CLEAN AIR ACT LEGAL BRIEFS

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Overview

- Clean Power Plan
- New Source Review – Updated Memoranda
- Demise of “Once In Always In”
- Boiler MACT Saga – Latest Decision
- D.C. Circuit Decision on 2008 Ozone NAAQS Implementation Rule
- Change in Approach to Title V Petitions

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Clean Power Plan Update

- U.S. Supreme Court issued a stay of the Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units on February 6, 2016 pending disposition of challenges in the D.C. Circuit.
- March 28, 2017 Executive Order on Promoting Energy Independence and Economic Growth
  - Called for review of the Clean Power Plan and related agency rules and actions as well as rescission or review of certain energy and climate-related actions, reports and memoranda issued by the prior administration.

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Clean Power Plan Update

- EPA withdrew proposed rules related to implementation of the Existing Source Emission Guidelines, including the model trading rule in April 2017. 82 FR 16144 (April 4, 2017).
- EPA announced that it was reviewing the NSPS for new, modified or reconstructed power plants. 82 FR 16330 (April 4, 2017).
- A proposed rule to repeal the Existing Source Emission Guidelines was published in the Oct. 16, 2017 Federal Register, 82 FR 48035.
- Comments were initially due December 15, 2017, but the comment deadline was extended to April 26, 2018.

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Clean Power Plan Update

- In a related development, EPA issued an Advance Notice of Proposed Rulemaking (82 FR 61507, Dec. 27, 2017) soliciting input on a future replacement rule. Comments were due Feb. 26, 2018. Although requests to extend the comment period were made, EPA declined to do so.
- Over 250,000 comments were received.

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New Source Review – Updated Memoranda

- December 7, 2017 Memo: NSR Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability.
  - Background discussion of the DTE NSR enforcement litigation regarding a Michigan power plant.
  - Intent of source to actively manage future emissions to prevent an emissions increase can be considered when projecting future emissions.
  - If the source follows the procedures in the regulations, EPA will not second guess the emissions projections.
  - EPA will focus on the level of actual emissions after the project in deciding whether to pursue enforcement.

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New Source Review – Updated Memoranda

- March 13, 2018 Memo: Project Emissions Accounting Under the NSR Preconstruction Permitting Program
  - Emissions decreases as well as increases from the project may be considered in Step 1 of the evaluation of whether the project constitutes a major modification.
  - This Step 1 review is termed “project emissions accounting” rather than “project netting.” “[N]etting more properly describes looking at those *other* projects” that may be undertaken over the contemporaneous period.
  - Decrease does not have to be enforceable as a practical matter to be considered at Step 1.
  - Still to come … “project aggregation” guidance.

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“Once In, Always In” Policy

- Related to classification of sources based on emissions of Hazardous Air Pollutants (HAP) and was an outgrowth of the 1990 Amendments to the Clean Air Act.
- Under Section 112 of the Act, if a source emits 10 tpy or more of a single HAP or 25 tpy or more of combined HAP, the source is classified as a major source.
  - Major sources of HAP are subject to Title V permitting.
  - Major sources of HAP are subject to MACT standards, whereas non-major HAP sources (i.e., area sources) may not be subject to technology-based control standards, or at least to less onerous standards.

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The May 16, 1995 Seitz Memorandum

- "The purpose of this memo is to clarify when a major source of [HAP] can become an area source – by obtaining federally enforceable limits on its potential to emit – rather than comply with major source requirements."
- An existing source must achieve the change in status before the first date it must comply with a substantive MACT requirement.
- A new source that would otherwise be major must take limits to become an area source prior to start-up or the promulgation date of the MACT standard.

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The May 16, 1995 Seitz Memorandum

- "EPA is today clarifying that facilities that are major sources for HAP on the 'first compliance date' are required to comply permanently with the MACT standard ….."
- So, even if a source later reduced HAP emissions to less than major source thresholds MACT still applied.
  - Replaced an older line/equipment with more efficient one.
  - Reduced HAP emissions through product substitution.
  - Chemical no longer classified as a HAP.
- Regulatory amendment proposed in 2007 to eliminate OIAI policy - not finalized. 72 FR 69 (Jan. 3, 2007).

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The January 25, 2018 Wehrum Memo

- “The plain language” of the Act “compels the conclusion” that a major source becomes an area source at such time as the source takes an enforceable limit on its potential to emit HAP to less than 10 tpy single HAP and less than 25 tpy combined HAP.
- The source will no longer be subject either to major source MACT or other major source requirements that were applied due to major source status under Section 112.

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The January 25, 2018 Wehrum Memo

- EPA anticipates publishing a Federal Register notice soon to take comment on regulatory text to reflect this updated reading of the statute.
- Like NSR requirements, the “Once In, Always In” policy was flagged for review as part of the Trump Administration’s regulatory reform initiative.
- On March 28, 2018, seven environmental groups filed suit in the D.C. Circuit seeking review of the Wehrum Memo. *California Communities Against Toxics v. USEPA*, Case No. 18-1085.

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Litigation Notes

- Boiler MACT Litigation
  - March 16, 2018 D.C. Circuit decision in *Sierra Club v. EPA*, Case No. 16-1021.
  - Two main issues:
    - Did EPA adequately support the 130 ppm CO limits?
    - Are the startup/shutdown work practice standards arbitrary & capricious?

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Boiler MACT Litigation – First Issue

- The court had previously agreed that CO was a suitable surrogate for organic HAP but had not addressed whether the 130 ppm CO limits were appropriate.
- The court found that the record did not support EPA's action and that EPA was inconsistent in the way it viewed the same data.
- The court remanded the 130 ppm CO limits to EPA for reconsideration but did not vacate the limits.
  - Petitioner Sierra Club asked the court not to vacate;
  - Vacatur would cause substantial disruption due to removal of emissions limits on regulated HAPs.

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Boiler MACT Litigation – Second Issue

- Sierra Club argued that EPA's approach to startup and shutdown was not adequately supported and was not sufficiently stringent. In particular, the Sierra Club disputed the 4-hour startup window before meeting numeric standards.
- The history of the rulemaking was reviewed and the court ultimately rejected the challenge, finding EPA's approach reasonable.
- "EPA's work practices are admittedly less than exacting, but they are materially more precise and demanding than the general duty standard we disapproved in *Sierra Club* [551 F.3d 1019] in 2008."

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Ozone Implementation Rule Litigation

- On February 16, 2018, in *South Coast Air Quality Management District v. EPA,* Case No. 15-1115, the D.C. Circuit ruled on challenges to the Implementation Rule for the 2008 Ozone NAAQS, 80 FR 12264 (March 6, 2015).
  - Rejected argument that VOC and NOx reductions from sources outside the nonattainment area could be used to meet Rate-of-Progress and Reasonable Further Progress requirements.
  - Although EPA may revoke a previous NAAQS, EPA must include adequate anti-backsliding provisions.

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Ozone Implementation Rule Litigation

- Anti-backsliding issues
  - Orphan nonattainment areas (designated attainment for 2008 NAAQS but nonattainment for 1997 standard)
    - Unless formal redesignation to attainment, EPA cannot allow termination of NSR and transportation conformity requirements or shifting anti-backsliding requirements to "contingency measures."
    - Maintenance provisions must be included, but separate 'maintenance plan' is not a required SIP component
  - For areas designated nonattainment for the 1997 and 2008 NAAQS that are formally redesignated attainment, it is permissible to remove the anti-backsliding controls. However, the rule's option of a redesignation substitute request was not upheld.

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Ozone Implementation Rule Litigation

- Other issues
  - Proper baseline year
  - Application of 15 percent rule for moderate and greater nonattainment areas
  - Use of averaged area-wide emissions reductions – RACT not required for each individual source
  - Removal of transportation conformity requirements in areas designated attainment for the 2008 standard after being designated maintenance areas under the 1997 NAAQS (orphan maintenance areas)
  - Maintenance plan requirements

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Ozone Implementation - Vacated Provisions

- Waiver of statutory attainment deadlines for 1997 standard
- Removal of NSR and conformity controls from orphan nonattainment areas
- Grant of permission to move anti-backsliding requirements for orphan nonattainment areas to contingency measures
- Waiver of requirement to adopt outstanding applicable requirements for revoked 1997 NAAQS
- Waiver of maintenance plan requirement for orphan nonattainment areas
- Creation of the redesignation substitute

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Ozone Implementation Rule – Vacated Provisions

- Creation of alternative baseline year option
- Elimination of transportation conformity in orphan maintenance areas
- Waiver of requirement for second 10-year maintenance plan for orphan maintenance areas

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Redefining the Scope of Title V Permit Review

- Previously EPA has taken the position that it has authority to review prior determinations by states when undertaking review of proposed Title V permits.
- This has included revisiting prior state NSR conclusions on the basis that Title V permits must include all applicable requirements for the source.
- Administrator Pruitt has signaled a change in recent orders denying petitions to object to Title V permits.

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PacifiCorp Energy Hunter Power Plant

- Petition No. VIII-2016-4, Order Denying Petition entered October 16, 2017
  - Sierra Club claimed that Title V renewal permit failed to include PSD requirements for major modifications constructed in 1990's.
  - EPA found no error in Utah's decision to incorporate the terms and conditions of the previous preconstruction permit into the Title V permit without reevaluating whether those terms were properly derived.
  - The Order explains a change in approach in terms of EPA review of Title V permits.

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PacifiCorp Order

- Preconstruction permit terms and conditions should be incorporated into Title V permits without further review. "[T]itle V permitting is not intended to second-guess the results of state preconstruction permit programs…."
- The Act does not require that applicable requirements derived on a case-by-case basis must be checked before being incorporated into the Title V permit.
- Oversight of New Source Review should be handled under Title I. Citizen oversight can be accomplished through state appeals processes or citizen suits.

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PacifiCorp Order

- Incorporation of prior state determinations into the Title V permit does not affect EPA's enforcement authority or mean that EPA agrees the state reached the correct determination in the past.
- With respect to the permit shield, compliance with the Title V permit constitutes compliance with Title V of the Act. If the source wants a broader shield that addresses inapplicability of requirements, a discussion of inapplicability needs to be included as part of the permit determination.

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Resulting Litigation

- In February, the Sierra Club filed petitions for review of EPA's *PacifiCorp* Order in both the 10th Circuit (Case No. 18-9507) and the D.C. Circuit (Case No. 18-1038).
  - Sierra Club asserts the issue is one of national significance and should be heard by the D.C. Circuit. The filing in the 10th Circuit is characterized as a protective filing.
  - 10th Circuit set a mediation in March.
  - D.C. Circuit docket indicates dispositive motions now due April 26, 2018.

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Thank you

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