric Utility Steam Generating Units
  - Chemical Manufacturing Area Sources
  - Polyvinyl Chloride and Copolymers Production

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Sierra "Affirmative Defense" Deletion Petition

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- EPA already "obeying" April 2014 *NRDC* case holding in new CAA proposals
  - Petroleum refining NSPS proposal, 79 FR 36879, 36945, June 30, 2014
  - No affirmative defense language in proposed rule
  - Preamble explains EPA can rely upon enforcement discretion, Courts can rely upon CAA §113(e)(1)

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ADDITIONAL CLEAN AIR ACT DEVELOPMENTS

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CSAPR Background

- Aimed at curbing interstate air pollution
- Lots more detail in past webinars
- Based on "good neighbor" provision
  - CAA s. 110(a)(2)(D)(i)(I)
  - Requires states to prohibit sources from emitting “air pollutants in amounts” that will "contribute significantly to nonattainment in . . . any other state"

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CSAPR Programs

- Three programs (SO2, annual NOx, and ozone-season NOx)
- Original two-phase compliance dates: Jan/May 2012 and Jan. 2014
- BUT NOW: Jan/May 2015 and Jan/May 2017?
- D.C. Circuit stayed rule and then overturned it and reinstated CAIR
  - Two big issues: FIP first and EPA's use of cost

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U.S. Supreme Court's EME Homer Decision

- 6-2 (Roberts and Kennedy + Liberals)
- Good Neighbor provision
  - CAA language is vague (didn't even rely on EPA's main argument)
  - → EPA gets lots of deference and could use cost
  - Court thought EPA's approach was "equitable and efficient"
- SIP/FIP
  - CAA required states to deal with transport in SIPs
  - States haven't done it
  - EPA's "FIP first" approach was lawful
- Left door open for "as applied" challenges

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What Now?

- Still issues pending before D.C. Circuit
  - Fights over briefing schedule
  - As applied challenges (e.g., Texas, Louisiana, Wisconsin)
- EPA has asked to lift stay
- EPA will need to re-write the rule to change compliance dates, etc.
- Does current CSAPR really matter?
  - 2013 NOx/SO2 actual emissions = 1.18 million/2.58 million
  - 2015 NOx/SO2 CSAPR budgets = 1.26 million/3.47 million
  - 2017 NOx/SO2 CSAPR budgets = 1.20 million/2.26 million

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New Source Review – Aggregation Finally Defined

- Background
  - Issue of what facilities should be considered part of the same "stationary source"
  - Three elements traditionally relied on by U.S. EPA
    - Contiguous or adjacent properties
    - Same SIC code
    - Under common control
  - Over the years, U.S. EPA taken an expansive view of those criteria
    - Example – "adjacent" = functional interrelatedness of facilities
    - Traditionally – fact specific so physically separate facilities part of larger production process = aggregated

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Summit Petroleum – Sixth Circuit Court of Appeals (Aug. 2012)

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- Rejected "functional interrelatedness" test – unreasonable interpretation of adjacent
- Court adopted dictionary definition of "adjacent" – physical location next to each other
- U.S. EPA issues "policy memo" in response (Dec. 21, 2012)
  - Purports to limit *Summit Petroleum* decision to Sixth Circuit states – Michigan, Ohio, Kentucky, Tennessee
  - Other states – U.S. EPA applies "functional interrelatedness" test

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No Aggregation in *Any* State

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- *NEDACAP v. EPA*, 2014 U.S. App. LEXIS 10047 (D.C. Cir. May 30, 2014)
  - After losing *Summit* in 6th Circuit, EPA issues "directive" in form of HQ memorandum to regions
  - Directive states that EPA will follow *Summit* opinion only in 6th Circuit states: Kentucky, Michigan, Ohio, Tennessee
  - In all other states, EPA will continue to follow position on aggregation that 6th Circuit rejected

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No Aggregation in *Any* State

- Group of industries regulated by CAA seek judicial review of "directive" in D.C. Circuit
- Court (3-0) vacates memorandum:
  - EPA CAA regulations have for years provided that it is EPA's "policy" to "assure uniform application by all Regional offices of the criteria, procedures, and policies employed in implementing and enforcing" the CAA (40 C.F.R. § 56.3(a),(b))
  - EPA's post-*Summit* "directive" in effect amends those regulations
  - Regulations can only be amended through notice-and-comment rulemaking; therefore the directive must be vacated
  - Court did not opine on whether the *Summit* decision was correct

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Practical Implications

- Aggregation of facilities
  - U.S. EPA, in the future, can adopt new aggregation rules that incorporate functional interrelatedness test
  - Alternatively, U.S. EPA can remove the Regional Consistency Rule
  - States remain free to interpret SIPs as not subject to Regional Consistency Rule

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Practical Implications

- Other implications of Regional Consistency Rule
  - "Criteria, procedures and policies" must be uniform
  - Was issue here narrow – i.e., memo was a U.S. EPA directive and not uniform
  - However, implications could be broader – court imposed "interpretations" on Regions that differ
  - Does decision create a "race to the courthouse"

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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 the event Website early next week http://www.foley.com/environmental-law-update-significant-new-clean-air-act-developments–what-you-need-to-know-07-10-2014/
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