HUNTON& WILLIAMS

Clean Air Act Legal Updates

September 18, 2015

Joseph C. Stanko, Jr.

Partner
Hunton & Williams LLP

HUNTON& WILLIAMS

Major Clean Air Act Legal Activity

- GHG Existing Source Performance Standards (ESPS)
- GHG New Source Performance Standards (NSPS)
- Ozone National Ambient Air Quality Standards
- Regional Haze Program
- Startup, Shutdown, Malfunction (SSM) SIP Call
- Single Source Determination (Aggregation)

HUNTON& WILLIAMS

GHG ESPS: State Plan Deadlines

- **September 6, 2016:** "Initial Submittal" (extension request) or State Plan
- **September 6, 2017:** Update (if extension granted)
- **September 6, 2018:** State Plan (if extension granted)

HUNTON& WILLIAMS

GHG ESPS: "Initial Submittal" – Extension Request or Request Not to be Automatically FIPed?

- **Extension request**
  - Must "sufficiently demonstrate" ability "to submit an approvable final plan by the extended deadline."
    1. Identify an approach to implement the final rule.
    2. Explain why an extension is needed.
    3. Describe outreach efforts to stakeholders, including low-income communities.
  - Granted unless EPA denies by letter within 90 days (with no opportunity for public comment).
  - States denied extension after September 6, 2016 would have failed to submit a state plan.
- **Federal Implementation Plans (FIPs)**
  - EPA encourages comments on model plans "whether or not" a state intends to submit a state plan, noting that "it is reasonable to propose this federal plan now so that federal plans will be ready to be promulgated quickly . . ."
  - EPA asserts it can FIP a state "at any time" and warns that it intends to "promptly" do so if states do not submit plans or initial submittals by September 6, 2016.
  - EPA will impose FIPs by "cross-referencing" model plans, calling action "ministerial in nature."
    - *See e.g.* GHG PSD and Title V Permitting Rule, 80 Fed. Reg. 50199, "This action is exempt from notice-and-comment <u>because it is ministerial in nature</u>." (emphasis added).

HUNTON& WILLIAMS

GHG ESPS: "Initial Submittal" – Extension Request or Request Not to be Automatically FIPed?

- **Immediate FIP:** EPA is positioning itself to immediately FIP states, without public comment, based on model plans that are to be finalized next summer.
  - "**Just say no" States:** Subject to FIP immediately after September 6, 2016.
  - "**Building block one only" States:** Extension requests will fail to show states can submit "approvable plan" by 2018; also subject to FIP immediately after September 6, 2016.
- **Bottom Line:** States that do not commit by September 6, 2016 to achieving the entire GHG ESPS could be immediately subject to a FIP.

HUNTON& WILLIAMS

GHG ESPS: Litigation to Date

- **Section 321 (Employment Shift Evaluations)**
  - ***Murray Energy Corp. v. McCarthy* (N.D. W. Va.):** Petitioners argued that EPA did not consider employment impacts from its regulations as required in Clean Air Act section 321. Court refused to dismiss case for lack of standing, but has yet to rule on government motion for summary judgment.
- **Proposed GHG ESPS**
  - ***In Re: Murray Energy Corp.* and *West Virginia v. EPA* (D.C. Cir. 2015):** Requesting an "extraordinary writ" (*Murray*) and petition for review (*West Virginia*), petitioners argued that EPA cannot regulate power plants under both section 111(d) and 112. Court heard arguments, but dismissed cases on procedural grounds on June 9, 2015, saying that challenges were premature since the rule was not final.
  - ***Oklahoma v. McCarthy* (N.D. Okla. 2015):** Petitioners argued that proposal, if adopted, would violate the U.S. Constitution, allowing jurisdiction in district court. Court dismissed the case ruling that petitioners failed to show extraordinary reasons for immediate action.
- **Final GHG ESPS**
  - ***In Re: State of West Virginia* (D.C. Cir. 2015):** 16 States led by West Virginia requested an extraordinary writ for immediate stay. The request was dismissed on September 6, 2015 on the procedural grounds that the states did not meet stringent standards for such a writ.

HUNTON& WILLIAMS

GHG ESPS: State Opposition

- **24 States Have Filed or Announced Legal Challenges Against GHG ESPS**
  - **Joint stay (16 States):** Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, Wisconsin, Wyoming.
  - **Individual stays (2 States):** New Jersey, Texas.
  - **Extraordinary writ (15 States, 2 not on stays):** Alabama, Arkansas, Florida*, Indiana, Kansas, Kentucky, Louisiana, Michigan*, Nebraska, Ohio, Oklahoma, South Dakota, West Virginia, Wisconsin, Wyoming.
  - **Announced will challenge (2 States):** Colorado, North Carolina.
- **Another 11 States Expressed Opposition in Comments:** Alaska, Georgia, Idaho, Illinois, Iowa, Mississippi, Montana, North Dakota, Nevada, New Mexico, Tennessee.

HUNTON& WILLIAMS

GHG ESPS: Approximate Litigation Timeline

- **Challenges Filed**
  - **Published in Federal Register:** Late October 2015
  - **Petition for Review Deadline:** Late December 2015

- **D.C. Circuit**
  - **Phased Approach:** September 2016
  - **Normal Approach:** March 2017

- **Supreme Court Decision:** July 2018

HUNTON& WILLIAMS

GHG ESPS: Litigation Issues

- **Stay Motions:** As in MATS, the GHG ESPS will require final compliance decisions before Supreme Court review. Those challenging the GHG ESPS will file stay motions where they will have to demonstrate: (1) that they will suffer harms that cannot be redressed by the courts and (2) a substantial likelihood of success on the merits.
- **Cooperative Federalism:** The GHG ESPS is inconsistent with Clean Air Act Section 111(d)'s cooperative federalism approach.
  - **111(d):** EPA establishes emissions guidelines and states develop performance standards implemented on a case-by-case basis.
  - **GHG ESPS:** EPA establishes mandatory performance standards, leaving states little flexibility to implement.

HUNTON& WILLIAMS

GHG ESPS: Litigation Issues

- **Section 112 Exclusion**
  - ***King v. Burwell* (2015):** Exception to *Chevron* deference in questions of "deep economic and political significance" and where agency "lacks expertise."
- **Inside vs. Outside the Fenceline**
  - ***UARG v. EPA* (2014):** "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."
  - ***Michigan v. EPA* (2015):** In promulgating MATS without analysis of cost, EPA "strayed far beyond" its "bounds of reasonable interpretation." Agency deference under *Chevron* does not "license interpretive gerrymandering."
    - **Justice Thomas Concurrence:** *Chevron* has gone too far, "Although we hold today that EPA exceeded even the extremely permissive limits on agency power set by our precedents, we should be alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here."

HUNTON& WILLIAMS

GHG NSPS: Litigation Issues

- **"Adequate Demonstration":** Boundary Dam Unit #2 in Saskatchewan, Canada - the only operational CCS power plant in the world - falls well short of showing that the technology is "adequately demonstrated."
  - Very small (just 110 MW), very new (opened just last year), and heavily subsidized by the Canadian government.
  - Other examples that EPA relies on (that aren't otherwise prohibited from consideration by statute) are even smaller and are not power plants.
- **Energy Policy Act of 2005:** Prohibits EPA from even "consider[ing]" CCS projects relied upon in the rule.
  - Kemper Energy Facility, Texas Clean Energy Project, Hydrogen Energy California, W.A. Parish Project.
- **Co-Firing Alternative:** Unlawfully "redefines the source" by forcing a coal power plant to essentially become a natural gas power plant.

HUNTON& WILLIAMS

Ozone NAAQS: Basis for Standard

- **Studies Do Not Support Lower the Standard:** The clinical and epidemiological studies relied upon by EPA in the proposal are subject to substantial uncertainty and, therefore, do not support lowering the standard.
- **Margin of Safety:** Case law supports the option of building a margin of safety into analysis of the health effects evidence, not necessarily adding one at the end. EPA's studies are designed to inherently incorporate a margin of safety. At best (and with considerable uncertainty) the lowest those studies find effects is at 72 ppb.
- **68 ppb Standard:** Some in the Administration are reportedly pushing for a 68 ppb standard. Even taking EPA's position at face value, there is no support for a standard below 72 ppb, and a 70 ppb standard already incorporates a margin of safety.
  - Studies do not identify significant adverse effects below 80 ppb, meaning 75 pbb standard already incorporates a margin of safety.

HUNTON& WILLIAMS

Ozone NAAQS: Achievability

- **NAAQS Must Be Achievable**
  - **Section 107(a):** SIPs specify how NAAQS "will be achieved and maintained."
  - **Legislative History:** Standards set at background levels are "impractical" and represent "no-risk philosophy."
  - **Courts:** "May well be a sound reading" to conclude "it is inappropriate to set a standard below the level that can be achieved" *ATA v. EPA* (D.C. Cir 1999).
- **70 ppb is Not Achievable:** EPA in 1997 declined to set standard at 70 ppb because standard would be "more likely to be inappropriately targeted in some areas."
- **EPA's Proposed Relief Insufficient:** Promised future revisions to the Exceptional Events Rule and other changes do not provide sufficient relief for states. States cannot judge whether changes will work until EPA actually proposes language, and past similar EPA commitments have fallen through. In any case, those programs were not designed to address background ozone.

HUNTON& WILLIAMS

Ozone NAAQS: Permitting

- **New Nonattainment Area Quagmire:** Impossible for PSD permit applicants to demonstrate that a project does not "cause or contribute" to a violation of the immediately applicable revised standard, yet offset program will not yet be developed.
- ***Sierra Club v. EPA*** **(9th. Cir. 2014)** ***("*****Avenal"):** EPA can grandfather pending PSD applications if grandfathering addressed in regulations.
- **Grandfathering in Proposal:** EPA proposed grandfathering PSD permits that by the signature date of the final rule either: (1) are deemed complete or (2) have had a public notice published.
- **Current Grandfathering Insufficient:** While this grandfathering proposal is helpful, more is needed. PSD permits should be grandfathered until final designations. At a minimum, EPA should promptly issue transition guidance for new nonattainment areas.

Ozone NAAQS: Statutory Deadlines

- **EPA Modeling:** Projects most areas outside California will comply with 70 ppb standard under other existing federal controls by 2025.
  - ***Sierra Club v. EPA* (6th Cir. 2015):** Areas must implement "reasonably available control measures" before being designated in attainment even if local concentrations attain standard.
- **Statutory Attainment Deadlines:** Marginal nonattainment areas will be required to attain the revised standard by 2020.
  - ***NRDC v. EPA* (D.C. Cir. 2014):** EPA limited in ability to change attainment deadlines, cannot extend deadline to end of the year.
- **Modeling Doesn't Match Deadlines:** EPA's optimistic 2025 projections misaligned with statutory requirements.

Regional Haze

- **Arkansas:** EPA denied Arkansas state plan in 2012. Sierra Club sued EPA in 2014 to require the Agency to impose a FIP. EPA proposed a consent decree agreeing to issue final FIP by December 15, 2015, just five months after the comment period closed on proposed FIP. Court approved Arkansas AG motion to intervene, which argued that 5 months was too short to consider technically-detailed public comments on proposed FIP.
- **Montana**
  - ***Nat'l Parks Conservation Ass'n v. EPA* (9th Cir. 2015):** Power plant controls in FIP were arbitrary and capricious because of high costs without assured visibility improvement.
- **Wyoming**
  - ***Wyoming v. EPA* (10th Cir. 2014):** Court stays EPA's partial disapproval of Wyoming state regional haze plan.
  - ***Wildearth Guardians v. EPA* (10th Cir. 2014):** Court finds EPA was not arbitrary and capricious in partially approving emissions trading program in Wyoming's SIP. The Wyoming SIP will continue until court rules on EPA partial disapproval.

SSM SIP Call

- **Final SSM SIP Call:** Published on June 12, 2015, subjects 36 States to a SIP call deadline of November 22, 2016.
- **Requirements:** Affected states must adopt "continuous" controls and remove affirmative defense to limit penalties where a source has unavoidable exceedances.
  - Required revisions would leave industry essentially defenseless from citizen suits for unavoidable emissions from SSM events.
- **State Challenges:** A bipartisan group of 19 States have filed petitions for review in the D.C. Circuit Court of Appeals challenging the SSM SIP Call.
  - Challenges consolidated into single case, *Southeastern Legal Foundation Inc. et al. v. EPA*, case number 15-1166.

HUNTON& WILLIAMS

Single Source Determination (Aggregation)

- **2007 "Wehrum Memo":** Emissions from interconnected facilities aggregated if under "common control" and "adjacent" – defined as within a quarter mile.
- **2009 "McCarthy Memo":** Wehrum memo overturned, single source determination based on case-by-case analysis.
- ***Summit Petroleum Corp. v. EPA* (6th Cir. 2014):** EPA cannot base adjacency in source determinations on anything but geographical proximity.
  - EPA released memo stated that it would only apply this standard in the 6th Circuit.
    - ***NEDA/CAP v. EPA* (D.C. Cir. 2014):** Court ruled that memo violated EPA's own regional consistency policy.
- **Regional Consistency Policy:** On August 5, EPA proposed revisions to its regional consistency policy to make an exception "where Federal court decisions concerning the CAA have regional or local applicability."
- **Proposed Source Determination Rule:** On August 18, EPA proposed a rule surprisingly recommending that adjacency be determined by quarter-mile proximity approach.

Joseph C. Stanko
Partner
Hunton & Williams
jstanko@hunton.com