FEDERAL REGULATORY UPDATE

Federal Regulations

END OF AN ADMINISTRATION BRINGS REGULATORY CHANGES TO SPCC, AIR, AND CIVIL PENALTY RULES AND PROPOSED SOLID WASTE EXCLUSIONS

by Tom Wood; Stoel Rives LLP (Portland)

Introduction

Active Period

The end of 2008 was an active period for the US Environmental Protection Agency (EPA). With administration change looming in Washington DC, the agency sought to finalize or instigate various rulemakings that it considered particularly important or overdue. These rules ranged from substantial changes to the Spill Prevention, Control and Countermeasure (SPCC) rules to guidance dictating that carbon dioxide (CO_2) is not a pollutant that needs to be addressed in new source review air permitting. Topping off this tumultuous period was a decision by the DC Circuit Court striking down a portion of the federal Maximum Achievable Control Technology (MACT) rules. With the new leadership now ensconced, at least some of these last minute actions will undoubtedly come under review. A short summary of the highlights of these agency and court decisions is presented below, as well as a description of the Obama administration's efforts to stymie the last minute rulemakings.

SPCC Rules

LESS COMPLEX - PERHAPS DELAYED

In 2002, EPA issued significant changes to the SPCC program rules. These rules apply to sources that have the above-ground capacity to store more than 1,320 gallons of oil or that have completely buried storage capacity of more than 42,000 gallons and where a release could make its way to navigable waters. These rules were initially supposed to require SPCC Plan revisions by February 17, 2003, but EPA has steadily postponed that deadline and in late 2008 proposed to postpone the SPCC deadline yet again. Under this most recent proposal, a source subject to the SPCC requirements would not need to revise and implement its SPCC plan to comply with the 2002 rules until November 20, 2009. When this ***Insider*** went to press it was still not known whether the Obama administration would endorse the extension and it would be issued as a final rule. This author predicts that there are better than average odds that the extension will be finalized, but this outcome is not assured. If the deadline is not extended, facilities must revise and implement their SPCC plans, consistent with the 2002 rules, by July 1, 2009.

Another Postponement?

In contrast to the proposal to extend the SPCC plan compliance deadline, late last year EPA issued final rules changing the SPCC program to make compliance much easier for many facilities. EPA made many detailed modifications to the SPCC program that include more ways for farmers to avoid SPCC requirements, exemptions for hot mix asphalt operations, and exemptions for domestic heating oil tanks.

Some Rules Eased

Perhaps the most interesting and far-reaching change to the SPCC rules was the introduction of a new type of facility — i.e., the "Tier I facility." Tier I facilities have 10,000 gallons or less of above-ground oil storage and within the prior three years have not had, within any 12 month period, a single oil release to navigable waters exceeding 1,000 gallons or two releases to navigable waters each exceeding 42 gallons. Tier I facilities also cannot have more than 5,000 gallons of above-ground oil storage. If a facility is lucky enough to qualify as a Tier I facility, it now has an incredibly cheap and easy way to comply with the SPCC requirements without the need of a consultant because EPA added a "check the box" SPCC plan template option. A Tier I facility is not required to use the template, but if it does, then it can just print it out, fill in the few blanks, self-certify, and be done. This should be a big cost-saver. Facilities not meeting the Tier I criteria are now called Tier II facilities. Tier II facilities can still use the self-certification process previously promulgated under certain circumstances, but they cannot use the new EPA "check the box" template.

New Tiered Categories

Many other changes to the rules were made. These include changes to the security requirements, the integrity testing requirements, and the requirements for oil production facilities and animal fat/vegetable oil facilities. The details on all of the changes are complex and before relying on the new rules, the fine print should, as always, be carefully studied. Because the SPCC program is federal law, the rule changes apply directly to Oregon sources.

Other Changes

Copyright© 2009 Envirotech Publications, Incorporated - Reproduction without permission strictly prohibited.

Federal Regulations

Federal Major New Source Review and CO_2 Greenhouse Gases

December Letter

One of the most hotly debated actions taken late in the last weeks of the Bush administration was guidance clarifying that carbon dioxide is not an air pollutant regulated by the federal major new source review air permitting program. On December 18, 2008, the EPA Administrator issued a 19-page letter to the EPA Regional Administrators stating that carbon dioxide (CO_2) should not be considered a "regulated air pollutant" for purposes of federal major new source review at this time. This statement is critical to sources undergoing federal major new source review that otherwise were left in doubt as to whether they had to establish and employ **b**est **a**vailable **c**ontrol **t**echnology (BACT) for CO_2. EPA's bold statement was welcomed in many business circles but was greeted with criticism by many environmental groups.

EAB Decision

In November 2008, EPA's Environmental Appeals Board (EAB) issued a decision calling into question whether a BACT analysis was required for CO_2 as part of major new source review. That decision involved the permitting of a new coal fired power plant in Utah and the insistence of the Sierra Club that EPA had to impose BACT in issuing a permit for the proposed plant. The Sierra Club argued that because the Acid Rain provisions required CO_2 monitoring, CO_2 was "subject to regulation under the Clean Air Act." Sources undergoing Prevention of Significant Deterioration (PSD) permitting must apply BACT for all pollutants "subject to regulation under the Clean Air Act." EPA had taken the position that BACT was not required for CO_2 because pollutants were not "subject to regulation under the Act" unless a substantive emissions control requirement applied. EPA also pointed out that the Acid Rain provision requiring CO_2 monitoring under the Clean Air Act had never been actually incorporated into the Clean Air Act.

The EAB ultimately concluded that EPA was not compelled to address CO_2 as a component of PSD permitting and as such not compelled to impose BACT. Contrary to the Sierra Club's argument, the EAB held that it was not clear that CO_2 was "subject to regulation under the Clean Air Act." However, the EAB was reluctant to say that "subject to regulation" necessarily was limited to pollutants for which controls were required. The EAB remanded the case to EPA to better document the reasoning for a decision to require, or not, BACT for CO_2. Specifically, the EAB wanted EPA to better document what it considers a pollutant "subject to regulation" under the Clean Air Act and whether that would include CO_2. The panel strongly suggested that EPA develop a nationwide position on this key point.

EPA Response

On December 18, the EPA Administrator's letter to the EPA Regional Administrators responded to the EAB decision, clearly stating a national position that CO_2 is not "subject to regulation" under the Clean Air Act. The EPA letter recognizes the ambiguity created by the EAB decision. While the EAB decision was technically just about whether BACT needed to be applied to CO_2, it opened the door to the argument that major source status could be determined based on CO_2 emissions. If this occurred, sources with a moderate sized commercial water heater would be large enough to be considered major sources that could trigger major new source review (a long and expensive process). This would stop development at a time when the country can least afford to impede industrial growth; therefore, EPA headquarters recognized the need to move quickly.

The central conclusion of EPA's letter was that the agency does not consider a pollutant to be a "regulated New Source Review (NSR) pollutant" unless there is a standard in place requiring actual emissions control of that pollutant. Power plants subject to Title IV of the Clean Air Act are required to monitor and report CO_2 emissions to EPA quarterly. The Sierra Club argued that because the Clean Air Act required reporting of CO_2 emissions, CO_2 must be a regulated NSR pollutant. The federal regulations were not as clear on this point as one could hope. EPA stated in its December letter that the wording of the existing regulation (40 CFR 52.21(b)(50)(iv)) was intended to include as regulated NSR pollutants only those pollutants subject to substantive control requirements. Simply monitoring or reporting a pollutant does not make it a regulated NSR pollutant. Many pages of reasoning were given by EPA for why this approach is consistent with the intent of the Clean Air Act and prior agency actions.

"Endangerment" Issues

Of equal interest in EPA's December letter is the statement that an endangerment finding does not constitute regulation under the Clean Air Act. Ever since the *Massachusetts v. EPA* case, in which the Supreme Court held that CO_2 was an air pollutant, EPA has been under extreme pressure to make a determination as to whether greenhouse gases endangers human health or the environment. This key step towards regulating CO_2 was a cause for concern by many because if EPA stated that CO_2 did endanger human health or the environment the question would arise whether CO_2 was a regulated pollutant. The December guidance addresses that concern by stating that CO_2 would not be a regulated NSR pollutant until a control standard is actually issued in the wake of any endangerment finding.

Oregon Considerations

The guidance is important to Oregon sources as Oregon would feel pressure to follow suit if the federal government declared CO_2 a regulated pollutant to be addressed under major new source review. While Oregon has a different program with its own definition of what constitutes a regulated air pollutant, a different outcome in the EPA guidance might have required long term revisions to Oregon's program.

Copyright© 2009 Envirotech Publications Incorporated - Reproduction without permission strictly prohibited.

Federal Regulations

Federal Major New Source Review Rules and Fugitive Emissions

Of lesser public interest, but of great importance to some sources, was a decision on how to regulate certain emissions under the federal major new source review program. In late December 2008, EPA signed a new rule that affects the way that fugitive emissions (emissions not passing through a vent, stack or opening) are taken into account for purposes of major new source review and Title V permitting. EPA's major new source review rules historically required the consideration of fugitive emissions only at sources within one of the source categories enumerated in the rules (referred to as the designated source list). In 2002, EPA revised the federal major new source review rules to require the inclusion of fugitive emissions in determining whether a physical or operational change results in a major modification for all sources (listed and non-listed). This approach brought the federal rules in line with Oregon's major new source review program, which has long required fugitive emissions to be included in applicability determinations. In 2007, EPA issued a proposed rule reconsidering whether it made sense to include fugitive emissions. In the December 2008 rule, EPA concluded that it did not make sense to require the inclusion of fugitive emissions under the federal major new source review program for sources not on the designated source list. This rule only affects sources where the federal major new source review rules are implemented. Because Oregon has its own unique EPA-approved new source review program, Oregon sources are not directly affected by EPA's rule on fugitive emissions.

2002 Revisions

2007 Proposal

December 2008 Rule

DC Circuit Strikes Down Portion of MACT Rules

Most major sources of **h**azardous **a**ir **p**ollutants (HAPs) in Oregon are subject to **n**ational **e**mission **s**tandards for **h**azardous **a**ir **p**ollutants (NESHAP) or, as they are also referred to, Maximum Achievable Control Technology (MACT) standards. Sources of HAP emissions are considered major if they have the potential to emit 10 tons or more of any individual HAP or 25 tons per year or more of aggregate HAP.

Federal SSMs

Each source subject to a MACT standard is required to develop a **s**tartup, **s**hutdown and **m**alfunction (SSM) plan to address any scenarios where a startup/shutdown event could result in noncompliance with the MACT standard or a malfunction event could result in potential noncompliance. These plans are separate from the startup, shutdown and maintenance plans required by DEQ and the Lane Regional Air Protection Agency (LRAPA) if a state standard could be violated. The federal startup, shutdown and maintenance plans are often confused with Oregon's state-based startup, shutdown and maintenance plans. The following discussion below addresses only the federal SSM plan rules.

Oregon SSMs

Federal SSMs Approach

A key aspect of the federal SSM plan rules is that by properly developing an SSM plan and then taking all reasonable measures to minimize emissions during an SSM event, the source is held to be in compliance with the MACT standard even if the substantive limit is exceeded. This approach was in recognition of the fact that MACT standards are technology based and that many technologies do not work (or fail to reach optimal performance) during startups, shutdowns and malfunctions. Until 2006, it was necessary that a source follow its SSM plan in order to qualify for this SSM exemption. However, in 2006 EPA changed the rules to be more pragmatic. EPA recognized that one can never anticipate all of the things that will go wrong and that requiring a source to follow their SSM plan could result in far worse environmental consequences under certain circumstances. Therefore, EPA changed the rules to require the comprehensive planning exercise that goes into an SSM plan, but did not require that a facility slavishly follow that plan in the face of changing circumstances. Many sources viewed EPA's changes as a practical approach, but the Sierra Club did not and they sued.

EPA Changes

EPA Sued

On December 19, 2008, the DC Circuit issued a decision in *Sierra Club v. EPA* and the majority agreed with the Sierra Club. Two of the three judges on the panel were convinced that by removing the requirement to follow the SSM plan to the letter, EPA had created an exemption from MACT compliance and that the Clean Air Act requires continuous compliance. This questionable analysis appears to state that MACT determinations must be made based on technologies that work at all times. This conclusion would stand MACT on its head if literally applied as many technologies underlying MACT standards simply do not work during startup and shutdown (let alone during malfunctions). If applied literally, the opinion would suggest that these technologies cannot be the basis for MACT. The third judge in the panel harshly criticized the majority opinion, saying that the judges had wandered off into areas of the law that were not briefed by the parties and that an important legal issue was being decided without EPA input.

"Continuous Compliance"

MACT Implications

Impacts

There is no immediate impact from this decision. As this ***Insider*** went to press, the court still had an order in place preventing entry of the court's mandate until the deadline passed for motions for reconsideration. The decision does not take effect unless and until the mandate is entered. If the mandate is ultimately entered and the decision retained, then sources will need to revisit the manner in which they

Copyright© 2009 Envirotech Publications, Incorporated - Reproduction without permission strictly prohibited.

Federal Regulations

comply with the MACT requirements during SSM events. Because these requirements are adopted by reference in Oregon, the DC Circuit decision in this case is likely to affect most major sources of hazardous air pollutants located in Oregon.

EPA Rules Most Animal Manure Air Emissions Are Not an Emergency

Manure Emissions

Over the past several years a source of much litigation and threatened litigation has occurred related to the potential hazardous nature of animal manure emissions. While this subject matter is primarily known for the wealth of humorous jokes that can be attributed to it, a serious issue for animal operations was whether the gases naturally emitted from chicken, pig, cow, or other animal manure required reporting under the hazardous substance release provisions of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Emergency Planning and Community Right-to-Know Act (EPCRA). In late December 2008, EPA issued a final rule holding that, except in particular circumstances, these routine air emissions do not have to be reported as emergency hazardous substance releases.

CERCLA & EPCRA Requirements

CERCLA and EPCRA both require immediate reporting if more than a reportable quantity of a hazardous substance is released to the environment over a 24-hour period. Gases such as ammonia and hydrogen sulfide are naturally generated as part of the breakdown of any manure. When large quantities of animals inhabit a confined area and do what animals do, the manure builds up and the emissions have the potential to exceed EPA's reportable quantities. The December final rule exempts many, but not all, animal operations from having to report these releases to air. However, it is important to note that releases to other media (e.g., water) are not exempted under the December rule. Also, the exemption can depend on the size of the operation; the more animals maintained in a confined animal feeding operation, the less likely it is that the exemption applies. This rule has immediate impact to Oregon facilities as the release reporting thresholds and exemptions are established as a matter of federal law.

December Exemptions

Increase in Maximum Federal Civil Penalty

Rulemaking Corrected

On December 11, 2008, EPA issued a direct final rule increasing the maximum civil penalty allowed under federal law for most environmental violations from $32,500 per day to $37,500 per day. On January 7, 2009, EPA issued a corrective notice due to problems with the December rulemaking. Both the original and the revised notice took effect on January 12, 2009. The corrected rulemaking can be found at 74 Fed. Reg. 626 (January 7, 2009). The change in maximum penalties only has relevance to Oregon sources to the extent that a source faces federal enforcement. DEQ has its own penalty matrix and maximum limits that apply to the state enforcement actions that make up the vast majority of environmental enforcement in the state.

Exclusions from the Definition of Solid Waste: Beneficial Use Determination for Various Materials

Proposed Rulemaking

EPA started off 2009 by issuing an Advanced Notice of Proposed Rulemaking (ANPR) identifying certain fuels and other materials that it is considering excluding from the definition of "solid waste." 74 Fed. Reg. 41 (January 2, 2009). EPA previously issued rules applicable to boilers at major sources of hazardous air pollutants (called "Boiler MACT") and rule for Commercial and Industrial Solid Waste Incineration (CISWI) units. See Wood, ***Insider*** #363. The federal Clean Air Act specifies that a source subject to the CISWI rules cannot also be subject to Boiler MACT. Therefore, it was important to differentiate between incinerators and boilers. EPA chose to do so based on whether the heat generated by combustion of the material was put to a useful purpose. In June 2007, the DC Circuit vacated these rules based on EPA not having the authority to call something that was combusting a waste anything other than an incinerator. This has caused concern in the regulated community because it is no longer reasonably possible to determine whether a source is subject to Boiler MACT as opposed to the CISWI rules.

Incinerators v. Boilers

Regulatory Concerns

The January 2, 2009 ANPR opens the dialog for exempting eight fuel source groups and six secondary material ingredients from the definition of "solid waste." The fuel source groups are biomass, construction debris, scrap tires, scrap plastics, spent solvent, coal refuse, wastewater treatment sludge, and used oil. The six secondary material ingredients are steel slag, cement kiln dust, coal combustion byproducts (fly ash, bottom ash, slag), foundry sand, silica fume, and secondary glass material. It is anticipated that the Obama administration will move this rulemaking along so as to clarify and incent the beneficial use of various materials. This rule could have tremendous impacts within Oregon as many of these materials are already beneficially used in the state and federal clarification of their status would enhance efforts to keep these materials out of landfills.

Oregon Impacts

Copyright© 2009 Envirotech Publications Incorporated - Reproduction without permission strictly prohibited.

Federal Regulations

Rules on Hold

Obama Strikes Back

This whirlwind of activity was not lost on the incoming administration and Obama's staff took swift action. On January 20, Rahm Emanuel (Obama's Chief of Staff) issued a memorandum to all agency heads directing them to cease issuing any new regulations and to withdraw any regulations from the Government Printing Office that had been signed by Administrator Johnson but not yet published in the Federal Register. The memorandum also asks that agencies "consider" extending the effective date of any regulation promulgated in the closing days of the Bush administration "for the purpose of reviewing questions of law and policy raised by those regulations." For regulations that are reopened, the memorandum directs the agency to reopen public comment for 30 days.

Heads Spinning

The Emanuel memorandum is just the latest move in a series of regulatory actions that spun the head of anyone who tried to keep up with the almost daily developments at the end of the Bush Administration. While there is precedent for a rush to finish rulemaking efforts before the end of an administration, the level of activity in December and early January seemed unusually high.

Shake-Out To Come

Some of the concepts advanced in the waning days of the Bush administration are likely to be embraced across the political spectrum and remain with the regulated community for years to come. Some of the concepts advanced were more contentious and are less likely to survive the 60-day stay. The next 60 days will be as interesting for what comes as what goes.

For Additional Information, Contact:
Tom Wood, Stoel Rives LLP, 503/ 294-9396 or email: trwood@stoel.com

Resources & References

SPCC Rule: 73 Federal Register 74236 (December 5, 2008); 73 Federal Register 72016 (November 26, 2008).

Federal New Source Review and Carbon Dioxide: http://www.epa.gov/nsr/documents/psd_interpretive_memo_12.18.08.pdf

Federal New Source Review and Fugitive Emissions: 73 Federal Register 77881 (December 19, 2008)

Sierra Club v. EPA decision: http://pacer.cadc.uscourts.gov/docs/common/opinions/200812/02-1135-1154946.pdf

Manure Odors Not Hazardous Releases Requiring Reporting; 73 Federal Register 76948 (December 18, 2008)

Solid Waste Definition: 74 Federal Register 41 (January 2, 2009)

Civil Penalty Increase: 4 Federal Register 626 (January 7, 2009)

Tom Wood is a partner at Stoel Rives LLP who helps industrial clients obtain permits and comply with the myriad requirements of the Clean Air Act, Spill Prevention Countermeasure and Control Program, solid waste regulation, and other environmental tes.

 Copyright© 2009 Envirotech Publications, Incorporated - Reproduction without permission strictly prohibited.