

# **Clear Skies, Many Tries**

**Air and Waste Management Association  
Annual One-Day Environmental Technical  
Conference for the Midwest Section**

**January 20, 2009**

**by**

**Robert J. Lambrechts, P.E., Esq.  
Lathrop & Gage LLP  
10851 Mastin Blvd., Suite 1000  
Overland Park, KS 66210  
(913) 451-5126  
[blambrechts@lathropgage.com](mailto:blambrechts@lathropgage.com)**

# Clean Air Interstate Rule

- On March 10, 2005, Steve Johnson, Acting Administrator of the U.S. Environmental Protection Agency (EPA), signed the final Clean Air Interstate Rule (CAIR). EPA expected the rule to achieve the largest reduction in air pollution since the Acid Rain Program reductions of the 1990 Clean Air Act Amendments.
- Initially proposed in January 2004, CAIR was intended to require steep and sustained reductions in air pollution and concurrent health benefits by 2015.

# Clean Air Interstate Rule

- On July 11, 2008, a federal appeals court threw out the rule, calling it "fatally flawed." (The court objected to it on multiple counts: It thought the rule overstepped the authority granted in the Clean Air Act; it also felt the rule didn't do enough to protect eastern states from upwind pollution.)
- That decision led to a state of chaos for regulators and utilities.

# Clean Air Interstate Rule

- On December 24, 2008, the U.S. Court of Appeals for the D.C. Circuit issued an order that leaves the Clean Air Interstate Rule in effect while the U.S. Environmental Protection Agency develops a new clean air program for power plants.
- The court essentially reversed its previous ruling made last July which vacated the rule and sent it back to the EPA for retooling.

# Clean Air Interstate Rule

- The pollution cuts required by the Clean Air Interstate Rule are to be implemented in two phases beginning on January 1, 2009, for NO<sub>x</sub> and 2010, for SO<sub>2</sub>, and a second phase in 2015 for both contaminants.
- A federal implementation plan will govern the power plants until the EPA approves the covered states implementation plans.
- Missouri, but not Kansas, is covered by CAIR and is therefore required to control for both fine particle pollution and ozone transport.

# Clean Air Mercury Rule

- On March 15, 2005, EPA issued the Clean Air Mercury Rule to permanently cap and reduce mercury emissions from coal-fired power plants for the first time ever. This rule gave the United States the notable distinction of being the first country in the world to regulate mercury emissions from utilities.

# Clean Air Mercury Rule

- On February 8, 2008, the D.C. Circuit vacated EPA's Clean Air Mercury Rule.
- Since the mercury rules were vacated, the implementation plans for all the states under this category are invalidated and no mercury regulations or monitoring requirements are in effect.
- Both Kansas and Missouri adopted the model CAMR rules with minimal if any modification.

# Clean Air Mercury Rule

- Following the Court's decision, both coal- and oil-fired EGUs remain listed as source categories under section 112. The EPA must take one of two courses regarding future regulations:
  - (1) the EPA can promulgate emission standards for coal- and oil-fired EGUs with MACT rules, or
  - (2) the EPA can try to delist coal- and oil-fired EGUs by following the 112(c)(9) procedures.

# The Clean Air Act and Global Climate Change

- Does the Clean Air Act, which underwent its last major amendment in 1990, include all the tools and criteria needed to address the global issue of climate change, including requirements to balance the economic effects and impacts on U.S. manufacturing jobs along with the environmental considerations?



# Regional Greenhouse Gas Initiative

- The Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort by ten Northeast and Mid-Atlantic states to limit greenhouse gas emissions. RGGI is the first mandatory, market-based CO<sub>2</sub> emissions reduction program in the United States.
- These ten states will cap CO<sub>2</sub> emissions from the power sector, and then require a 10 percent reduction in these emissions by 2018.

# Midwestern Regional Greenhouse

## Gas Reduction Accord

- On November 15, 2007, six states (including Kansas but not Missouri) and one Canadian province established the Midwestern Regional Greenhouse Gas Reduction Accord.
- Under the Accord, members agree to establish regional greenhouse gas reduction targets, including a long-term target of 60 to 80 percent below current emissions levels, and develop a multi-sector cap-and-trade system to help meet the targets.

# National Ambient Air Quality Standards

- According to 42 USC § 7409(d), NAAQS are to be reviewed and revised as appropriate every five years. As a practical matter, the U.S. EPA has had difficulty meeting this schedule.

# National Ambient Air Quality Standards

- It is clear from the legislative history that the public whose health is to be protected includes “particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment.”

# Revision to NAAQS Process

- “Top-to-bottom” review of process by which NAAQS are reviewed and revised was requested by EPA Deputy Administrator in December 2005.
- EPA workgroup formed to address issue and make recommendations

# Ongoing NAAQS Reviews: Schedules

as of 7/1/08

MILESTONE	POLLUTANT						
	Ozone	Lead	NO <sub>2</sub> Primary	SO <sub>2</sub> Primary	NO <sub>2</sub> /SO <sub>2</sub> Secondary	PM	CO
NPR	<u>Jun 20, 2007</u>	<u>May 1, 2008</u>	<u>May 28, 2009</u>	<u>Jul 30, 2009</u>	<u>Feb 12, 2010</u>	Jan 2011	Oct 2011
NFR	<u>Mar 12, 2008</u>	<u>Oct 15, 2008</u>	<u>Dec 18, 2009</u>	<u>Mar 2, 2010</u>	<u>Oct 19, 2010</u>	Oct 2011	Jul 2012

Note: Underlined dates indicate court-ordered or settlement agreement deadlines.

# Deseret Power Decision

- On November 13, 2008, the U.S. EPA Environmental Appeals Board (EAB) ruled that the prevention of significant deterioration (PSD) permit for Utah-based Deseret Power Electric Cooperative's new coal-fired electric generating unit be remanded.

# Deseret Power Decision

- The Sierra Club argued that the April 2007 decision by the Supreme Court (Massachusetts v. EPA, 549 U.S. 497 (2007)) established CO<sub>2</sub> as an air pollutant under the CAA, and that the lack of a set BACT emissions limit for CO<sub>2</sub> for Deseret, as with all new power plants, violated the Act since PSD rules require BACT-level controls be installed in new and modified major sources if they are expected to increase emissions output, just as in new source review.

# Deseret Power Decision

- EAB found adequate proof that CO<sub>2</sub> was subject to CAA regulation and EPA limits lacking. EAB ruled that the permit be sent back to EPA for further consideration as to regulation of CO<sub>2</sub> and whether it is subject to CAA regulation on a larger scale, as opposed to through a PSD permit only.

# EPA Interpretive Memo on Regulating CO2

- The EPA issued a significant interpretive memorandum in response to the Deseret Power case which states CO2 is not a regulated pollutant under the Clean Air Act. While more litigation will ensue, the permitting process can move forward on pending permits for new coal plants.

# Deseret Power Decision

- The Bush Administration's action ties the Obama Administration hand for the short term: Administrator Johnson's memo cites to a series of cases that "recognized that an Agency has the flexibility to establish an initial interpretation of a regulation without engaging in a notice and comment process."

# Senator Asks Mukasey to Reverse Memo on CO<sub>2</sub> From Coal Fired Plants

- On December 22, 2008, Senator Boxer (D-CA), asked Attorney General Mukasey to reverse EPA Administrator Johnson's memorandum declaring that the agency is not required to consider the potential for major sources of air pollution to emit CO<sub>2</sub> when issuing permits under the CAA's PSD program.

# ANPR for Regulating Greenhouse Emissions Under the Clean Air Act

- On July 11, 2008, U.S. EPA released its 500-plus page Advanced Notice of Proposed Rulemaking ("ANPR") for Regulating Greenhouse Emissions Under the Clean Air Act.

# ANPR for Regulating Greenhouse Emissions Under the Clean Air Act

- Whether to define the six primary greenhouse gases as “air pollution” collectively or individually;
- Whether to regulate or address air constituents outside of the six greenhouse gases, such as water vapor;
- How to determine the baseline emissions of greenhouse gases in order to assess what constitutes an “endangerment” going forward.

# ANPR for Regulating Greenhouse Emissions Under the Clean Air Act

- Regulation by the EPA under the CAA in this area could potentially have a significant effect on many sectors of the economy, and could expand the EPA's regulatory authority in an unprecedented way.

# Xcel Energy Settlement with New York Attorney General Requires Greater Climate Risk Disclosure

- In September 2007, Attorney General Cuomo of NY subpoenaed the executives of several major energy companies for information on whether disclosures to investors in filings with the SEC adequately described the companies' financial risks related to their emissions of global warming pollution.
- Cuomo issued subpoenas under New York State's Martin Act, a 1921 state securities law that grants the Attorney General broad powers to access the financial records of businesses.

# Xcel Energy Settlement with New York Attorney General Requires Greater Climate Risk Disclosure

- The climate risk disclosure agreed to by Xcel includes analysis of the impact of the following:
  - the potential impact of present and probable future climate change regulation and legislation;
  - climate-change related litigation;
  - physical impacts of climate change.

# Xcel Energy Settlement with New York Attorney General Requires Greater Climate Risk Disclosure

- This landmark agreement sets a new industry-wide precedent that will force companies to disclose the true financial risks that climate change poses to their investors.
- The NY Attorney General's settlement conveys the message that investors have the right to know all the associated risks.

**Stay tuned for interesting developments in 2009 courtesy of the new administration, the EPA, the courts and third parties.**