



OMA Environment Committee

November 19, 2009

AGENDA

Welcome – Joe Bulzan, OMA Committee Chair, Smurfit-Stone Container Corp.

Guest Speaker

- Bob Hodanbosi, Chief, Ohio EPA Division of Air Pollution

OMA Environmental Counsel's Report

- Frank Merrill, Bricker & Eckler

PPS Report

- Kevin Schmidt, OMA Staff

Lunch

- Review OMA Environmental Competitiveness Agenda
- Review 2010 Meeting Dates

Committee Meetings begin at 10:00 a.m. and conclude by 1:00 p.m. Lunch will be served.

Please RSVP to attend meetings by contacting Judy: jthompson@ohiomfg.com or (614) 224-5111 or toll free at (800) 662-4463.

Additional committee meetings or teleconferences, if needed, will be scheduled at the call of the Chair.

Thanks to Today's Meeting Sponsor:



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OMA Calendar of Events

[Training courses available through BWC's Division of Safety & Hygiene quarterly flyer \(Oct. - Dec. 2009\)](#)

[Plante & Moran Webinar: A Tax Webinar To Prepare You for the Changes Ahead - 11/17/2009](#)

[OMA Environment Committee Meeting - 11/19/2009](#)

[Bricker & Eckler LLP - 7th Annual Top Gun Construction Claims Seminar - Dublin, OH - 11/19/2009](#)

[Taft Stettinius & Hollister LLP Seminar: Negotiating the Changing Shareholder Landscape: Developments for the 2010 Proxy Season - 11/19/2009](#)

[OMA/JacksonLewis Webinar: Critical Updates on Health Care & Benefits Issues - 11/19/2009](#)

[OMA/NORED presents: The Northwest Ohio Manufacturing Forum - Business Diversification - Toledo - 11/20/2009](#)

[OSCPA's Mega Tax Conference - 12/02 & 12/03/2009](#)

[Columbus State Videoconference: Management Leadership Series - Our Guide to the Recession Rebound - Columbus - 12/03/2009](#)

[AREVA - EPR™ Supplier Day: Seeking partners to build new AREVA EPR™ Reactors in the U.S. and around the world - Columbus - 12/03/2009 - 12/04/2009](#)

[Columbus State Lean Six Sigma Courses - 12/4/2009, 12/8-12/10/2009](#)

[Taft Annual Labor Law & Employment Update - Cincinnati - 12/04/2009](#)

[Thompson Hine Webinar: Prepare Your Company For Future Nanotechnology Litigation - 12/10/2009](#)

[BWC - Safety & Hygiene Training Center - Classes for Ohio Workers - Jan. - Mar. 2010](#)

[OMA Safety & Workers' Comp Meeting - 01/21/2010](#)

[OMA Tax Committee Meeting - 01/26/2010](#)

[OMA Energy Committee Meeting - 01/27/2010](#)

[DMTC 2nd Annual Strategic Materials Conference \(SMC 2010\) - Cleveland - 02/01-02/2010](#)

[OMA Government Affairs Committee Meeting - 02/03/2010](#)

[OMA Environment Committee Meeting - 02/04/2010](#)

[OMA Energy Committee Meeting - 04/28/2010](#)

[OMA Safety & Workers' Comp Committee Meeting - 05/06/2010](#)

[OMA Tax Committee Meeting - 05/13/2010](#)

[OMA Government Affairs Committee Meeting - 05/19/2010](#)

[OMA Environmental Committee Meeting - 05/20/2010](#)

[OMA Government Affairs Committee Meeting - 08/25/2010](#)

[OMA Energy Committee Meeting - 11/03/2010](#)

[OMA Tax Committee Meeting - 11/10/2010](#)

[OMA Environmental Committee Meeting - 11/11/2010](#)

[OMA Safety & Workers Comp Committee Meeting - 11/18/2010](#)

[OMA Government Affairs Committee Meeting - 12/08/2010](#)

2010 OMA Committee Calendar

Rev 11/03/09

Government Affairs Committee 2010

Wednesday, February 3
Wednesday, May 19
Wednesday, August 25 (Pre-Election Forecast)
Wednesday, November 3 (Post-Election **Conference Call** 3pm)
Wednesday, December 8

Tax Policy Committee 2010

Tuesday, January 26
Thursday, May 13
Thursday, Nov 10

Safety & Workers' Comp Committee 2010

Thursday, January 21
Thursday, May 6
Thursday, November 18

Energy Committee 2010

Wednesday, January 27
Wednesday, April 28
Wednesday, November 3

Environment Committee

Thursday, February 4
Thursday, May 20
Thursday, November 11

Public Policy Report

Public Policy Memo

To: OMA Government Affairs Committee
 From: Kevin Schmidt, OMA Staff
 Re: Environment Update
 Date: 11/19/2009

1. General Assembly Actions

- a. **Environmental Review Appeals Commission** – In the state operating budget, HB 1, [Representative Szollosi](#) (D-49, Oregon), and [Senator Wagoner](#) (R-2, Toledo) inserted language that would have required ERAC to decide appeals before it according to rigid timeframes, some as early as []. In response, ERAC scheduled one-hour *de novo* hearings for these appeals. Parties to the *de novo* hearings appealed to the court of common pleas arguing the one-hour hearings violated their rights to due process. In response, the court vacated all of the one-hour hearings and clarified that the legislative timelines were directory and not mandatory.

The OMA has been a strong supporter of improving the process at ERAC, which can leave final permit approval in limbo for years. The effect of this is financing is held up and job creation is delayed or lost. The OMA has fought off attempts at removing the timeframes in their entirety, and is working with parties to craft new language that can be implemented that would result in reasonable timelines for decisions from ERAC.

2. Federal Issues

- a. **Cap and Trade** – The Senate version of cap and trade, the Clean Energy Jobs and American Power Act, has been voted out of the Senate Environment and Public Works Committee chaired by California senator Barbara Boxer.. The GOP protested the vote and requested that there be time to review a full economic analysis of the bill which US EPA has said could take a few more weeks to complete. A summary of the Senate bill can be found [here](#).

Senator Voinovich remains a strong advocate for manufacturing and is concerned about the effects the Boxer-Kerry proposal may have on Ohio's top industry. Senator Voinovich has stated "While utilities are reasonably happy with the deal they struck, the bill places a disproportionate compliance obligation on manufactures and producers of transportation fuels." Senator Voinovich has been, and continues to be a vocal supporter of restarting America's nuclear energy sector to help supply America's energy needs in a carbon-responsible manner.

Senator Brown has not taken a position on the Boxer-Kerry proposal. Senator Brown is playing a central role in the national debate and is a self-stated protector of manufacturing. He is a strong supporter of developing Ohio and America's clean energy manufacturing sector and has been recently quoted saying ""Clean energy manufacturing will help rebuild our nation's middle class by utilizing our skilled labor force to build next-generation technologies. We owe it to the future of our economy and our global competitiveness to invest in a national manufacturing strategy that promotes new jobs and industries."

Environment – Public Policy News

U.S. EPA Announces Bad Greenhouse Gas Rule

The National Association of Manufacturers' asks manufacturers to sign a letter opposing new rules proposed by the U.S. EPA:

On September 30, 2009, the Environmental Protection Agency (EPA) announced its proposed "tailoring rule" and outlined its regulations for greenhouse gas (GHG) emissions from large industrial facilities while establishing a process to begin regulation of smaller plants.

The EPA proposes to issue permits under its so-called "Prevention of Significant Deterioration" program, in which facilities such as manufacturing plants, power plants and refineries would be required to demonstrate they are using the best technologies to minimize GHG emissions.

This proposed rule is the EPA's first step toward regulating carbon emissions from large stationary sources that emit more than 25,000 tons of GHG.

Congress, not the EPA, is the appropriate authority to deal with such a complex regulatory issue that needs and deserves transparency and rigorous public debate.

The EPA's proposed rule is subject to a 60-day comment period, which ends on December 28, 2009. We urge you to take quick action to help stop EPA from moving forward with these regulations and to let Congress continue to debate the issue by signing the letter at www.nam.org/epa. 10/30/2009

DC Circuit Court Vacates Common Sense Rule

In response to a Sierra Club appeal, the DC Circuit court last week vacated a long-standing exemption which has allowed certain air sources to operate during startup, shutdown or malfunction events in noncompliance with its permit requirements. This exemption was important to manufacturers installing new equipment because it gave the manufacturer time to tweak the equipment and operations during the initial start up of the unit. The exemption also provided necessary relief during shutdown and malfunction events, which are bound to happen during the life of the equipment.

This is yet another example of courts' and environmental groups' failure to comprehend the practical realities of manufacturing. For more information on this recent development see attached [memo](#) prepared by [Chuck Waterman](#) with [Bricker & Eckler](#), environmental counsel for OMA. 10/23/2009

Court Rules to Give More Time for Permit Appeals Hearings

The Court of Common Pleas in Franklin County recently issued a [judgment](#) vacating all of the one-hour hearings before the Environmental Review Appeal Commission (ERAC). Earlier this year, a provision was inserted in the state operating budget requiring ERAC to issue appeals within certain timeframes. In response, ERAC issued new hearing dates for many parties giving them only one hour to make their cases. ERAC argued this was the only way they could meet the new statutory timeframes.

A number of parties appealed the hearings stating that they could not adequately present their complex case in one hour. While the judgment by the court makes the timelines directory rather than mandatory it is an improvement. The OMA supports reasonable timelines on permit appeals and is exploring ways to make the timelines mandatory. [Contact Kevin Schmidt](#) with questions. 10/16/2009

U.S. EPA Issues Proposal to Regulate CO2

This week, Administrator Jackson of the U.S. EPA announced a [proposed rule](#) under the Clean Air Act that would allow regulation of sources emitting at least 25,000 tons of greenhouse gases (GHG) a year. These facilities would be required to obtain permits that demonstrate they are using the best practices and technologies to minimize GHG emissions.

The legal authority of the Clean Air Act to just those sources of more than 25,000 tons is unclear. The National Association of Manufacturers [contends](#) that the U.S. EPA decision will result in litigation and lead to burdensome regulations on small manufacturers and other businesses. 10/02/2009

U.S. Senators Boxer and Kerry Unveil Climate Change Proposal

U.S. Senators Boxer and Kerry unveiled their climate change [proposal](#) this week. Instead of calling their strategy for reducing CO2 "cap and trade," the Senators dub it "pollution reduction and investment." A summary released by the Senators can be found [here](#). Among other things, the proposal calls for a federal program to encourage investment in natural gas fired electricity generation and funding for states to respond to the effects of global warming with particular focus on coastal states. 10/02/2009

Ohio's Environmental Permit Process Improved

In the state operating budget passed earlier this year, an amendment was inserted by [Representative Matt Szollosi](#) and [Senator Mark Wagoner \(page 1743\)](#) that required the Environmental Review and Appeals Commission (ERAC) to issue decisions on appeals within 12 months of filing. ERAC is the quasi-judicial body to which all environmental permit appeals go before they reach the courts. Historically, appeals could languish at ERAC for years leaving permit applicants and permit holders in limbo.

Special interests are working to remove the deadlines in their entirety due to procedural difficulties created as a result of ERAC's interpretation of its new mandate. The OMA continues to support common sense regulatory reform proposals and has sent a [letter](#) to Representative Szollosi and Senator Wagoner thanking them for their work. 10/02/2009

U.S. EPA Releases Mandatory GHG Reporting Rule

U.S. EPA released its final [greenhouse gas reporting rule](#) this week. Currently, the rule only requires large emitters of greenhouse gases to report their emissions. It is estimated that the rule will govern nearly 85% of all GHG emissions in the United States. OMA environmental counsel [Frank Merrill](#) and [Matt Warnock](#) of [Bricker and Eckler](#) have prepared this [bulletin](#) explaining the rule in more detail. 09/25/2009

Decisions on Environmental Appeals to Move (Too) Quickly

A late addition to Ohio's [operating budget](#) requires the Environmental Review and Appeals Commission (ERAC) to issue decisions according to rigid deadlines. ERAC is the first body to which a party must appeal EPA permit decisions. Under this budget amendment, pending appeals filed before April 15, 2008 must be decided by December 15, 2009. For all other pending appeals and appeals filed with ERAC as of October 15, 2009, decisions must be rendered by July 15, 2010.

OMA environmental counsel [Frank Merrill](#) reports that the deadlines have had one unintended consequence: ERAC has scheduled one-hour hearings for all appeals filed on or before April 15, 2008 to clear its backlog of hundreds of appeals. In many cases, the appeals before ERAC involve complex technical issues that cannot be adequately heard in one hour.

A group of businesses filed a petition for a [writ of mandamus](#) with the Franklin County Court of Appeals on September 8, 2009, requesting that the court order ERAC to vacate the one-hour hearings and reschedule the hearings in a fashion that provides for due process. The court [granted](#) petitioners' writ and ordered ERAC to halt the one-hour hearings or explain why they should continue. In response, ERAC has cancelled all one-hour hearings scheduled through September 25, 2009, and the court will hold a conference during the week of September 21 to address the ERAC process going forward. *09/11/2009*

Ohio EPA Director Korleski Talks Climate Change

Ohio EPA Director [Chris Korleski](#) addressed the OMA's Environment Committee this week and spoke about Ohio's stance on climate change legislation being considered by Congress. Director Korleski stated that Governor Strickland believes man-made climate change is real and it is a problem that needs to be addressed. Additionally, he said that Governor Strickland believes that any climate change legislation needs to protect Ohio's economy and not be a wealth transfer from the Midwest to coastal states.

The committee also heard from Kevin Schmidt of the OMA and [Frank Merrill](#), OMA Environment Counsel, regarding state issues. The OMA Environment Committee materials may be found [here](#).

The OMA will offer a webinar on September 22 in conjunction with the Industrial Energy Consumers of America about Waxman-Markey, the climate change bill passed by the United States House of Representatives. Please consider [registering](#) to learn more about how the climate change proposals currently before Congress may affect you and your facility. *08/26/2009*

NAM Releases Study on Climate Change Legislation

The National Association of Manufacturers (NAM) and the American Council for Capital Formation (ACCF) released a comprehensive [study](#) on the impact of The American Clean Energy and Security Act of 2009, also known as the Waxman-Markey Bill (HR 2454). The bill aims to reduce greenhouse gas emissions and to cap the amount of carbon that is emitted by U.S. industry.

The [impact on Ohio](#)? By 2030, a loss of between 79,700 and 108,600 jobs; a decline of household income of \$873 to \$1,419 per year; gasoline price increases of between 20% and 26%, electricity price increases of up to 60% and natural gas prices up by 79%, and; manufacturing output decline of between 5.4% and 6.0%. *08/14/2009*

OMA Environment Committee – Bill Tracker

Environment Legislation

Prepared by: The Ohio Manufacturers' Association
Report created on November 17, 2009

Hearing)

Comments: None

HB1 BIENNIAL BUDGET (SYKES, V) To make appropriations for the biennium beginning July 1, 2009, and ending June 30, 2011 for the operation of state programs.

Current 7/17/2009 - **SIGNED BY**
Status: **GOVERNOR**, eff. 7/17/09
appropriations; other sections subject to referendum 10/16/09

Comments: Various fee changes that bear watching. Overall, budget increases resources dedicated to manufacturing needs without directly raising fees on manufacturers.

HB324 ENVIRONMENTAL REVIEW APPEALS COMMISSION (YATES, T) To eliminate the schedule in accordance with which the Environmental Review Appeals Commission must issue written orders concerning certain actions that were filed with the Commission and to make an appropriation.

Current 10/27/2009 - Referred to
Status: Committee House Finance and Appropriations

Comments: None

HB230 COMMON SENSE REGULATION ACT (MORAN, M) To enact the Common Sense Regulation Act to improve state agency regulatory processes, especially as they relate to small businesses, to require state departments to develop customer service training programs, and to require the director of environmental protection to provide environmental regulatory compliance assistance to small businesses.

Current 10/28/2009 - **PASSED BY**
Status: **HOUSE**, Vote 94-0

Comments: None

HCR25 CAP AND TRADE LEGISLATION (JORDAN, K) To urge the Congress of the United States to refuse to enact cap and trade legislation that would negatively impact Americans by increasing the costs of goods and services and instead enact legislation that encourages states to establish and develop their own renewable energy portfolio standards.

Current 6/17/2009 - Referred to
Status: Committee House Public Utilities

Comments: None

HB301 ADVANCED ENERGY FUND (FOLEY, M) To replace the current Advanced Energy Fund revenue rider on retail electric distribution service rates with a new rider that will terminate on January 1, 2025 and permit aerospace institutes to receive Advanced Energy Fund money for advanced energy projects and economic development.

Current 11/17/2009 - House
Status: Alternative Energy, (First

HJR1 COMPENSATION FOR VETERANS (PRYOR, R) To provide compensation to veterans of the Persian Gulf, Afghanistan, and Iraq conflicts.

Current 2/19/2009 - House
Status: Veterans Affairs, (First Hearing)

Comments: None

SB3 SMALL BUSINESS EMPOWERMENT ACT (FABER, K) To require a rule-making agency to prepare a cost-benefit report for, and regulatory flexibility analysis of, rules that may have any adverse impact on small businesses, to

create the Small Business Regulatory Review Board.

Current 11/10/2009 - House State

Status: Government, (First Hearing)

Comments: None

SB4 PERFORMANCE AUDITS FOR REGULATORY AGENCIES

(SCHAFFER, T) To require the Auditor of State to conduct performance audits of the Bureau of Workers' Compensation, Environmental Protection Agency, Department of Natural Resources, Department of Agriculture, and Department of Health.

Current 10/27/2009 - Senate State

Status: and Local Government and Veterans Affairs, (Third Hearing)

Comments: None

SB18 ENVIRONMENTAL LAWS (GIBBS,

B) To require the proceeds of fines paid by certain political subdivisions under environmental laws to be expended by the state in the county that incurred the fine and require the proceeds of the fines to be deposited in the General Revenue Fund.

Current 3/3/2009 - Senate Finance

Status: and Financial Institutions, (Second Hearing)

Comments: None

SCR15 AMERICAN JOBS (WIDENER, C)

To urge the Congress of the United States to refuse to enact cap and trade legislation that would negatively impact Americans through the elimination of jobs and by increasing the costs of goods and services and instead enact legislation that encourages states to establish and develop their own renewable energy.

Current 7/1/2009 - Referred to

Status: Committee House Commerce and Labor

Comments: None

Counsel's Report



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COUNSEL'S REPORT

Frank L. Merrill, Bricker & Eckler LLP, Counsel to the OMA
November 19, 2009

ADMINISTRATIVE

A. U.S. EPA Activities of Note

1. U.S. EPA Finalizes Federal Greenhouse Gas Reporting Rule

On September 22, 2009, U.S. EPA finalized rules establishing the first-ever comprehensive national system for the mandatory reporting of carbon dioxide and related greenhouse gas (GHG) emissions. Originally published in draft form in Spring 2009, the rules underwent a number of significant changes based upon approximately 16,800 comments received from interested parties. Among the most significant changes involved: 1) the reduction in the types of facilities required to report (e.g., electronics manufacturers no longer have to report), and categories of emission sources that must be reported (e.g., emissions from magnesium production, industrial landfills, and industrial wastewater treatment systems no longer have to be calculated); and 2) elimination of the “once in, always in” standard through the creation of a mechanism allowing facilities to cease annual reporting by reducing their GHG emissions. It has been estimated that approximately 10,000 facilities will be required to monitor and report annual emissions, with monitoring required to begin on January 1, 2010.

For additional information, please see attached Bricker & Eckler bulletin “Climate Change Spurs Federal Action: EPA Issues Final Rule Requiring Mandatory Reporting of Greenhouse Gases (GHG)”. OMA, Bricker & Eckler and ENVIRON will be conducting a webinar on the nuts and bolts of complying with the GHG reporting rule on December 15, 2009 at 10:00 a.m. (details to follow).

2. U.S. EPA approves Ohio EPA's Redesignation of 1997 Ozone Standard for Cleveland and Columbus

Based upon their failure to meet the 1997 eight-hour ozone standard of 0.08 parts per million (ppm), several areas in Ohio (including Cleveland and Columbus) were designated as non-attainment zones. Recent air monitoring data, however, indicated that the Cleveland-Akron-Lorain and Columbus areas were in attainment with the 1997 ozone

Counsel's Report
Page 2
November 19, 2009

standards. On September 15, 2009, U.S. EPA formally designated these areas in attainment of the 1997 ozone standards. However, based upon U.S. EPA's strengthening of the ozone standard in March 2008 to 0.075 ppm, Ohio expects both areas to again be designated as non-attainment areas sometime in 2010.

3. U.S. EPA Proposes Rule under Clean Air Act Establishing Prevention of Significant Deterioration (PSD) Levels for Greenhouse Gas (GHG) Emissions

On September 30, 2009, U.S. EPA proposed a regulation that would add greenhouse gas emissions to the Prevention of Significant Deterioration (PSD) and Title V permitting programs currently regulating air pollutants such as NO_x, SO₂, and VOC. U.S. EPA explained that the proposed rule was "necessary because EPA expects soon to promulgate regulations under the [Clean Air Act] to control GHG emissions from light-duty motor vehicles and, as a result, trigger PSD and title V applicability requirements." U.S. EPA estimates that approximately 14,000 large sources would need to obtain operating permits that include GHG emissions.

Under the first phase of the proposed rule, any source with potential GHG emissions of 25,000 tons of carbon dioxide equivalents (CO₂e) per year would be required to obtain a construction and operating permit covering these emissions. The proposed rule also established a PSD significance level between 10,000 and 25,000 tons of CO₂e per year, meaning that existing major sources of GHG emissions making modifications that increase GHG emissions within this range also would be required to obtain a PSD permit. The second phase of the program would begin within 5 years of the effective date of the rules, and include a detailed study of the success of phase one. U.S. EPA will be accepting comments on the proposed rule through December 28, 2009.

B. Ohio EPA Regulations

1. Ohio EPA Closes in on Completion of Transition to CAIR Program

(OAC Ch. 3745-109; Ch. 3745.14) After receiving only one comment on draft amendments to Ohio's NO_x SIP Call Program Rules Ohio EPA recommended on October 22, 2009 that the final rules be approved by the Joint Committee on Agency Rule Review ("JCARR").

As discussed in a previous Counsel's Report, Ohio EPA published draft amendments to Ohio's NO_x SIP Call Program Rules in August 2009 to begin the process of sunseting sections of Chapter 3745-14 that will be superseded by the federal Clean Air Interstate Rules ("CAIR") rules. These proposed amendments affect only the applicability provisions of Chapter 3745-14, as Ohio EPA chose not to rescind the entire CAIR program due to the

Counsel's Report
Page 3
November 19, 2009

uncertainty surrounding the CAIR Program after the D.C. Circuit Court's decision in *North Carolina v. EPA*.

The specific amendments to Ohio's rules provide that all affected units (electrical generation units and large industrial boilers) will have to comply with Ohio's CAIR program for the 2009 control period, but should U.S. EPA eliminate or suspend the CAIR program (which is currently under review by U.S. EPA as required by court order in *North Carolina v. EPA*) then the NOx SIP Call Program would be reinstated.

2. Increase to Title V Emissions Fees

Based on a 0.18% increase in the All Urban Consumers subset of the Consumer Price Index for the calendar year 9/1/08 through 8/31/09, the Title V emissions fee for reporting year 2009 will be **\$43.83** per ton.

3. Completion of Draft Amendments to Portions of Clean Air Mercury Program

(OAC 3745-108-07) On October 23, 2009, Ohio EPA completed amendments to the "Monitoring and Reporting" portion of Ohio's Clean Air Mercury Rules (CAMR) program following a federal appellate court's decision vacating the federal CAMR program in 2008. See *New Jersey v. Environmental Protection Agency*, 517 F.3d 574 (D.C. Cir. 2008).

Based on the assumption that U.S. EPA would develop and implement a replacement program in light of the court's holding in *New Jersey v. Environmental Protection Agency*, Ohio EPA extended the deadline for affected persons to submit certifications and reports regarding their mercury monitoring programs through January 1, 2011. However, because of U.S. EPA's slow reaction to the court's holding, Ohio EPA further extended the deadline through January 1, 2013 in order to allow Ohio's current CAMR program to be properly incorporated into the expected federal mercury program. In the event the Ohio program does not fit, Ohio EPA will rescind all of Chapter 3745-108.

4. Review of Industrial Waste Rules

Ohio EPA is accepting comments on the current solid waste landfill program and associated rules, including rules covering "residual waste" and "industrial waste". The review is being conducted as part of the 5-year rule review requirement of Ohio Rev. Code §119.032. Of significance to OMA members is the continued regulation of the beneficial reuse of "industrial waste". A few years ago Ohio EPA proposed a comprehensive rule package to address the beneficial reuse of industrial waste. These rules were never adopted and appear to be placed permanently on hold. Ohio EPA has extended the comment period on the solid waste rules to December 31, 2009.

Counsel's Report
Page 4
November 19, 2009

LEGISLATIVE

A. Federal

1. Clean Energy Jobs & American Power Act S.1733

The Senate's version of the Waxman-Markey bill (discussed in September's Counsel Report) was introduced on September 30, 2009 by Senators Barbara Boxer (D-CA) and John Kerry (D-MA), and just recently passed out of the Senate Committee on Environment and Public Works. U.S. EPA's economic analysis of S. 1733 "show[s] that the impacts of S. 1733 would be similar to those estimated for H.R. 2454." However, S. 1733 proposes a more aggressive GHG emission reduction target of 20 % below 2005 levels by 2020 (as compared to a proposed 17% reduction in the House version). Notably, both versions call for a 42% reduction in carbon emissions by 2030 and an 83% reduction by 2050. Similar to the cap and trade proposal in the House version, S.1733 proposes a "Pollution Reduction and Investment" that would require covered entities to reduce their emission through a market-based trading system involving emissions allowances. Based on the number of other committees that must discuss the bill, it appears unlikely that it will be voted on in 2009.

B. State

1. Environmental Justice

As mentioned in September's counsel report, the State's original budget bill (H.B. 1) included a new program for "Environmental Justice" sponsored by Rep. Heard (Columbus). The bill proposed to create a new and multi-layered bureaucracy with a mandate to investigate and determine whether execution of Ohio law by over a dozen existing state agencies results in "fair treatment" of people of color, ethnicity, and /or economic status. Although the "Environmental Justice" proposal was pulled from the budget bill after OMA and other trade groups expressed concerns, the City of Cincinnati passed similar environmental justice legislation on July 24, 2009.

The Cincinnati Environmental Justice ordinance also establishes a multi-layer review process to analyze the health, environmental and socioeconomic impact of certain projects located within the City of Cincinnati (e.g., those required to obtain a Title V permit under the Clean Air Act, file a Toxic Release Inventory Report, or obtain a permit for the treatment, storage, or disposal of hazardous waste under RCRA). Compliance with the ordinance requires an administrative judge to determine that a project will not have a "material, cumulative adverse impact" on the health or environment of the community where the project is located. Simply stated, this standard requires a determination that the project does not constitute a public nuisance. An administrative appeals process is embedded within the ordinance should a project be denied a permit.

Counsel's Report
Page 5
November 19, 2009

2. ERAC Hearings

In reaction to the Franklin County Court of Common Pleas' ruling vacating ERAC's 1-hour de novo hearings (see below *AEP Ohio v. State of Ohio*), it has been reported that Rep. Szollosi and Sen. Wagoner are working on legislation to expedite ERAC's review of environmental appeal cases. OMA and other business trade groups met with Rep. Szollosi and Sen. Wagoner on October 20, 2009 regarding this potential legislation. OMA's concern and that of Rep. Szollosi and Sen. Wagoner is that the ERAC appeal process can effectively be used to stop the construction of new or expanded facilities while the permits are under appeal, costing jobs and investments to Ohio's manufacturing community.

OMA and the other business trade groups have drafted legislation to address this timing issue. Essentially, the proposal would allow a permittee to ask for an expedited hearing at ERAC if its permit is appealed by a third party (see draft legislation attached). The proposed legislation has not yet been introduced, and OMA is currently soliciting input from its members on the proposal.

Rep. Yates has introduced a bill in the House (H.B. 324) that deletes the ERAC deadlines, which were added this summer through the budget bill, and that also increases ERAC funding by more than 30%.

JUDICIAL

A. Federal

1. State of Conn. v. American Elect. Power Co., Inc., 2009 U.S. App. LEXIS 20873 (Sept. 21, 2009, 2nd Cir.).

The case originated in 2004 when a coalition of eight states, New York City, and three land trusts filed complaints in federal district court alleging federal common law nuisance claims against six electric companies based on the present and future impact of their carbon dioxide emissions. Both groups sought relief in the form of a carbon dioxide cap and reduction in carbon dioxide emissions over a ten-year period. The district court, however, dismissed both complaints, concluding that the "initial policy determination addressing global climate change was better left to the political branches of government. On appeal, however, the Second Circuit disagreed.

The Second Circuit concluded that Plaintiffs' claims fell within the scope of a public nuisance claim because the emissions from the electric companies' facilities contribute to global warming and "constitute a substantial and unreasonable interference with. . . the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the

Counsel's Report
Page 6
November 19, 2009

natural world.” The court also rejected the argument that the federal nuisance claims were displaced or superseded by federal law (i.e., the Clean Air Act and other climate-related statutes). Until U.S. EPA or Congress directly regulate the emission of carbon dioxide, private lawsuits against emitters of carbon dioxide may continue through the federal courts.

2. *Comer v. Murphy Oil USA*, 2009 U.S. App. LEXIS 22774 (5th Cir., Oct. 16, 2009)

Less than a month after the 2nd Circuit's decision in State of Conn. v. American Elect. Power Co., Inc., the 5th Circuit held that a group of private property owners could proceed with property damage claims against energy, fossil fuel, and chemical companies for their contributions to global warming. The specific allegations in the complaint claim that the companies' greenhouse gas emissions contributed to global warming that, in turn, increased the “ferocity of Hurricane Katrina,” and caused greater damage to both public and private property. Reversing the trial court's dismissal of the complaint, the 5th Circuit concluded that the property owners had “standing to assert their public and private nuisance, trespass, and negligence claims, and that none of these claims present nonjusticiable political questions.”

3. *Sierra Club v. U.S. EPA*, 551 F.3d 1019 (D.C. Cir. 2008)

On December 19, 2008, the D.C. Circuit Court vacated a long-standing exemption which has allowed certain air sources to operate during startup, shutdown or malfunction (SSM) events in noncompliance with its National Emission Standards for Hazardous Air Pollutants (NESHAP) permit requirements. This exemption was important to manufacturers installing new equipment in that it gave the manufacturer time to tweak the equipment and operations during the initial start up of the unit. The exemption also provided necessary relief during shutdown and malfunction events which are bound to happen during the life of the equipment. The Court, however, found that the SSM exemption violated the Clean Air Act requirement that the NESHAP limits must apply to a source on a continuous basis.

At the request of various parties, the Court stayed the effect of its decision. However, on October 16, 2009, the Court finally issued its mandate and the vacatur order became effective. As a result, sources subject to NESHAP limits which incorporated by reference the SSM exemption invalidated by the Court now must comply with applicable NESHAP limits at all times, including during SSM events. More specifically, U.S. EPA identified certain source categories that will immediately be affected by the Court's mandate, including: Pulp & Paper, Primary Lead, Secondary Lead, Primary Aluminum, Secondary Aluminum, Combustion Sources at Pulp Mills, Portland Cement, Boat Manufacturing, and Ferroalloy Production. For more detail, please see attached Bricker & Eckler bulletin “Court Vacates Startup, Shutdown, and Malfunction Exemptions from NESHAPs”.

Counsel's Report
Page 7
November 19, 2009

B. State

1. *AEP Ohio v. State of Ohio* (Franklin Cty. CP, Oct. 9, 2009), Case No. 09-CV-14494

On October 9, 2009, the Franklin County Common Pleas Court ruled that the 1-hour de novo hearings previously scheduled by the Environmental Review Appeals Commission (ERAC) were vacated. The Court reasoned that the decision deadlines, which had been imposed by the legislature in an 11th hour amendment to the state budget bill, were inconsistent with existing statutory requirements for ERAC hearings. As such, those deadlines were not mandatory, and the 1-hour hearings and associated orders issued by ERAC to comply with the deadlines were unnecessary and inconsistent with due process. For more information, please see attached Bricker & Eckler bulletin "ERAC Deadlines and 1-Hour Hearings Vacated by Court".

In response, ERAC has cancelled the previously scheduled barrage of hurry-up hearings, and has begun issuing orders in individual cases indicating that the parties either agree to place an appeal on a joint status report schedule or submit a proposed joint case management order. Failing that, ERAC will schedule in-person status conferences.

Meanwhile, a bill has been introduced in the Ohio House that would statutorily nullify the deadlines imposed on ERAC, and as a bonus, increase funding to ERAC for the next two years by more than 30%. However, given the state's current budget conundrum, additional dollars to ERAC may not be an easy sell.

Additional Materials



Environmental Law Bulletin



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Court Vacates Startup, Shutdown and Malfunction Exemptions from National Emission Standards for Hazardous Air Pollutants

On December 19, 2008, in *Sierra Club v. U.S. EPA*, the D.C. Circuit Court vacated the startup, shutdown and malfunction (SSM) exemptions from National Emission Standards for Hazardous Air Pollutants (NESHAP) compliance found in 40 CFR Part 63, Subpart A “General Provisions.” The provisions in question had required sources subject to NESHAP to minimize emissions of hazardous air pollutants (HAPs) during SSM events, but exempted those sources from strict compliance with NESHAP emission limits otherwise applicable during normal (non-SSM) operations. The Court found that the SSM exemption in 40 CFR 63.6 (f)(1) and 63.6 (h)(1) violated the Clean Air Act Sec. 112 requirement that the NESHAP limits must apply to a source on a continuous basis.

At the request of various parties over the next several months the Court stayed the effect of its decision. However, on October 16, 2009, the Court finally issued its mandate and the vacatur order became effective. As a result, sources subject to NESHAP limits which incorporated by reference the “General Provisions” SSM exemption invalidated by the Court must now comply with applicable NESHAP limits at all times, including during SSM events.

According to a July 22, 2009, guidance letter issued by U.S. EPA, not all NESHAP source categories are affected. The majority of NESHAP source category rules do not rely upon the “General Provisions” SSM exemptions invalidated by the Court, but rather include source category-specific SSM provisions that were not invalidated by the Court. Those category sources may continue to operate under the applicable category-specific SSM exemptions.

However, according to U.S. EPA many source categories will be affected immediately by the Court’s mandate, including, for example, Pulp & Paper, Primary Lead, Secondary Lead, Primary Aluminum, Secondary Aluminum, Combustion Sources at Pulp Mills, Portland Cement, MSW Landfills, Boat Manufacturing, Ferroalloy Production, and Publicly Owned Treatment Works. A list of immediately affected industries as identified by U.S. EPA is attached hereto.

It is significant to note that U.S. EPA has announced that it will begin a source-by-source SSM exemption review to determine whether, given the Court’s reasoning in *Sierra Club*, the

source category-specific SSM exemptions require revision. Thus, even though many NESHAP source categories were technically unaffected by the Court's vacatur of the "General Provisions" SSM exemptions, it is likely that in the near future U.S. EPA will be adopting changes in SSM exemptions affecting most NESHAP source categories.

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Table 1 – Section 112(d) Source Category Rules That Will Be Affected Once The Mandate Issues in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), Vacating the Startup, Shutdown, and Malfunction Exemptions in 40 C.F.R. § 63.6(f)(1) and (h)(1)⁴

Relevant Part 63 Subpart	Source Category
R	Gasoline Distribution
S	Pulp and Paper
T	Halogenated Solvent Cleaners
X	Secondary Lead Smelting
Y	Marine Loading Operations
GG	Aerospace Manufacturing
II	Shipbuilding and Ship repair
KK	Printing and Publishing
LL	Primary Aluminum
MM	Combustion Sources at Pulp Mills
CCC	Steel Pickling
III	Flexible Polyurethane Foam Production
LLL	Portland Cement
NNN	Wool Fiberglass
RRR	Secondary Aluminum
TTT	Primary Lead
VVV	Publicly Owned Treatment Works
XXX	Ferroalloy Production

⁴ This Table presents the Clean Air Act Section 112(d) source category rules that EPA currently believes will be directly affected once the mandate issues in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). The rules identified in this Table incorporate 40 C.F.R. Sections 63.6(f)(1) and (h)(1) by reference and contain no other regulatory text exempting or excusing compliance during startup, shutdown or malfunction events. The information in this Table is based on EPA's initial analysis and is, therefore, subject to change.

Table 1 (Continued) – Section 112(d) Source Category Rules That Will Be Affected Once The Mandate Issues in Sierra Club v. EPA, 551 F.3d 1019 (D.C. Cir. 2008), Vacating the Startup, Shutdown, and Malfunction Exemptions in 40 C.F.R. § 63.6(f)(1) and (h)(1)

Relevant Part 63 Subpart	Source Category
AAAA	Municipal Solid Waste Landfills
JJJJ	Paper and Other Web Coating
RRRR	Metal Furniture
VVVV	Boat Manufacturing
YYYYY	Electric Arc Furnaces – area sources
ZZZZZ	Iron and Steel Foundries – area sources
EEEEEE	Primary Copper – area sources
FFFFFF	Secondary Copper – area sources
GGGGGG	Primary Nonferrous metals – area sources
HHHHHH	Paint Stripping and Miscellaneous Coating – area sources
LLLLLL	Acrylic/Modacrylic fibers – area sources
NNNNNN	Chromium Compounds – area sources
OOOOOO	Flexible Polyurethane Foam Production and Fab – area sources
PPPPPP	Lead Acid Batteries – area sources
RRRRRR	Clay ceramics – area sources
TTTTTT	Secondary Nonferrous metals – area sources
YYYYYY	Ferroalloys Production – area sources



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Climate Change Spurs Federal Action: EPA Issues Final Rule Requiring Mandatory Reporting of Greenhouse Gases (GHG)

Pursuant to a congressional mandate in the 2007 Consolidated Appropriations Act, the United States Environmental Protection Agency (“U.S. EPA”) finalized rules establishing mandatory reporting requirements for greenhouse gas (GHG) emissions. Originally published in draft form on April 10, 2009, the GHG rules underwent a number of significant changes based upon approximately 16,800 comments received from interested parties. The final became final on September 22, 2009 and will require approximately 10,000 facilities (including everything from power plants to cement manufacturers) to monitor and report annual emissions of the seven most common greenhouse gases: carbon dioxide; methane; nitrous oxide; sulfur hexafluoride; hydrofluorocarbons; perfluorochemicals; and other fluorinated gases. In all, the GHG reporting rules will account for nearly 85% of all GHG emissions in the United States. A copy of the final rule and relevant summaries can be found on U.S. EPA’s website at <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>.

Who Must Report?

The GHG reporting rules are designed to target large emitters (i.e. facilities emitting greater than 25,000 metric tons of carbon dioxide equivalent per year). In order to limit the scope of the reporting requirement, the rules establish certain thresholds designed to

exclude residential homeowners, municipal operations (i.e. schools, hospitals, domestic wastewater treatment plants), most commercial establishments (i.e. office buildings and retail centers), most small businesses, and much of the agricultural sector.

In order to determine which facilities will be subject to the reporting requirements, the rules specifically identify various types of facilities and various categories of emission sources that will be subject to the rules. For some facilities, reporting is required regardless of the actual GHG emissions levels. These facilities, which must report emissions from all source categories (identified in Table 1 below), include:

- Certain importers and exporters of fossil fuels, but not retail gas stations. This category includes facilities such as local natural gas distribution companies; importers and exporters of petroleum products (i.e. gasoline, diesel fuel, propane, home heating oil, asphalt, road oil, lubricants); producers, importers, and exporters of certain coal-to-liquid products (i.e. gasoline and diesel); and suppliers of carbon dioxide. (see Subparts LL, MM, NN);
- Manufacturers of heavy duty mobile sources (i.e. heavy duty vehicles and engines, trains, snowmobiles, motorcycles, and ATVs);

- Primary aluminum producers (see Subpart F);
- Manufacturers of ammonia-based fertilizers (see Subpart G);
- Manufacturers of Portland cement (see Subpart H);
- Petroleum refineries, but only those that produce crude oil (see Subpart Y);
- Producers of titanium dioxide, a major source of white pigment in paints (Subpart EE);
- Municipal solid waste landfills accepting waste after January 1, 1980 and generating methane amounts equivalent to 25,000 metric tons of carbon dioxide (see Subpart HH);
- Large beef, dairy, poultry and swine manure management systems with certain average animal population values (per head), including: 29,300 for beef cattle; 3,200 for dairy cattle; 34,100 for swine; and 723,000 for layers (see Subpart JJ); and

- Suppliers of industrial GHG (includes producers, bulk importers, and bulk exporters of fluorinated GHG and nitrous oxide) (see Subpart OO).

Originally, the rules also included: manufacturers of electronics (e.g. semiconductors, LCD, and solar panels); coal suppliers; and underground coal mines. Based upon comments from interested parties, these facilities no longer are required to complete any GHG reporting.

For other facilities, the proposed rules only require reporting if combined emissions from specified source categories (identified in Table 1) are equal to, or greater than, 25,000 metric tons of CO₂ equivalent (CO₂e). In practical terms, this threshold amount is equal to carbon dioxide emissions from:

- Burning 131 railcars of coal (which would contain approximately 91 metric tons, or more than 26 million pounds, of coal);
- 4,579 passenger cars in one year;

TABLE 1

Subpart in Part 98 of Rules	Source Categories
C	Stationary Fuel Combustion Sources – devices that combust solid/liquid/gas fuel to produce electricity and/or useful heat or energy <u>OR</u> reduce volume of waste by removing combustible materials (i.e. boilers, stationary engines, process heaters, and combustion turbines)
D	Electricity generation (but only electric generation units subject to the Acid Rain Program or required to continuously monitor emissions under 40 CFR Part 75)
K	Ferroalloy production (i.e. combining iron and at least one other metal for use in the iron and steel industries)
N	Glass production (including flat glass; container glass; press and blown glass; textile fiberglass; and wool fiberglass using one or more continuous glass melting furnaces)
P	Hydrogen production
Q	Iron and Steel production (i.e. taconite iron ore/pellet processing; integrated iron and steel manufacturing; coke-making not located at an integrated iron and steel facility; and electric arc furnace steel-making not located at an integrated iron and steel facility)
R	Lead production (i.e. primary and secondary lead smelting, which includes the production of lead and lead alloys from lead-bearing scrap metal, i.e. used car batteries).
S	Lime manufacturing (on combined kiln basis)
U	Miscellaneous carbonate uses (does not include uses of carbonates that do not give off emissions)
X	Petroleum producers (excludes ethylene dichloride producers using only the direct chlorination process)
AA	Pulp and paper manufacturing
GG	Zinc production (i.e. primary zinc smelters using pyrometallurgical processes and secondary zinc recycling facilities, such as those built to process dust collected from electric arc furnace operations)

- 1,041,667 propane tanks used from home barbecuing;
- 1/10 of a coal-fired power plant for one year; or
- Electricity use at 3,467 homes in one year.¹

NOTE: The rules presume that the 25,000 CO₂e threshold has not been met when the maximum rated heat capacity of a facility is less than 30 million British thermal units (Btus). In practice, this provision should exempt nearly 80% of commercial buildings that use a boiler for heating water and steam from reporting under the rules.

In order to determine whether combined emissions are equal to, or greater than, 25,000 metric tons of CO₂ equivalent, a facility must calculate combined annual emissions from all of the Table 1 source categories located within the physical boundary of the facility, including stationary fuel combustion units and miscellaneous carbonate uses.

Among other things, the rules also included: food processing; magnesium production; industrial landfills; and industrial wastewater treatment system. Based upon comments from interested parties, these facilities no longer are required to complete any GHG reporting.

NOTE: The rule does not require facilities to report electricity purchases or indirect emissions from electricity consumption.

General Reporting Requirements

Measuring Greenhouse Gases: The general monitoring approach adopted by the proposed rules involves both direct emission measurement and facility-specific estimations. For detailed information regarding facility-specific monitoring approaches and/or emission calculations, you should consult the subparts applicable to your facility. Notably, the rules do allow for the use of best available data in lieu of facility-specific monitoring methods from January through March 2010.

Reporting Schedule: Facilities subject to the reporting rules will be required to begin collecting emissions data on January 1, 2010. The first annual report will be due on March 1, 2011, and will be based upon data collected during calendar year 2010. The lone exception to the annual reporting requirement is a facility with an electric generating unit (EGU) and subject to the Acid Rain Program (i.e. reporting of NO_x and SO_x emissions). Because facilities subject to the Acid Rain Program must report CO₂

emissions on a quarterly basis, the proposed GHG reporting rules will not change the quarterly reporting requirement.²

No Longer “Once in, always in”: The proposed rules required that, once a facility becomes subject to the GHG reporting requirements, it must continue to report even if it later falls below the reporting threshold. This absolute “once in, always in” standard was abandoned in the final rules. Now, the rules contain a mechanism that allows facilities to cease annual reporting by reducing their GHG emissions. A facility can stop reporting if the facility:

1. Has 5 consecutive years of emissions below 25,000 metric tons CO₂e/year;
2. Has 3 consecutive years of emissions below 15,000 metric tons CO₂e/year; or
3. Shuts down its GHG-emitting processes and/or operations.

The Annual Report: Annual reports must be submitted at the facility (rather than corporate) level. The annual report must contain the following information:

- Total facility emissions in metric tons of carbon dioxide equivalent aggregated for all source categories
- Total facility emissions in metric tons of carbon dioxide equivalent aggregated for all supply categories (i.e. supply/importing/exporting fossil fuels)
- Annual emissions from each source category and supply category expressed in metric tons for each of the 6 GHG, listed by GHG
- Onsite electricity generation in kWh
- Total pounds of synthetic fertilizer produced and total nitrogen in fertilizer
- Any additional information (i.e. unit/process-level emissions, activity data such as fuel use or feedstock inputs, quality assurance/control data)

Self-certification, EPA verification: All annual reports must be submitted electronically and certified by a designated representative of the owner or operator of the reporting facility. The certification requirement requires all reporters to acknowledge the contents of the annual report as truthful, accurate and complete. Once submitted, it is the responsibility of U.S. EPA to verify the completeness and accuracy of the report, as well as whether it satisfies the reporting requirements in the proposed rules. By accepting responsibility as the sole verifier of the GHG reports, EPA explicitly

rejected calls for third-party verification, which has become common in the cap-and-trade arena.

Expected Costs of Reporting: U.S. EPA estimates that the average reporting cost will be approximately \$0.02/metric ton, which will cost the private sector about \$132 million in the first year, and \$89 million each subsequent year. Industry sectors expected to bear the greatest burden include general station combustion (24%), pulp and paper manufacturers (10%), and motor vehicle and engine manufacturers (10%).

Record Retention: In the spirit of the free flow of information, the rules establish a three-year record retention schedule for all reporters. The materials that must be retained include the annual reports themselves, as well as all materials used to generate those reports.

Enforcement: The enforcement of the proposed rule will be under the Clean Air Act (Sections 113 and 203-205). Under the Clean Air Act, enforcement mechanisms include administrative, civil and criminal penalties up to \$32,500 per day, as well as injunctive relief to compel compliance with the rules.

FRANK MERRILL is a partner and chair of the Energy/Environmental practice group. He practices in the areas of environmental law, emphasizing the effect of environmental law on real estate transactions,

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MATT WARNOCK is an associate at Bricker & Eckler LLP in the firm's Energy/Environmental practice group. Matt also is a member of the firm's Green Strategies practice area.

Footnotes

¹These calculations are based upon the Greenhouse Gas Equivalencies Calculator developed by U.S. EPA and located at <http://www.epa.gov/solar/energy-resources/calculator.html>.

²Under the Acid Rain Program, the federal government established a cap-and-trade program designed to reduce sulfur dioxide and nitrogen oxide emissions. As a secondary component of this program, large EGUs must submit detailed quarterly reports detailing carbon dioxide emissions.

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ERAC Deadlines and 1-hour Hearings Vacated by Court

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In response, ERAC has cancelled the previously schedule barrage of hurry-up hearings, and begun issuing orders in individual cases requesting that the parties either request an order for an initial joint status report or submit a proposed joint case

management order. Failing that, ERAC will schedule in-person status conferences.

Meanwhile, a bill has been introduced in the Ohio House, H.B. 324, which would statutorily nullify the deadlines which had been imposed on ERAC in Am. Sub. H.B. 1, and as a bonus, increase funding to ERAC for the next two years by over 30 percent, presumably to facilitate a more expeditious appeal process. However, given the state's current budget conundrum, additional dollars to ERAC may not be an easy sell.

For now, cases previously subject to 1-hour hearings have no deadlines, but ERAC will be addressing that circumstance shortly.

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Section 3745.04.1 Expedited Review of Certain Actions

(A) In the event of an appeal to the environmental review appeals commission of a license, permit, approval of plans, or other action that approves or authorizes the installation, modification, enlargement or construction of an air contaminant source, disposal system, treatment works, disposal facility, or any other physical equipment, installation, or facility, filed by a person who is not the applicant for the license, permit, approval of plans, or other action, the commission shall employ expedited review proceedings in accordance with this section. The applicant for the license, permit, approval of plans, or other action or the applicant's successor in interest shall have a right to intervene in the appeal as an appellee and shall have a right to expedited review proceedings. The applicant may initiate expedited review proceedings by filing a motion requesting such proceedings.

(B) The commission within seven days of receipt of a motion for expedited review proceedings filed in accordance with division (A) of this section shall issue an order that establishes and commences the expedited proceedings. If the certified record has not been filed with the commission prior to issuance of the order, the commission in the order shall require the filing of the certified record within seven days.

(C) If an adjudication hearing was held prior to the issuance of the license, permit, approval of plans, or other action, the commission in the order shall establish a schedule for the filing of all briefs within sixty days of issuance of the order. The commission shall hear arguments on the merits of the appeal within fifteen days of the completion of filing of all briefs, and shall issue an order affirming, vacating, or modifying the license, permit, approval of plans, or other action within forty-five days of the filing of all briefs.

(D) If no adjudication hearing was held prior to the issuance of the license, permit, approval of plans, or other action, the commission in the order shall establish a schedule for discovery, the filing and disposition of prehearing motions, and the date of the hearing de novo. The hearing de novo shall be scheduled within one hundred twenty days after the issuance of the order, and shall not be interrupted by continuances unless otherwise agreed to by all of the parties. Hearings de novo under this division shall have priority on the commission's hearing schedule, and other hearings shall be rescheduled as necessary. The commission shall require the parties to confer and cooperate in the prehearing discovery process, including the prompt answering of interrogatories, production of documents, taking of depositions, and other prehearing discovery activities. The commission shall require the filing of prehearing merit briefs, shall give priority to and act promptly on all prehearing motions to assure that all motions are disposed of in advance of the hearing de novo, and shall take all other actions necessary to assure that the hearing de novo is commenced and completed in accordance with this division. The commission shall allow the filing of post-hearing briefs containing proposed findings of fact and conclusions of law within thirty days of completion of the hearing de novo, and shall issue an order affirming, vacating, or modifying the license, permit, approval of plans, or other action within sixty days of the completion of the hearing de novo.

(E) The commission's duty to employ expedited review proceedings in accordance with this section shall be enforceable through an action in mandamus in accordance with Chapter 2731 of the Revised Code.

- A. CAA Provisions Concerning SIP Requirements for PSD Programs, State Submittal Requirements, and EPA Action
- B. What PSD-specific implementation considerations are there?
- C. What title V-specific implementation issues are there?
- D. GHGs and Title V Permit Fees
- E. Implementation Assistance and Support
- XI. Statutory and Executive Order Reviews
 - A. Executive Order 12866 - Regulatory Planning and Review
 - B. Paperwork Reduction Act
 - C. Regulatory Flexibility Act
 - D. Unfunded Mandates Reform Act
 - E. Executive Order 13132 - Federalism
 - F. Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments
 - G. Executive Order 13045 - Protection of Children from Environmental Health Risks and Safety Risks
 - H. Executive Order 13211 - Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - I. National Technology Transfer and Advancement Act
 - J. Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Communities
 - K. Deauthorization under Section 307(d)
- XII. Statutory Authority

Start of Synopsis.

III. Overview of Proposed Rule

EPA is proposing to tailor the major source applicability thresholds for GHG emissions under the PSD and title V programs of the CAA by setting first-phase levels under both programs, setting a first-phase PSD significance level¹ for GHG emissions, undertaking efforts to streamline administrability of the programs, and committing to an assessment of administrability

¹ "Significant levels" for regulated NSR pollutants are commonly called "significance levels" or "significance thresholds," and these terms are used interchangeably for purposes of this proposed action.

within 5 years and a second-phase rulemaking within 6 years.

This proposal is necessary because EPA expects soon to promulgate regulations under the CAA to control GHG emissions from light-duty motor vehicles and, as a result, trigger PSD and title V applicability requirements for GHG emissions. When the light-duty vehicle rule is finalized, the GHGs subject to regulation under that rule would become immediately subject to regulation under the PSD program, meaning that from that point forward, prior to constructing any new major source or major modifications that would increase GHGs, a source owner would need to apply for, and a permitting authority would need to issue, a permit under the PSD program that addresses these increases. Similarly, for title V it would mean that any new or existing source exceeding the major source applicability level for those regulated GHGs, if it did not have a title V permit already, would have 1 year to submit a title V permit application.

If PSD and title V requirements apply at the applicability levels provided under the CAA, many small sources would be burdened by the costs of individualized PSD control technology requirements and permit applications. In addition, state permitting authorities would be paralyzed by enormous numbers of these permit applications; the numbers are orders of magnitude

greater than the current inventory of permits and would vastly exceed the current administrative resources of the permitting authorities. Based on the long-established judicial doctrines of "absurd results" and "administrative necessity," this proposed rule would phase in PSD and title V applicability. As the first phase, this rule would establish applicability thresholds for both the PSD and title V programs at the level of 25,000 tpy CO₂e, and would establish a PSD significance level of between 10,000 and 25,000 tpy CO₂e. This rule also marks the beginning of a concerted effort by EPA to streamline administration of the PSD and title V programs as much as possible and as quickly as possible. In addition, EPA commits that, within 5 years of promulgating the first phase, EPA will conduct a study of the permitting authorities' ability to administer the programs going forward, and then, within a year, conduct rulemaking for the second phase of the program. This second phase will either confirm the first-phase permitting levels or establish revised ones or other streamlining techniques. EPA also proposes to identify as the pollutant subject to PSD and title V for applicability purposes the group of up to six GHG emissions, each one weighted for its global warming potential, that are included in regulations for their control under the CAA. EPA also proposes to conform its action

on PSD state implementation plans (SIPs) and title V programs to match the proposed federal applicability requirements.

More specifically, following this overview, section IV of this preamble provides background information as to the nature of GHG emissions and the general requirements of the PSD and title V programs. Currently, PSD applies to sources that emit at least 100 or 250 (depending on the source category) tpy of pollutants subject to regulation under the CAA, and title V generally applies to sources that emit at least 100 tpy of pollutants subject to regulation under the CAA. Currently, PSD and title V requirements apply on the basis of emissions applicability thresholds that are pollutant-specific mass emissions rates expressed in tpy. Under PSD, construction of a stationary source that has the potential to emit (PTE) a regulated NSR pollutant in an amount exceeding 100 or 250 tpy (depending on the source category) (the "major stationary source" threshold, in the terminology of EPA regulations) triggers PSD permitting requirements. PSD permitting requirements are also triggered if a major stationary source undertakes a modification that is projected to increase emissions of a regulated NSR pollutant above an emissions threshold (the "significance level"). For any particular pollutant, this level is zero unless and until EPA establishes

one on the basis of de minimis emissions or administrative necessity. Under title V, a source with emissions exceeding a "major source" emissions threshold—generally 100 tpy on a PTE basis—triggers title V permitting requirements.

It should be noted that, as further explained in the background section, there are no geographic areas currently designated "nonattainment" for GHG pollutants; as a result, this action affects only the PSD program, and we are not proposing to amend the "nonattainment NSR" provisions of our major NSR program at this time, nor are we proposing to amend any provisions that affect minor NSR permitting.

Section IV of this preamble further describes the current and expected future treatment of GHG emissions for applicability purposes under those PSD and title V programs. In particular, section IV describes the light-duty motor vehicle rule, which EPA recently proposed and expects to promulgate by the end of March 2010, and which will control GHG emissions from certain mobile sources. Under EPA's current interpretation of PSD and title V applicability requirements, promulgation of this motor vehicle rule will trigger the applicability of PSD and title V requirements for stationary sources that emit GHGs.

In section V of this preamble, EPA describes the administrative burdens on permitting authorities if the

requirements of PSD and title V programs are triggered without having this tailoring rule in place. In short, without this tailoring rule, the administrative burdens would be immense, and they would immediately and completely overwhelm the permitting authorities. Without this tailoring rule, permitting authorities would receive approximately 40,000 PSD permit applications each year—currently, they receive approximately 300—and they would be required to issue title V permits for approximately some six million sources—currently, their title V inventory is some 15,000 sources. These increases are measured in orders of magnitude. We estimate the additional resource burdens in full-time equivalents (FTEs) and time delays in processing permits, but the sheer numbers of additional permits by themselves paint the picture of the overwhelming administrative burdens.

In section VI of this preamble, we describe the legal rationale for this tailoring rule. The judicial doctrine of “absurd results” authorizes departure from a literal application of statutory provisions if it would produce a result that is inconsistent with other statutory provisions or congressional intent, and particularly one that would undermine congressional purposes. The judicial doctrine of “administrative necessity” authorize an agency to depart from statutory requirements if the

agency can demonstrate that the statutory requirements, as written, are impossible to administer. However, the agency must first attempt to mitigate administrative problems through techniques consistent with the statutory requirements, and, if variance from the statutory requirements nevertheless is necessary to allow administrability, the variance must be limited as much as possible.

As discussed in section VI of this preamble, to apply the statutory PSD and title V applicability thresholds to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program. This extraordinary increase in the scope of the permitting programs, coupled with the resulting burdens on the small sources and on the permitting authorities, were not contemplated by Congress in enacting the PSD and title V programs. Moreover, the administrative strains would lead to multi-year backlogs in the issuance of PSD and title V permits, which would undermine the purposes of those programs. Sources of all types - whether they emit GHGs or not - would face long delays in receiving PSD permits, which Congress intended to allow construction or expansion. Similarly, sources would face long delays in receiving title V permits, which Congress intended to promote enforceability. For

these reasons, the absurd results doctrine applies to avoid a literal application of the thresholds.

By the same token, the impossibility of administering the permit programs brings into play the administrative necessity doctrine. This doctrine also justifies EPA to avoid a literal application of the threshold provisions.

Instead, these doctrines authorize EPA to apply the PSD and title V applicability provisions through a phased program. The first phase would establish the applicability thresholds at the 25,000-tpy levels and vigorously develop streamlining measures that would facilitate applying PSD and title V on a broader scale with overburdening sources and administrators. In this manner, the phased approach reconciles the language of the statutory provisions with the results of their application and with congressional intent.

In section VII of this preamble, we describe the streamlining techniques—short of limiting the applicability of PSD and title V to higher-emitting sources—that may be available to improve administrability. These techniques range from defining "potential to emit" — which is the basis for calculating the statutory thresholds — to be closer to actual emissions, to general permits and presumptive best available control technology (BACT), which is the principal control

requirement under the PSD program. Although these techniques offer promise over the long term to improve administrability, they cannot be in place by March 2010, when we expect PSD and title V requirements to be triggered for GHG emitters, or within a several-year period thereafter. Accordingly, this tailoring rule is necessary at this time.

In section VIII of this preamble, we describe in detail our proposed tailoring rule. For the PSD program, we are proposing to establish, as the first phase, the GHG "major stationary source" emissions applicability threshold level at 25,000 tpy on a CO₂e basis. That is, sources that emit at this level or higher would be considered "major stationary sources" and therefore would become subject to PSD requirements when they construct or modify. We are also proposing to establish in this first phase a PSD "significance level" emissions rate for GHGs and are proposing a range for that value of 10,000 to 25,000 tpy CO₂e for comment. The "significance" level is important for determining whether existing sources that make physical or operational changes become subject to PSD and for determining whether sources that are subject to PSD for other pollutants are also subject to PSD for their GHG emissions.

As further described in section VIII of this preamble, for the title V operating permits program, we are also proposing to

establish the GHG emissions applicability threshold level at 25,000 tpy CO₂e for this first phase. That is, sources that emit at this level or higher would be considered "major sources" and therefore would become subject to title V requirements.

As further described in section VIII of this preamble, as an integral part of the tailoring rule, EPA proposes to commit to complete, within 5 years of a final rule, a study to evaluate the actual administrative burden resulting from the proposed GHG permitting thresholds and possible other thresholds, and the progress of developing streamlining techniques and augmentation of permitting authorities' resources. In addition, EPA commits to propose and promulgate a rulemaking—informed by the study—within 6 years from the effective date of a final version of this rulemaking (i.e., 1 year from the completion of the study) that would establish the second phase, which would either reaffirm the GHG permitting thresholds, promulgate alternative thresholds, adopt other streamlining techniques, and/or take other action consistent with the goal of expeditiously meeting CAA requirements in light of the administrative burden that remains at that time.

During this first phase of the tailoring program, EPA proposes to make a concerted effort to assess and implement streamlining options, tools, and guidance—some of which we

describe in section VII of this preamble – to reduce the administrative burden on permitting authorities when implementing PSD and title V for GHGs. EPA proposes to undertake as many of these streamlining actions as possible and to do so as quickly as possible. In addition, for larger sources that would be subject to PSD and title V requirements during the first phase, EPA intends to work closely with the stakeholders to develop efficient methods for implementing those requirements. For smaller sources for which PSD and title V requirements would not apply during the first phase due to the increase in the major source applicability threshold, EPA intends to identify cost-effective opportunities available as soon as possible to achieve GHG reductions through means other than PSD and title V (e.g., energy efficiency and other appropriate measures).

Section VIII of this preamble further describes our proposal to define the relevant pollutants as the group of up to

six GHG emissions that have been regulated for control, calculated on the basis of global warming potential (GWP).²

Section IX of this preamble describes the burden and economic impacts of the proposed rule.

Section X of this preamble discusses implementation issues related to this proposal. These include conforming EPA approval of the PSD programs in SIPs and EPA approval of the state title V programs to be consistent with the proposed applicability threshold levels. By way of background, as soon as EPA promulgates a rule regulating for control of GHG emissions—which we expect to occur with the proposed light-duty motor vehicle rule, scheduled for promulgation at the end of March 2010—stationary sources will become subject to PSD and title V requirements. The major source thresholds for PSD and title V, significance level for PSD, and identification of GHGs subject to PSD and title V as proposed in this tailoring rule would each

² The Intergovernmental Panel on Climate Change (IPCC) describes GWP as an index, based upon radiative properties of well-mixed GHGs, measuring the radiative forcing of a unit mass of a given well-mixed greenhouse gas in the present-day atmosphere integrated over a chosen time horizon, relative to that of CO₂. The GWP represents the combined effect of the differing times these gases remain in the atmosphere and their relative effectiveness in absorbing outgoing thermal infrared radiation. (Intergovernmental Panel on Climate Change (IPCC), Glossary of Terms used in the IPCC Fourth Assessment Report, WG1). <http://www.ipcc.ch/>

take effect immediately in the federal PSD program (codified at 40 CFR 52.21) and in the federal operating permits program (codified at 40 CFR 71), as applicable. To conform EPA action on PSD SIPs and state title V programs, EPA intends to limit its previous approval of those SIPs and title V programs to cover only the permitting of sources of GHG emissions at or above the proposed threshold levels. EPA will take no action on—that is, EPA will not disapprove—the PSD SIPs and title V programs to the extent they require permitting of GHG emitters at levels below the proposed thresholds. EPA proposes to take this action by virtue of its authority to reconsider its previous regulatory actions. Section X of this preamble also explains how we propose to address the treatment of GHGs in the fee programs under title V.

IV. Background

A. What are greenhouse gases and their sources?

Gases that trap heat in the atmosphere are often called GHGs. Some GHGs such as carbon dioxide (CO₂) are emitted to the atmosphere through natural processes as well as human activities. Other gases, such as fluorinated gases, are created and emitted solely through human activities. The primary GHGs of concern directly emitted by human activities include CO₂, methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs),

perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). These six primary GHGs will, for the purposes of this proposal, be referred to collectively as "the six primary GHGs." These six gases, once emitted, remain in the atmosphere for decades to centuries. Thus, they become well-mixed globally in the atmosphere and their concentrations accumulate when emissions exceed the rate at which natural processes remove them from the atmosphere. The heating effect caused by the human-induced buildup of GHGs in the atmosphere is very likely the cause of most of the observed global warming over the last 50 years. A detailed explanation of climate change and its impact on health, society, and the environment is included in EPA's technical support document for the endangerment finding proposal (Docket ID No. EPA-HQ-OAR-2009-0171-0137).³

In the U.S., the combustion of fossil fuels (e.g., coal, oil, gas) is the largest source of CO₂ emissions and accounts for 80 percent of total GHG emissions. More than half the energy-related emissions come from large stationary sources such as power plants, while about a third come from transportation. Of the six primary GHGs, four (CO₂, CH₄, N₂O, and HFCs) are emitted

³ "Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act," Climate Change Division, Office of Atmospheric Programs, U.S. Environmental Protection Agency, Washington, DC. April 17, 2009.

by motor vehicles. Industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management are also important sources of GHG emissions in the U.S. These emissions are inventoried at a national level by EPA in the Inventory of U.S. Greenhouse Gas Emissions and Sinks.⁴

Different GHGs have different heat-trapping capacities. It is useful to compare them to each other through the use of the CO₂e metric. This metric incorporates both the heat-trapping ability and atmospheric lifetime of each GHG and can be used to adjust the quantities, in tpy, of all GHGs relative to the GWP of CO₂. When quantities of the different GHGs are multiplied by their GWPs, the different GHGs can be summed and compared on a CO₂e basis. Depending on which GWP values are used, the calculated GHG emissions on a CO₂e basis will vary. Throughout this preamble, we are applying the GWP values established by the Intergovernmental Panel on Climate Change (IPCC) in its Second Assessment Report (SAR) (IPCC 1996).⁵ For example, CH₄ has a GWP

⁴ For additional information about the Inventory of U.S. Greenhouse Gas Emissions and Sinks, and for more information about GHGs, climate change, climate science, etc., see EPA's climate change Web site at www.epa.gov/climatechange/.

⁵ "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2007," U.S. Environmental Protection Agency, EPA 430-R-09-004, April 15, 2009. Table 1-2, p. 1-6.
<http://www.epa.gov/climatechange/emissions/usinventoryreport.htm>
1.

of 21, meaning each ton of CH₄ emissions would have 21 times as much impact on global warming over a 100-year time horizon as 1 ton of CO₂ emissions. Thus, on the basis of heat-trapping capability, 1 ton of CH₄ would equal 21 tons of CO₂e. The GWPs of the six primary GHGs range from 21 (for CH₄) up to 23,900 (for SF₆). Aggregating all GHGs on a CO₂e basis at the source level allows a facility to evaluate its total GHG emissions contribution based on a single metric. For a complete list of the applicable GWP values for each GHG, please refer to EPA's Inventory of U.S. Greenhouse Gas Emissions and Sinks.

B. What are the general requirements of the PSD program?

1. Overview of the PSD Program

The PSD program is a preconstruction review and permitting program applicable to "new major stationary sources" and "major modifications" at existing major stationary sources, in the terminology of EPA's implementing regulations. The PSD program applies in areas meeting the health-based National Ambient Air Quality Standards (NAAQS) or for which there is insufficient information to determine whether they meet the NAAQS ("unclassifiable" areas). The PSD program is contained in part C of title I of the CAA. The "nonattainment NSR" program applies in areas not meeting the NAAQS and in the Ozone Transport Region, and is implemented under the requirements of

OMA Environment Committee
Competitiveness Agenda - DRAFT 11/19/2009

Competitiveness Challenge:

To successfully compete in today's global market, Ohio manufacturers need reasonable state and federal environmental regulations and controls that are based on sound science. Additionally, those regulations must be administered in an efficient and transparent manner that promotes cooperative interaction with Ohio EPA and its customers.

Manufacturing Public Policy Agenda:

To effectively comply with federal and state environmental regulation, Ohio's manufacturers need state-level implementation that ensures regulatory burdens do not unnecessarily impeded manufacturing competitiveness.

1. Work with Ohio EPA to craft rules that allow for operational flexibility while protecting the environment. Such rules might encompass construction activities that may take place before the issuance of any permit by Ohio EPA. This change was effected for air permits and should be expanded to all of Ohio EPA's regulatory duties.
2. Work with Ohio EPA to draft reasonable Best Available Technology rules as required by the recently passed state legislations (Senate Bill 265).
3. Ensure that solid waste regulations are developed with common sense and do not create an anti-competitive environment for Ohio manufacturers.
4. Ensure that the Great Lakes Compact will be adopted without restrictive mandates on watershed use by Ohio industry. The initiative must not impose any competitive or economic disadvantage for Ohio industry in the Great Lakes basin.
5. Ensure that State Implementation Plans (sip's) for ozone and P.M. 2.5 are based on sound science and not political expediency.
6. Advocate for state funding to study the impact that non-utility industry has on the environment to ensure regulations match science.

Benefit to Ohio:

A more efficient Ohio EPA along with effective federal and state environmental compliance programs will help improve the environment in Ohio and save manufacturing resources (time and money) that can be used to capitalize on other business opportunities.