

AIR POLLUTION REGULATION ROUNDUP

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In what we hope will become a regular feature of this website, we are presenting the first in a series of environmental regulatory “roundups” – an overview of developments in a particular environmental legal area occurring in the previous 12 months, with a hint of what to expect in the future. Subjects to be covered in upcoming months include: stormwater, climate change, and environmental remediation.

We begin this month with air pollution regulation. As anyone who reads the news can attest, more than 20 years after enactment of the Clean Air Act (CAA) Amendments of 1990, federal and state efforts to regulate air pollution remain in a state of flux. Although the U.S. Environmental Protection Agency (EPA) has largely completed the hundreds of rulemaking and other tasks assigned to it under the 1990 CAA Amendments, many of the standards required by the Act are now undergoing review. Moreover, new issues have arisen that demand regulatory attention. At the state level, the New York State Department of Environmental Conservation (DEC) has undertaken several important air initiatives in the last 12 months. NOTE: This summary does not cover rules relating to mobile sources.

Boilers and Related Sources

In the past year, EPA adopted a series of controversial rules regulating emissions from all types of boilers, including long-awaited standards for non-utility major and area source boilers under the National Emission Standards for Hazardous Air Pollutants (NESHAP) program. However, the agency postponed implementation of the major source boiler standards pending further review. On the utility side, EPA adopted a replacement for its Clean Air Interstate Rule and proposed long-delayed standards limiting hazardous air pollutant emissions from utility boilers. At the state level, DEC adopted a controversial new rule regulating outdoor wood boilers, an increasingly popular home heating option in rural areas.

- **Area source NESHAP for industrial, commercial and institutional boilers.** The rule, set forth at 40 CFR Part 63, subpart JJJJJJ, applies to coal, biomass and oil-fired boilers located at area (i.e., minor) sources; natural gas boilers are exempt. The standards differ depending on the size and type of boiler. For the most part, however, existing boilers are subject only to a periodic tune-up requirement. In addition, owners of existing large boilers (10 mmBtu/hour or more heat input) at area sources must arrange for an energy assessment to identify cost-effective energy conservation measures. Immediately after adoption, EPA commenced reconsideration of the controversial rule and in December 2011, proposed to postpone the deadline for completing the first mandatory boiler tune-up and extend the time between mandatory tune-ups for certain sources. 76 Fed. Reg. 80532 (Dec. 23, 2011). By EPA’s estimate, there are approximately 187,000 existing area source boilers nationwide, many of which are located at facilities such as commercial and municipal buildings that are not currently subject to federal or state air pollution control regulations. Owners/operators of boilers subject to the rule were required to submit initial notifications to EPA by **September 17, 2011**.

- **Major source NESHAP for industrial, commercial and institutional boilers and process heaters.** In response to a 2007 federal court decision vacating the original standard, EPA adopted major revisions to the maximum achievable control technology (MACT) standards for boilers set forth at 40 CFR Part 63, subpart DDDDD. The revised subpart DDDDD rule limits emissions of mercury, dioxin, particulate matter, hydrogen chloride, and carbon monoxide from various subcategories of boilers/process heaters; the limits depend on the type of fuel and type/size of unit. As with the area source standards discussed above, smaller and/or less polluting units are subject only to periodic tune-up requirements; in addition, existing units must conduct an energy assessment. In response to multiple requests for reconsideration, EPA took additional comment on the standards and proposed numerous changes, including: expanding the number of subcategories and setting new emission limits; replacing numeric dioxin limits with work practice standards; and decreasing the tune-up requirements for certain small, less-polluting boilers. 76 Fed. Reg. 80598 (Dec. 23, 2011). EPA has postponed the effective date of the major source boiler rule until judicial review of the rule is complete or EPA completes the reconsideration process.
- **Standards and emission guidelines for commercial and industrial solid waste incinerators (CISWI).** In 2007, a federal court vacated the CISWI standards after finding that EPA defined solid waste too narrowly, potentially resulting in the improper regulation of CISWIs under CAA § 112 rather than CAA § 129, which is somewhat stricter. In response, EPA revised its standards for CISWIs, a category that includes incinerators, energy recovery units that combust solid waste, waste-burning kilns, and small, remote incinerators. Consistent with the requirements of CAA § 129, the rules, which are set forth at 40 CFR Part 60, subparts CCCC and DDDD, establish emission standards for particulate matter, lead, cadmium, mercury, dioxins/furans, carbon monoxide, nitrogen oxides, hydrogen chloride, and sulfur dioxide. The precise limits depend on the type of unit and whether it is new or existing. In a separate rule, EPA adopted a definition of non-hazardous solid waste to be used to identify whether non-hazardous secondary materials burned as fuels or used as ingredients in combustion units are solid waste and thus, whether the units burning the materials are regulated as CISWIs under CAA § 129 or boilers under CAA § 112. In December 2011, EPA proposed changes to both the CISWI and solid waste definition rules. 76 Fed. Reg. 80452 (Dec. 23, 2011). When EPA stayed the major source boiler standard it also stayed the CISWI rule pending completion of judicial review or EPA's administrative reconsideration.
- **Proposed standards for coal and oil-fired electric utility steam generating units (EGUs).** More than 10 years after adding EGUs to the list of stationary sources subject to regulation under the NESHAP program and three years after a federal court vacated a mercury cap-and-trade program adopted in place of a NESHAP, EPA confirmed its 2000 findings that it is necessary and appropriate to regulate emissions of mercury and other hazardous air pollutants (HAPs) from EGUs under CAA § 112 and proposed MACT standards that include: (1) emission limitations for mercury, hydrogen chloride and particulate matter (as a surrogate for non-mercury metallic HAPs) from new and existing coal and solid oil-derived fuel-fired EGUs; (2) emission limitations for total HAP metals (including mercury), hydrogen chloride and hydrogen fluoride from new and existing liquid oil-fired EGUs; and (3) work practice standards. 76 Fed. Reg. 24976 (May 3,

2011) (to be codified at 40 CFR Part 63, subpart UUUUU). EPA finalized the standards in December 2011; to date, however, they have not been published in the Federal Register.

- **Cross-State Air Pollution Rule (CSAPR).** The CSAPR or “Transport Rule” is an emission cap-and-trade program that replaces the Bush administration’s Clean Air Interstate Rule (CAIR), an earlier cap-and-trade program designed to address ozone and fine particulate matter nonattainment problems in the Northeast by reducing emissions of nitrogen oxides and sulfur dioxide from power plants. In 2008, a federal appeals court invalidated the CAIR after finding that the rule’s region-wide emission trading scheme violated the CAA because it did not target emissions from the specific sources contributing to downwind nonattainment problems. In response, EPA established state-specific emission budgets under the CSAPR based on each state’s contribution to downwind nonattainment. 76 Fed. Reg. 48208 (Aug. 8, 2011). The required emission reductions were to be implemented in two phases, with the first phase scheduled to start January 1, 2012. However, a federal appeals court stayed implementation of the CSAPR in December pending final resolution of a court case challenging the rule.
- **Outdoor wood boiler rule.** In January 2011, DEC adopted controversial new standards for outdoor wood boilers (OWB) – boilers installed outdoors or in non-occupied structures that burn wood or other fuels to provide heat or hot water. The new regulations, which are set forth at 6 NYCRR Part 247: (1) prohibit burning anything in OWBs other than seasoned clean wood, wood pellets, and other approved fuels; (2) prohibit emissions that cause a nuisance or exceed 20 percent opacity; (3) establish particulate matter emission standards and siting and stack-height requirements for new OWBs; (4) impose manufacturer testing certification and equipment labeling requirements; and (5) compel OWB distributors and buyers to sign a notice concerning OWB operation. DEC is contemplating further changes to the regulation as evidenced by its inclusion in the Department’s 2012 Regulatory Agenda.

Prevention of Significant Deterioration, Nonattainment New Source Review, and New Source Performance Standards

In 2011, EPA implemented its controversial greenhouse gas (GHG) tailoring rule, which is designed to extend the existing Prevention of Significant Deterioration (PSD) program to major sources of GHGs. EPA also took the first steps toward regulating GHG emissions under the New Source Performance Standards (NSPS) program and reforming the NSPS review process generally. At the state level, DEC revised New York’s New Source Review (NSR) regulations to implement the GHG tailoring rule.

- **GHG tailoring rule.** On December 30, 2010, EPA adopted a series of rules designed to implement its 2010 GHG tailoring rule, which established special “tailored” thresholds for assessing the applicability of the PSD program to major sources of GHGs that reflect the fact that GHGs are emitted in significantly higher quantities than other PSD pollutants. EPA also made available various tools to help state and local permitting authorities identify cost-effective pollution reduction options for GHGs, including a guide entitled *PSD and Title V Permitting Guidance for Greenhouse Gases*, which

discusses the process of setting best available control technology for GHGs and applying the Title V operating permit program to GHG sources. The guidance and related documents can be found on EPA's website at: www.epa.gov/nsr/ghgpermitting.html.

- **New York's NSR regulations.** In October 2011, DEC revised 6 NYCRR Part 231 to implement the GHG tailoring rule as well as recent EPA rules establishing emission offset, increment, and other thresholds required to regulate fine particulate matter under the PSD and nonattainment NSR programs.
- **NSPS for power plants and petroleum refineries.** EPA revised the NSPS and emission guidelines for both source categories several years ago and was sued by states and environmental groups for failing to address GHGs as part of those revisions. In the wake of various developments, the parties agreed to a schedule for issuing regulations addressing GHGs from these sources. The settlements represent the first time EPA has committed to using the NSPS program to limit GHG emissions. EPA's announcement of the settlement can be found at: www.epa.gov/airquality/ghgsettlement.html.
- **Periodic review of NSPS.** Although CAA § 111(b)(1)(B) requires EPA to review its technology-based NSPS at least every eight years, the agency has largely failed to meet this obligation. In October 2011, EPA published an advance notice of proposed rulemaking (ANPR) seeking comment on a strategy for focusing reviews of the NSPS to maximize public health and welfare benefits while assuring the effective management of government resources. 76 Fed. Reg. 65653 (Oct. 24, 2011). The ANPR identifies criteria to be considered in assessing the continued efficacy of a NSPS and identifying standards that do not require review; the remaining source categories would then be prioritized based on additional factors. EPA also sought feedback on a tentative list of source categories determined not to require further review.

National Ambient Air Quality Standards

In the past year, EPA made major progress in completing its review of several national ambient air quality standards, including electing to retain the existing carbon monoxide NAAQS. However, the Obama administration terminated its review of the 2008 ozone NAAQS and postponed issuing a joint secondary NAAQS for sulfur and nitrogen oxides.

- **Carbon monoxide NAAQS.** After a multi-year review process, EPA announced in August 2011 that it was retaining the existing NAAQS for carbon monoxide (CO) after finding that the standards provide a proper level of health protection and that available epidemiological studies do not justify stricter standards. 76 Fed. Reg. 54294 (Aug. 31, 2011). However, EPA revised the CO monitoring provisions to focus on highly trafficked roads in larger urban areas because most CO emissions come from mobile sources. There are currently no CO nonattainment areas, meaning additional controls on CO sources are likely only if relocated monitors reveal new CO nonattainment problems.
- **2008 ozone NAAQS.** President Barack Obama suspended review of the 2008 NAAQS for ozone, which were adopted by the Bush administration despite recommendations for stricter standards from EPA's expert advisory panel. Upon taking office, the Obama

administration announced plans to reconsider the 2008 standards and new ozone NAAQS based on the panel's earlier recommendations were proposed in early 2010. After several delays in finalizing the standards, President Obama issued a statement in September 2011 announcing the suspension of the review process, noting, among other things, that a complete review of the ozone NAAQS is currently underway. The announcement can be found at: www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards. Since then, EPA has issued a memorandum explaining how it plans to implement the 2008 standards and sought comment on state recommendations regarding ozone nonattainment area designations under the 2008 standards.

- **Secondary NAAQS for nitrogen and sulfur oxides.** EPA proposed to retain the existing secondary (welfare-based) NAAQS for nitrogen and sulfur oxides pending further study of a possible joint standard based on the collective impacts of these pollutants on sensitive aquatic systems. 76 Fed. Reg. 46084 (Aug. 1, 2011).

Hazardous Air Pollutants

In the past year, many of the developments associated with the regulation of hazardous air pollutants have involved boilers and electric generating units. However, EPA also has taken important steps toward completing its review of MACT standards required by the CAA.

- **Residual risk/periodic technology review.** Under Clean Air Act § 112, EPA must assess whether any residual risk remains after imposing technology-based standards and revise them as necessary; EPA also must conduct a periodic review of the underlying technology to confirm that it remains current. In the past year, EPA completed its review of the following MACT standards all of which can be found at 40 CFR Part 63: group I polymers and resins (subpart U); secondary lead smelting (subpart X); marine tank loading vessel operations (subpart Y); shipbuilding and ship repair (subpart II); wood furniture manufacturing (subpart JJ); printing and publishing industry (subpart KK); pharmaceuticals production (subpart GGG); and primary lead processing (subpart TTT). EPA also proposed revisions to the following standards after residual risk/periodic technology reviews: pulp and paper industry (subpart S); oil and natural gas production (subpart HH); primary aluminum reduction (subpart LL); mineral wood production (subpart DDD); natural gas transmission and storage (subpart HHH); wool fiberglass manufacturing (subpart NNN); and ferroalloys production (subpart XXX). In several cases, EPA adopted stricter standards to address certain residual risks and/or technological developments. EPA also amended certain standards to address operations not covered by the current standard and make other changes.
- **Startups, shutdowns and malfunctions (SSM).** As part of most NESHAP rulemakings during the past year, EPA has replaced existing startup, shutdown and malfunction provisions with provisions requiring facilities to comply with standards at all times, including during startup and shutdown. With respect to malfunctions, EPA has adopted an affirmative defense to civil penalties, which is available to facilities provided they meet certain criteria. EPA is revising the SSM requirements in response to a court

decision that vacated EPA's general SSM exemption in 40 CFR Part 63, subpart A because it violated the CAA.

- **Sewage sludge incinerators.** In March 2011, EPA adopted emission standards for new and existing sewage sludge incinerators under CAA § 129. 76 Fed. Reg. 15372 (Mar. 21, 2011). EPA estimates that there are over 200 of these units at municipal wastewater treatment facilities across the United States. The rules, which are set forth at 40 CFR Part 60, subpart LLLL (new sources) and MMMM (existing sources), establish separate emission standards for multiple hearth and fluidized bed incinerators. As with other solid waste incinerator standards, the regulations limit emissions of cadmium, carbon monoxide, dioxins/furans, hydrogen chloride, lead, mercury, nitrogen oxides, particulate matter, and sulfur dioxide. In December 2011, DEC proposed revisions to New York's incinerator rules, set forth at 6 NYCRR Part 219, to incorporate the new federal standards.

Other Regulatory Developments

- **State air permitting regulations.** DEC announced that it is seeking input from stakeholders on planned revisions to New York's air permitting regulations, which have not been significantly revised since 1996 when DEC adopted changes required to implement the Clean Air Act's Title V operating permit requirements. Major changes to 6 NYCRR Part 201 under consideration include: (1) clarifying the procedures for obtaining approval of physical changes at existing Title V facilities; (2) revising the provision requiring new sources to obtain state facility permits because they trigger a New Source Performance Standard or emit a hazardous air pollutant; (3) revising the list of exempt and trivial activities, including the exemption for temporary emission sources; (4) adding a permit term for registrations and state facility permits; and (5) requiring certain facilities that emit specified persistent, bioaccumulative and toxic compounds above threshold levels to obtain a state facility permit. A pair of stakeholder meetings was held in November 2011; DEC plans to formally propose rule changes in 2012.

All Federal Registers cited above can be accessed at www.gpo.gov/fdsys. Proposed and recently adopted state regulations can be found at www.dec.ny.gov/regulations/propregulations.html.