**THOMPSON  
HINE**

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**ENVIRONMENTAL UPDATE****Was Chicken Little Right? Recent Developments in Air Pollution Law**

There have been many recent developments in the area of air pollution law, both nationally and in Ohio.

First, the U.S. Environmental Protection Agency (EPA) issued a notice in the *Federal Register* indicating its intent to tighten the National Ambient Air Quality Standards (NAAQS) for sulfur dioxide (SO<sub>2</sub>). The agency also proposed revisions to the ozone NAAQS and issued a final rulemaking establishing a revised one-hour NAAQS standard for nitrogen dioxide (NO<sub>2</sub>).

Second, two developments occurred in connection with greenhouse gases: EPA finalized its greenhouse gas reporting rule and issued a finding of “endangerment” for greenhouse gases, opening the door for additional regulation.

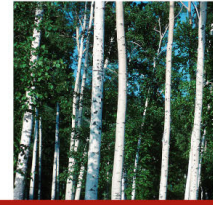
Third, over the past several years, EPA has promulgated area source Maximum Achievable Control Technology (MACT) requirements for several industry sectors that apply to smaller sources of emissions that emit less than 10 tons per year of any one Hazardous Air Pollutant (HAP) and less than 25 tons per year of combined HAPs. Many of the MACT standards take effect in 2010 or soon thereafter.

Finally, Ohio EPA has failed to issue rules identifying Best Available Technology (BAT) requirements for sources as required by Senate Bill 265 (SB 265). *See* Ohio Rev. Code Ann 3704.03. Therefore, Ohio EPA has issued a policy governing BAT requirements that is likely to draw challenges. The agency is not happy with SB 265, as the pre-SB 265 Ohio EPA BAT requirements are part of the state’s federally approved air permitting program.

**PROPOSED NEW SO<sub>2</sub>, OZONE AND NO<sub>2</sub> STANDARDS**

On December 8, 2009, EPA announced its intent to lower the NAAQS for SO<sub>2</sub> from the existing primary standards of 140 parts per billion (ppb) measured over 24 hours, and 30 ppb measured over an entire year, to either a 50, 75 or 100 ppb one-hour standard. This would place a number of counties throughout the country into “non-attainment.”

A non-attainment designation has two primary effects: first, it lowers the emissions threshold for a source to be considered a “major stationary source” under the federal New Source Review (NSR) pre-construction permitting scheme; and second, if major stationary source permitting is triggered, it significantly increases the burden a company faces to obtain a permit. Thus, facilities that have a potential to emit 100 tons per year (tpy) or more of SO<sub>2</sub> will be classified as major stationary sources, also making future expansion or modifications difficult and costly where such changes



(either individually or combined with other projects or changes over the timeframe established in the rules) result in an increase of 40 tpy.

Second, where air quality modeling is required by an agency to demonstrate that a new or modified major source will not violate the NAAQS, the new standard is significantly more difficult to meet. This is because a facility currently can have one-hour peak emissions of SO<sub>2</sub> above the threshold, so long as there are no daily or annual air quality impacts above threshold levels.

Hawaii, Indiana, Illinois, Missouri, Ohio, Pennsylvania, Tennessee and West Virginia are disproportionately impacted by the legislation, as ambient air in many counties within those states will fail to meet the revised NAAQS. EPA will accept comments through February 8, 2010.

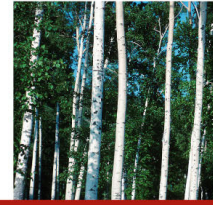
On January 19, 2010, EPA proposed revisions to the 2008 eight-hour ozone standard. The proposed revision would lower the limit from 0.075 parts per million (ppm) to 0.060 or 0.070 ppm. Like the SO<sub>2</sub> revision, this would have the effect of putting many counties throughout the country into non-attainment. In turn, lower emission thresholds would be in effect with respect to NSR permitting within the affected counties. Comments on this proposal are due by March 22, 2010.

Finally, on January 22, 2010, EPA adopted a new one-hour NO<sub>2</sub> standard of 100 ppb. This standard includes a new method of monitoring and measuring NO<sub>2</sub> levels for determining whether or not an area meets the standard. EPA is still considering adopting more stringent secondary NO<sub>2</sub> standards. The new NO<sub>2</sub> standards appear to solely impact Chicago, which is the only area that will be designated non-attainment. However, the standard will affect permits that must include modeling that shows compliance with the standards.

### **GREENHOUSE GAS REPORTING REQUIREMENTS AND DEVELOPMENTS**

On October 30, 2009, EPA issued its greenhouse gas (GHG) reporting rule, effective January 1, 2010. Numerous categories of manufacturing facilities are covered by the rule, regardless of the amount of GHG emissions, including power plants, cement producers, aluminum producers and petroleum refiners. A facility that does not fall within an identified source category that automatically subjects it to the rule may be subject to the rule if it has an aggregated maximum heat input of 30 mm/BTU or more **and** emits 25,000 tons or more of CO<sub>2</sub> (or CO<sub>2</sub> “equivalents”) per year. The reporting requirements also apply to certain fossil fuels supplier/producers, industrial GHG suppliers and manufacturer/importers of **non**-light-duty vehicles. The requirements include both downstream (such as furnace emissions, automobile emissions or smokestack emissions) and upstream (such as the carbon content of natural gas extracted from a natural gas well) GHGs. Reports must be submitted by March 31 of each year, with the first report due March 31, 2011 for 2010 GHG emissions.

On December 15, 2009, EPA issued a finding of endangerment for GHGs, opening the door for additional regulation. Specifically, the administrator found that the current and projected concentrations of six GHGs—carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF<sub>6</sub>)—in the



atmosphere threaten public health and welfare. EPA further found that the combined emissions of these well-mixed GHGs from new motor vehicles and new motor vehicle engines “cause or contribute” to the GHG pollution, which threatens public health and welfare. EPA posited that such finding was a prerequisite to its issuance of proposed light-duty vehicle GHG emission standards.

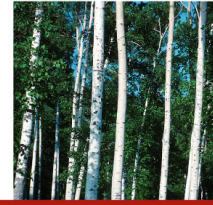
The practical effect of the endangerment finding is that it opens the door to the regulation of other industries beyond the light-duty vehicle GHG emission standards, such as certain manufacturing plants, hospitals, universities and other facilities with large carbon footprints, yet relatively low emissions of traditional Clean Air Act pollutants. Moreover, although the endangerment finding does not by itself trigger major new source or Title V permitting requirements, EPA recognizes that absent legislative action, GHGs from many previously unregulated sources (e.g., schools, office buildings, small industrial operations) are subject to these (and other) Clean Air Act programs. Consequently, EPA proposed a “Prevention of Significant Deterioration” (PSD) and Title V GHG “Tailoring Rule” on September 30, 2009. The Tailoring Rule would limit the applicability of PSD/Title V to emitters of 25,000 tons of GHGs per year.

Companies that have emissions at or near 25,000 tpy of GHG emissions should consider the effect of these rules on their future plans and operations. For instance, it might be advisable for some businesses to undertake expansion plans or projects now, without the additional burdens of major new source permitting. Moreover, it might be advisable for other businesses to reduce emissions below thresholds now where such an action makes business sense to avoid reporting and other requirements. It remains to be seen whether Congress enacts climate change legislation that clarifies or limits EPA’s authority to regulate GHG emissions.

#### **AREA SOURCE MACT STANDARDS AND UPCOMING DEADLINES**

Over the past several years, EPA has promulgated a number of MACT standards on smaller (“area sources”) emitters of certain HAPS. These rules require regulated sources to notify EPA and state agencies, and impose operating practice requirements and emissions limitations, as well as record-keeping and reporting requirements. Many of these requirements have compliance or notification dates in 2010 and 2011. The soon-to-be effective MACT requirements cover, among other operations, metal finishing, plating and polishing; gasoline dispensing; paint stripping and miscellaneous coating; iron and steel foundries; glass manufacturing; and asphalt processing. The metal finishing, plating and polishing; gasoline dispensing; and paint stripping and miscellaneous coating MACT requirements in particular are likely to impact a significant number of manufacturers and other business owners.

The metal fabricating and finishing MACT applies to sources that are involved in electrical and electronic equipment finishing operations, fabricated metal products, fabricated plate work (boiler shops), fabricated structural metal manufacturing, heating equipment, industrial machinery and equipment finishing operations, iron and steel forging, and primary metal products, so long as they use materials that contain 0.1 percent (or greater) by weight of cadmium, chromium, lead or nickel,



or materials that contain 1 percent by weight (or greater) of manganese. Shotblasting, welding, cutting and other activities on parts in the manufacturing process are impacted by this MACT standard. The notification date for this standard for existing sources is July 25, 2011 and the compliance date is November 22, 2011.

The plating and polishing operations MACT regulates facilities that are engaged in one or more of the following processes: electroplating other than chromium electroplating; electrolysis or non-electrolytic plating; other non-electrolytic metal coating processes; dry mechanical processing of finished metals and formed products after plating; electroforming; and electropolishing. It also is applicable to facilities that use or have emissions of compounds of one or more plating and polishing metal HAP, including any compound of cadmium, chromium, lead, manganese and nickel. The compliance date for this MACT for existing facilities is July 1, 2010.

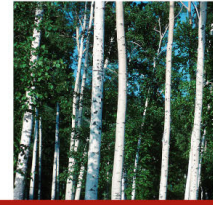
EPA has also issued a MACT for gasoline dispensing stations (i.e., gas stations). The level of regulation is dependent upon the amount of gasoline that is dispensed monthly. Facilities that dispense less than 10,000 gallons per month must minimize spills and implement other work practices. In addition to these practices, facilities that dispense over 10,000 gallons per month must implement submerged filling. Finally, facilities that dispense over 100,000 gallons per month must implement a number of other requirements. Testing, record-keeping, monitoring and reporting are also required under the rule, which becomes effective on January 10, 2011.

Certain paint-stripping operations are covered by yet another MACT standard. This MACT regulates the use of chemical strippers that contain methylene chloride in paint removal processes from wood, metal, plastic and other surfaces; auto body refinishing operations that encompass motor vehicle and mobile equipment spray-applied surface coating operations; and spray application of coatings containing compounds of chromium, lead, manganese, nickel or cadmium to any part or product made of metal or plastic, or combinations that are not motor vehicles or mobile equipment. These rules require monitoring, record-keeping, work practice and reporting requirements. The applicable rules have a notification date of January 11, 2010, and a compliance date of March 11, 2011.

Finally, EPA issued a MACT for asphalt processing and roofing on December 2, 2009. This MACT standard governs area sources (i.e., non-major sources) that are engaged in certain asphalt operations. Exceptions apply for “hot-mix” asphalt plants. The standard contains emission limitations, as well as monitoring, record-keeping and reporting requirements. The initial notification is due April 2, 2010, and the compliance date for the MACT is June 2, 2011.

### **OHIO BAT RULE-MAKING AND SB 265 DEVELOPMENTS**

Prior to enactment of SB 265 in 2006, Ohio EPA imposed BAT in air permits to install on a case-by-case basis, theoretically by looking at the most stringent air pollution control equipment and emissions limits in place throughout the state (and occasionally outside of the state). The agency’s analysis often resulted in ad-hoc insertion of requirements that the local permit writer felt were



appropriate. SB 265 replaced the ad-hoc approach for applications submitted after August 2, 2009, with a requirement that BAT be expressed in Ohio EPA rules. To date, Ohio EPA has failed to issue BAT rules, even in draft form.

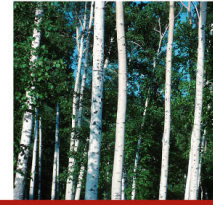
Instead, Ohio EPA issued a policy on December 10, 2009 that governs the agency's implementation of SB 265 requirements. Ohio EPA stated in the policy that EPA has indicated its objection to permits that are issued without BAT as "backsliding." Ohio EPA has indicated that it will continue to determine BAT on a case-by-case basis, with certain limitations; for example, BAT will only be expressed in one of the four ways outlined in SB 265. Ohio EPA is accepting comments on this policy until January 30, 2010.

The policy goes further than simply defining what is BAT and when it will be implemented. For instance, Ohio EPA encourages its permit writers to use the nuisance rule for used oil specifications and limitations in addition to a BAT limit on pounds per hour of emissions. More problematic is Ohio EPA's position with respect to potential to emit and BAT. The agency states that because "state law does not currently allow us to establish BAT, we do not feel it is appropriate to determine major NSR applicability based on emissions after controls. From this day forward, all major NSR applicability determinations should be made based on emissions prior to controls." This will broaden the applicability of the stringent major source pre-construction permit programs.

Ohio EPA has had a longstanding approach of not considering for potential to emit purposes a variety of situations that arguably should be considered limits on potential to emit. This Ohio EPA approach includes not considering for potential to emit purposes emissions limits in permits that did not go through notice and comment as well as limits in permits that have been exceeded (even if the permit did go through notice and comment). Ohio EPA takes this position even though such permit limits are federally enforceable (they are still part of the approved State Implementation Plan) and even though the requirements are legally and practicably enforceable by the state.

Ohio EPA's position is curious in that it threatens to refer a company to EPA for enforcement for not accepting BAT (because BAT is still part of the SIP), while simultaneously saying that BAT is not enforceable. Ohio EPA's position is further contradicted by federal case law. *Nat'l Mining Ass'n v. United States EPA*, 59 F.3d 1351, (D.C. Cir. 1995) (vacating U.S. EPA rules and explaining that either federal enforceability or legal and practical enforceability by the states is sufficient to limit potential to emit) and *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) (holding that the potential to emit rules' reference to "design capacity" necessarily includes add-on controls).

Companies impacted by Ohio EPA's policy will necessarily need to consider whether it is advantageous under the circumstances to challenge the policy at the time the impact arises. In addition, companies that expect to be impacted should submit comments by the January 30, 2010 deadline. Moreover, companies should review permits with care and should put any add-on controls into their permits as an enforceable condition to guard against claims the company triggered new source review.



## CONCLUSION

All of these developments are important to industry and other emitters. More restrictive SO<sub>2</sub>, ozone and NO<sub>2</sub> NAAQS will impose new regulatory burdens that may inhibit future expansion projects in many areas of the country, with a disproportionate impact from SO<sub>2</sub> and ozone on Midwest states. The GHG developments may threaten future expansion or growth projects, existing GHG emissions may have to be retrofitted with controls, and in any event, new reporting requirements broadly apply. The new MACT requirements will subject many small manufacturers to control technologies, operating practices or, at a minimum, record-keeping and reporting requirements. Finally, Ohio SB 265 developments and failure of Ohio EPA to issue BAT rules presents a possible opportunity for companies wishing to modify their air pollution sources to obtain more favorable permit terms.

## FOR MORE INFORMATION

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