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New year of GHG regulation

BY MARY ELLEN TERNES

EPA's Clean Air Act rules pulling six major greenhouse gases into CAA regulation of mobile sources, as well as major stationary sources undergoing New Source Review for Prevention of Significant Deterioration and Title V permitting, began January 2, 2011. On December 10, 2010, the D.C. Circuit Court of Appeals rejected pleas to stay the EPA's suite of GHG rulemaking pending judicial review, finding that the petitioners simply had not satisfied the stringent standards required for a stay pending court review. Specifically, with regard to each of the challenged rules, the D.C. Circuit held that petitioners had not shown that the harms they alleged were "certain," rather than speculative, or that the alleged harms would result directly from the EPA's actions which they sought to enjoin. The suite of GHG rules under judicial review that will not be stayed pending this review include EPA's December 7, 2009, Endangerment and Cause or Contribute Findings; the April 1, 2010, mobile source emission standards; the May 13, 2010, Tailoring Rule; and the March 29, 2010, "timing memo" also referred to as the "Johnson Memorandum." Moreover, the legislative attempts to block the rules appeared to end on December 17, 2010, when Sen. Jay Rockefeller reportedly decided to stop pushing for a legislative two-year delay in EPA's rule implementation due to lack of support.

With the judicial and legislative barriers out of the way for the time being, EPA has paved the way for state GHG permitting authority. All but 13 states have assured EPA that they have adequate state implementation plans (SIP) to permit major sources of GHG pursuant to EPA's GHG rules. For the remaining 13 states, including Arizona, Arkansas, California, Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada, Oregon, Texas, and Wyoming, EPA promulgated a final rule determining that these 13 state programs were inadequate, including a SIP call requiring these states revise their SIPs within a twelve month deadline and a Federal Implementation Plan (FIP) for use in the interim.

Notably, Texas did not reply to this SIP call. As a result, EPA notified Texas on December 21, 2010, via letter that it is taking over the Texas GHG air permitting program until Texas adopts a compliant SIP. EPA promulgated these rules in the December 13, 29 and 30, 2010, issues of the Federal Register. But not so fast! Also on December 30, 2010, the D.C. Circuit granted the State of Texas's petition for review and request for an emergency stay regarding EPA's interim final rule providing EPA with the mechanism to take over the Texas GHG program in response to Texas's argument that the State had no time to comment. Will facilities needing PSD GHG permits be able to get them in Texas in 2011? Watch these developments as the GHG CAA permitting landscape continues to evolve very quickly.

- **EPA's GHG rulemaking initiatives**
- **EPA's recently promulgated rules, including the SIP revisions, the FIP, Title V authority and EPA's response to Texas**
- **D.C. Circuit's Order**

EPA's mandatory GHG reporting rule

BY MARY ELLEN TERNES

Final Rule, Subpart W, Oil and Natural Gas Systems

Oil and natural gas producers are busily preparing to comply with EPA's final rules requiring reporting of GHG emissions from oil and natural gas systems, promulgated as 40 CFR Part 98, Subpart W (Section 98.230), 75 *Fed. Reg.* 75548 (Nov. 30. 2010). The final petroleum and natural gas reporting rule applies to, specifically, offshore petroleum and natural gas production, onshore petroleum and natural gas production, onshore natural gas processing, onshore natural gas transmission compression, underground natural gas storage, liquefied natural gas (LNG) storage and LNG import and export, and natural gas distribution. Only those facilities, as defined by Subpart W, that emit 25,000 metric tons or more of CO2 equivalent per year in aggregated emissions from all sources are required to report annual GHG emissions to EPA.

This rule was originally proposed on April 10, 2009. After significant comment by industry, this proposed rule was taken back to the drawing board and reproposed a year later in a much more manageable form. With the new proposal, EPA had cut back most of the original provisions requiring actual measuring and monitoring to allow estimating based upon component count, and included a new definition for "facility" based upon basin-specific production. The 2009 proposal required 100 percent measurement by six segments of the reporting industries, while the 2010 proposal and final rule require hybrid methodologies for GHG quantification by eight industry segments with only limited direct measurement. This hybrid method of GHG quantification includes engineering estimates, emissions modeling software and emission factors, and, only when other methods are not feasible, direct measurement of emissions.

The final rule's definition of "facility" is specific only to reporting of GHG emissions pursuant to Subpart W and will not affect other EPA CAA rule implementation. For purposes of Subpart W as applied to onshore petroleum and natural gas production, "facility" means all petroleum or natural gas equipment on a well pad or associated with a well pad and CO2 enhanced oil recovery operations that are under common ownership or common control including leased, rented, and contracted activities by an onshore petroleum and natural gas production owner or operator and that are located in a single hydrocarbon basin as defined in 40 CFR 98.238. If an entity owns or operates more than one well in a basin, then emissions from all equipment are aggregated and included within that single "facility" as defined. The final rule also defines vented emissions separately from fugitive emissions and replaces the term "fugitive emissions" with "equipment leak" to align Subpart W with industry terminology. Producers should begin actual data gathering activities per Subpart W on January 1, 2011, and be prepared to submit GHG emission reports by March 31, 2012.

- **EPA's links to Subpart W rulemaking**

More protection for confidential business information

EPA has always taken the position that air pollutant emissions data required to be reported pursuant to the Clean Air Act are not "confidential business information." With the GHG reporting rule, EPA originally took this position a step further and maintained that data, required for use in calculations that will produce emissions data, are also not CBI. However, it is this input data (i.e., production and throughput quantities, product compositions, raw materials used, and other process-specific information among other data elements, etc.) required as input data for the mandated calculations that have been identified by industry as sensitive, trade-secret and CBI.

To resolve many of the public comments expressing concerns about CBI swept into emission reporting as input data, on December 17, 2010, EPA issued three concurrent actions deferring reporting requirements for this data and giving EPA time to evaluate these comments before releasing this information to the public. First, EPA is proposing to defer reporting these data elements, as specified in the rulemaking, until March 31, 2014, with an interim final rule deferring 2010 reporting of these data elements until August 31, 2011, and a call for information on these inputs to emissions equations to assist EPA in evaluating these issues.

- **EPA's links to CBI developing rulemaking**

Harsh disciplinary actions within EPA Criminal Investigation Division

BY CHRIS PAUL

A quarter of the staff in the Environmental Protection Agency's Criminal Investigation Division has considered leaving the agency in the wake of a disciplinary program, according to an internal review obtained by Public Employees for Environmental Responsibility (PEER). Consultants who conducted the review reported a pattern of disciplinary actions being handed down "arrogantly and harshly." According to the review, the reports were "too numerous to be attributed to sour grapes among a few bad applies."

Cynthia Giles, EPA's Assistant Administrator for Enforcement and Compliance Assurance was critical of the review's conclusions. The consultants "were not in a position to make many of the sweeping conclusions they made in their report" given how they conducted the review, she said.

"They did not have any information about the basis for agency action in individual cases, so were not in a position to assess whether the conduct of the employee merited the action taken, and whether appropriate standards were used to make decisions, or the reasons for managers' decisions on personnel matters," she said in her memo. "Some of the statements in the review are inaccurate, go well beyond what the evidence supports, and do not appropriately reflect these acknowledged limits."

Along with EPA's internal review, PEER released a survey in which a majority of criminal investigators who responded expressed concerns about the division's management. More than 75 percent of investigators surveyed criticized the criminal division's management, with more than half calling enforcement efforts under the Obama administration weaker than those under the preceding Bush administration. Nearly 80 percent of respondents said they lacked the resources to perform their duties.

SIDEBAR

Online reporting for low consequence liquid pipeline incidents

PHMSA's online system for filing a Form PHMSA F 7000-1 for low consequence accidents from liquids pipelines is available. A low consequence accident cannot involve death or personal injury requiring hospitalization, fire or explosion, a release of five barrels or more, property damage greater than $50,000, or pollution of water. See the Hazardous Liquid Pipeline Systems Accident Report and note that per the instructions, low consequence accidents only require information in shaded fields.

» **Hazardous Liquid Pipeline Systems Accident Report**

Homeland Security Cyber and Physical Infrastructure Protection Act of 2010

The House Committee on Homeland Security is looking to expand DHS's cyber-security functions, as well as establish cyber-security standards with some bite in the private sector.

A bill introduced November 17, 2010, by the committee's leadership would establish new cyber-security offices and duties at the agency, add 500 more workers, and establish and enforce cyber-security standards for big private network operators.

» **See summary of the bill (H.R. 6423, or the "Homeland Security Cyber and Physical Infrastructure Protection Act of 2010").**

New York votes to ban permits for hydraulic fracturing

The New York State Assembly gave legislative approval to a bill November 30, 2010, that would establish a moratorium on the issuance of state permits for natural gas drilling using the practice of hydraulic fracturing. The moratorium would last until May 15, 2011, and would cover hydraulic fracturing in Marcellus Shale and Utica Shale formations. This bill is opposed by the Independent Oil and Gas Association of New York.

» **The bill (S. 8129) is available here**

Stay on Operating Permit Requirements Proposed by EPA

The EPA stayed the requirement for small chemical manufacturers to obtain Clean Air Act Title V operating permits until March 14, 2011, pending further review. The American Chemistry Council and the Society of Chemical Manufacturers and Affiliates submitted petitions for reconsideration to the EPA, which will be reviewed during the stay. One reason for reconsideration was the omission of small producers from the proposed version of the national emissions standards for hazardous air pollutants (NESHAP) permitting requirements, resulting in no opportunity to comment. The EPA has proposed an additional extension to the 90-day stay, citing belief it may be unable to complete the reconsideration process during that time. Those opposing the extended stay claim the extension would be "irresponsible" as the standards should have taken effect years ago. The EPA will accept comments on its proposed additional stay until January 28, 2011.

Terrorism and the General Duty Clause

BY VICKIE BUCHANAN

The "General Duty Clause", §5(a)(1) of the Occupational Health and Safety Act of 1970 ("OSHA") requires that employers provide employees with a workplace that is free from serious recognized hazards that are causing or likely to cause death or serious physical harm to employees. A "recognized hazard" must satisfy three criteria. First, it must be "reasonably foreseeable" that a particular hazard is likely to affect employees in the course of their employment. (An employer is not liable for hazards that are not foreseeable.) Second, the hazard must be: (1) recognized in the industry, (2) recognized by the employer, and (3) obvious. Third, the hazard must cause or be likely to cause, death or serious physical harm to employees.

In the post-9/11 era, many employers have questioned whether the General Duty Clause requires them to protect the workplace from acts of terrorism. Currently, there is no federal or national legislation that regulates the possibilities of terrorist activities in the workplace. In an interpretation letter written by Enforcement Director Richard Fairfax on November 24, 2003, Fairfax stated, "Terrorist acts are not considered foreseeable emergencies that OSHA expects an employer to reasonably anticipate in the workplace. However, if an employer chooses to develop an emergency plan to safeguard their employees from the possibility of a terrorist event, OSHA recommends that they contact the local emergency planning committee (LEPC) and possibly plan exercises with those involved so they understand their capabilities and limitations."

An interpretation letter written by John L. Henshaw on May 24, 2004, agrees with the Fairfax letter and further advises employers that OSHA has published emergency preparedness guidance available on its webpage to assist employers and employees in the planning for all types of emergencies, including terrorist events. The guidance published includes the Emergency Planning Matrix, Emergency Response e-Tool, Anthrax Matrix, Anthrax Health and Safety Plan, and a fact sheet for high-rise building occupants. Thus, under current OSHA interpretation, employers are not required to include the risk of a terrorist attack in their emergency planning obligations; however, due to the increasing number of thwarted terrorist plots directed at targets in the United States, legislation requiring employers to plan for terrorist events is likely to be soon addressed by Congress.

- **A more comprehensive article on this topic will be presented in an upcoming edition of RegLINC**

Safety practices for transmission pipelines

BY ROBERT JOYCE

In a report released by the Pipeline and Hazardous Materials Safety Administration (PHMSA) on December 16, 2010, the Agency unveiled consensus recommendations for property development near existing transmission pipelines. The report, entitled *Partnering to Further Enhance Pipeline Safety in Communities Through Risk-Informed Land Use Planning*, was prepared by the Pipeline and Informed Planning Alliance (PIPA) which is a coalition made up of more than 130 individuals from the pipeline industry, land development industry, government, and safety organizations. The Alliance is sponsored by the PHMSA Office of Pipeline Safety.

According to the document, PIPA's goal was to "reduce risks and improve the safety of affected communities and transmission pipelines through implementation of recommended practices related to risk-informed land use near transmission pipelines." The report represents the initial effort of PIPA to develop recommended practices for pipelines, land owners and developers, local governments and real estate boards to implement on a voluntary basis. The report, however, only addresses transmission pipelines and is not intended to apply to production, gathering and distribution pipeline systems. PIPA plans to continue working on an implementation strategy to enhance communication and understanding of the best practices outlined in the report.

The report identifies the key stakeholders potentially affected by transmission lines, outlines the benefits and risks associated with transmission pipelines, and considers that there is wide variation in the characteristics of these gas and hazardous liquid pipelines and their surroundings. Because of this variation, the report recommends a "risk-informed approach to land use planning and development" founded on good communication between the pipeline operators and the affected community and full consideration of the specific characteristics of the pipeline and its surroundings. The report presents a series of 18 Baseline (BL) Recommended Practices to be implemented by stakeholders in preparation for future land use and development, and 28 New Development (ND) Recommended Practices to be used when *specific* new land use/development projects are proposed.

One of the major recommendations is the use of consultation zones and planning areas to be adopted by local governments as part of ordinances requiring developers to contact pipeline operators and jointly review project plans for those zones and areas. The report provides a copy of a model ordinance, together with guidance on enhancing communications, developing planning areas, and incorporating transmission pipeline right-of-ways into new developments.

- **Full PHMSA's Stakeholder Communications report**

EPA's renewable fuel standard for 2009/2010 biodiesel blending upheld

BY HEIDI SLINKARD BRASHER

On December 21, 2010, the U.S. Court of Appeals for the D.C. Circuit upheld the lower court's decision and handed a win to the Environmental Protection Agency (EPA) in actions brought by the National Petrochemical & Refiners Association (NPRA) and the American Petroleum Institute (API) (*Nat'l Petrochemical & Refiners Ass'n v. EPA*, D.C. Cir., No. 10-1070, consolidated with No. 10-1071).

Congress' 2007 Energy Independence and Security Act (EISA) expanded the renewable fuel provisions of the Energy Policy Act of 2005 by increasing the renewable fuel volume requirement for U.S.-sold gasoline and added volume requirements for advanced biofuels, biomass-based diesel and cellulosic biofuel. As a result of these changes, the EPA revised its 2005 Act regulations.

According to the EPA, the new EISA directives led to the EPA's inability to meet the deadline for establishing 2009 volume requirements. Instead, the EPA set a combined 2009/2010 biomass-based diesel standard in its final revised regulation on February 3, 2010, which was posted on its website that day and published as a Final Rule in the March 26, 2010, *Federal Register*. In the Final Rule, obligated parties — refiners, importers and some gasoline blenders — must demonstrate compliance with the 2010 standard by February 28, 2011. Upon publication of the Final Rule, the NPRA and API brought suit, challenging it as violating statutory requirements to set separate 2009 and 2010 volume requirements, as impermissibly retroactive, and as violating statutory compliance provisions and lead times.

In upholding the Final Rule, the Court held that the EPA's missed deadline for setting the standards did not result in a loss of its authority to act and that such loss of authority would only result had Congress provided for the same in the EISA. The NPRA and API argued that the imposition of the standard which became effective in July 2010, but which applied to all of 2010, resulted in an "impermissibly retroactive" Final Rule. However, the Court held that Congress provided the EPA authority under the EISA to act and, "[t]o the extent the Final Rule may be retroactive[, the agency] did not exceed its authority." The court arrived at this conclusion after review of the statutory and agency history and review of other legal precedent, noting:

- There is a difference between invalid "new sanctions on past conduct" and a rule that "merely 'upsets expectations,' which is secondarily retroactive."
- Any primary retroactive effects were implicitly authorized under the EISA and the EPA reasonably balanced any retroactive effects against the benefits of applying "the new regulations to the full calendar year."
- "EPA had clear albeit implicit authority under the EISA to apply both the 2009 and 2010 volume requirements in the 2010 calendar year in order to achieve the statutory purpose" — "Congress anticipated the possibility of some retroactive aspects in the first year of the expanded renewable fuel program" and was "explicitly aware" the EPA may miss a deadline for promulgation.
- The effect of any retroactivity did not make "the situation worse" because of the ample notice the obligated parties had regarding their need to accumulate RINs to meet the 2010 obligations.
- Adequate lead time and notice of obligations were given.

Environmental crime – Asbestos and the Clean Air Act

BY CHRIS PAUL

A federal jury found an asbestos removal contractor and his company guilty of violating the Clean Air Act and other charges related to improper removal of asbestos (*United States v. Gordon-Smith*, W.D.N.Y., No 08-CR-6019, 11/12/10). They were found guilty of eight counts of violating the Clean Air Act, six counts of failing to provide required notice to EPA, and making false statements to an inspector of the Occupational Safety and Health Administration. The owner faces criminal penalties of up to five years in prison and $250,000 for each count, while the company faces fines of up to $500,000 per count.

Workers removed copper pipes, ceiling tiles and scrap metal without wearing any protective gear. The structure contained about 70,000 square feet of asbestos. After receiving complaints from workers, OSHA inspected the site, but the owner told an inspector that workers had not removed any of the materials.

» **http://www.justice.gov/usao/nyw/gordon.html**

EPA issues draft implementation plan

BY ROBERT JOYCE

On December 9, 2010, EPA issued its draft plan aimed at implementing its recently announced Integrated Cleanup Initiative. The Initiative is aimed at accelerating cleanups and implementing other improvements to the Agency's various land cleanup programs. According to EPA, the main goals of the Initiative are to speed up the cleanup process, address more contaminated sites, and place sites back into productive use. EPA's plan focuses on "integrating approaches and leveraging best practices across the full spectrum of contaminated sites – Superfund, brownfields, Resource Conservation and Recovery Act (RCRA) corrective action, federal facilities, and underground storage tanks," and enhancing opportunities for the public to play an active role in the site revitalization process. In addition, EPA plans to step-up its enforcement activities to seek increased accountability from those determined responsible for contamination and to "ensure that responsible parties are compelled to clean up contaminated sites."

The Implementation Plan describes the Agency's specific objectives for the Initiative and sets forth Agency actions for the next three years. The Plan identifies five main objectives:

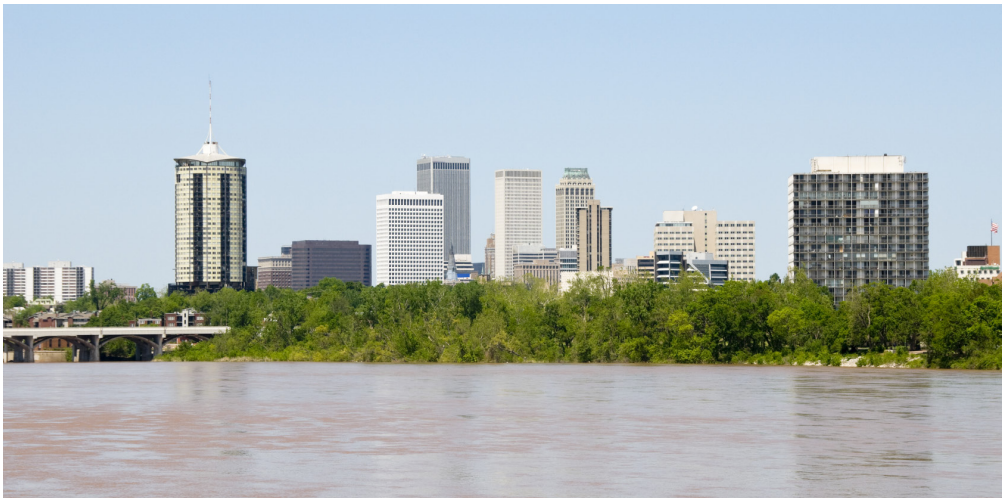
- Starting cleanups by focusing on early "site identification and assessment activities"
- Advancing cleanups by coordinating during cleanup and developing new enforcement strategies
- Completing cleanups through the use of pilot projects "aimed at accelerating cleanups" as well as increased reporting to the public and "leveraging revitalization efforts"
- Evaluating performance metrics and effectiveness
- Communicating the progress and benefits to the public. For each of these objectives, EPA identifies a number of specific tasks and assigns responsibility for completion of those tasks to various federal, state and tribal offices/agencies

Overall, the Agency has identified 26 specific steps to be taken in the next three years by the various governmental organizations.

One of the first objectives of the Plan is to implement a new measure for reporting cleanup progress at Superfund sites. This measure – "remedial action project completions – is designed to report on discrete steps in the cleanup process at a site and will supplement EPA's current reporting on site-wide cleanup construction completion. EPA explains that this new measure "will provide communities with a valuable new tool to evaluate and hold EPA accountable for ongoing progress and risk reduction at Superfund sites" and allows the program to be managed in a way "that more closely aligns with the real work in the field."

In connection with the Initiative, EPA has set a goal of completing cleanup at 95 percent of the 3747 contaminated sites it has identified by 2020. The Agency is accepting comments on the Plan through January 10, 2011.

- **The Plan can be found on EPA's webpage for the Integrated Cleanup Initiative here**



Proposed rulemaking for stormwater management under the Clean Water Act

BY JESSICA JOHN BOWMAN

The Environmental Protection Agency has solicited public input concerning potential regulations intended to (1) reduce stormwater discharges from new development and redevelopment and (2) otherwise strengthen the stormwater program. In order to collect information to inform its analyses of a possible rulemaking proposal, the EPA has solicited written comments, held a series of public listening sessions, and issued a series of questionnaires to selected entities and permitting authorities.

The EPA anticipates that the proposed regulations may have a significant economic impact on a number of small business entities. It therefore expects to convene a Small Business Advocacy Review Panel that will provide input into the rulemaking process and ensure that the concerns of small entities are carefully considered by the EPA. The EPA issued a formal notification concerning the panel on August 17, 2010.

After all comments are received, the EPA will determine whether, and to what extent, existing stormwater regulations should be revised. If the EPA decides to revise its regulations, the regulations may include the following changes, among others:

- Expanding the scope of stormwater discharges regulated under the CWA;
- Establishing national standards for stormwater discharges from newly developed and redeveloped sites;
- Strengthening existing requirements for discharges from municipal separate storm sewer systems (MS4s);
- Revising existing MS4 regulations to set out the requirements for MS4 permits together in one place (as opposed to separate Phase I and Phase II rules);
- Revising existing MS4 regulations to include requirements for retrofitting stormwater controls at existing developed sites that discharge to an MS4; and
- Including specific regulatory provisions for stormwater discharges in the Chesapeake Bay watershed.

If new regulations are issued, the general public will have the opportunity to submit comments during the standard public comment period, which commences after the publication of the notice of proposed rulemaking in the *Federal Register.*

- **Summary and status of the developing rules**
- **List of recent additions to stormwater regulations**
- **Overview of the proposed rulemaking**

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