

MEMORANDUM

TO: Clients and Friends

FROM: Van Ness Feldman

DATE: June 2010

RE: Accelerated EPA Activity under Existing Statutes - Critical Developments for the Energy Sector

Much attention has been paid to the climate change debate in the U.S. Congress. Critically, however, imminent administrative and enforcement activity by the Environmental Protection Agency (EPA) under existing statutes will have far reaching and more immediate impacts on the energy sector. This memo provides an update on EPA's key regulatory actions.

As reflected in the attached matrix, EPA is developing numerous new rules and other initiatives that will impact investment and operational decisions in the electricity, oil and gas, and manufacturing sectors. These include rulemakings on:

- More stringent regulation of already regulated air pollutants, including SO₂, NO_x and fine particulates;
- New regulations of mercury and other hazardous air pollutants from power plants;
- Regulation, for the first time, of greenhouse gas emissions from certain stationary sources under the Clean Air Act beginning in 2011; and
- Revised regulation of power plant activities under other EPA-administered statutes, including the Clean Water Act and the Resource Conservation and Recovery Act.

In addition to all this rulemaking activity, EPA is poised to expand its enforcement activity in the energy sector. For instance, EPA has recently issued numerous so-called "Section 114 letters,"—the first evidence-seeking step in a potential enforcement investigation—to gas-fired generating units and natural gas pipelines.

All of this EPA regulatory activity creates a number of critical questions for regulated entities. For example:

- How will EPA's new regulatory initiatives, individually and cumulatively, affect the operation of existing facilities?
- How will EPA's new regulatory initiatives affect investment in and construction of new or modified facilities?
- How will substantive conditions and procedural timelines for permitting be affected, and how can projects be shaped to avoid permitting hang-ups?
- How should corporate compliance programs be adapted to reflect the changing regulatory

requirements and increased enforcement scrutiny?

- How can regulated entities most effectively participate in the policy-making process at EPA and in Congress to ensure that special concerns are raised and addressed?

EPA's activist regulatory agenda will present these and more challenging questions to the energy and manufacturing sectors over the coming months.

How Van Ness Feldman Can Help

Van Ness Feldman's professionals in Washington, DC, and Seattle, WA, are uniquely positioned to assist clients in navigating this new era of environmental regulation. We offer extensive expertise and knowledge on the CAA and evolving GHG regulations, a network of contacts with key staff in EPA and Congress, and a wealth of experience handling complex project development, permitting and enforcement matters. Our clients benefit from our sophisticated legal counseling and government relations capabilities, our thorough understanding of the business and operational mandates of the energy and industrial sectors, and decades of hands-on experience – in government positions as well as the private sector – with the development and implementation of environmental regulation.

Among the services we provide include:

Strategic Counseling. With multiple regulatory and legislative developments proceeding at different paces, it is important to understand the big picture and figure out how to understand the relationships among all the moving pieces. Van Ness Feldman excels at assisting our clients to understand the potential impacts of regulatory and policy developments, consider and prioritize appropriate enterprise-wide strategic responses, and implement and adjust those strategies over time.

Project Planning & Permitting. New projects, as well as modifications, expansions, and retrofits to existing projects and facilities, carry unique environmental planning and permitting considerations. Van Ness Feldman attorneys and technical advisors routinely participate in early strategy sessions with clients to help educate and explain changes in permitting requirements and to spot regulatory trends so that pending projects can be planned strategically and pitfalls can be anticipated and avoided. Once a project is underway, our attorneys work closely and efficiently with client environmental and engineering staff (and third-party consultants) to navigate legal and technical issues and complications that can arise due to changing and shifting environmental laws, policies, and political pressures.

Key Rulemakings. The attorneys in our Environmental Practice are actively engaged in all the major rulemakings on EPA's regulation of traditional pollutants (*e.g.*, revisions to NAAQS, air toxics standards, aggregation, and PM_{2.5} grandfathering regulations) as well as EPA's efforts to address GHG emissions (*e.g.*, GHG Reporting Rule, Tailoring Rule). In many cases this has meant working closely with clients to develop comments and conduct follow-up meetings with agency staff to shape a workable rule. For other clients, we also have provided advice on how

proposed and final regulations will impact their projects, existing facilities and operations. We undertake these efforts both on behalf of individual clients as well as on behalf of industry coalitions.

Compliance. Our in-depth knowledge of permitting requirements and emerging areas of regulation (e.g., GHG regulations) allow us to help our clients understand which rules apply to their facilities and how to effectively comply so as to reduce risk of future enforcement action. We also develop compliance programs, training programs, and assist in auditing ongoing compliance.

Enforcement. We have counseled clients through all aspects of EPA enforcement actions, from answering EPA's initial Section 114 information request to settlement negotiations. In some cases, the settlements were extremely complex deals that took a year or more to negotiate and involved reaching agreement on a package of system-wide emissions control requirements (including emissions trading restrictions) among multiple federal and state parties. Through these engagements, we have built effective working relationships with EPA enforcement staff.

Legislation. The entirety of this area is potentially subject to Congressional action – whether in the form of legislation eliminating GHG regulatory authority under the CAA, comprehensive climate change legislation, or other legislative approaches being developed, such as the so-called “3-pollutant” bill. Working alongside our bipartisan government relations practitioners, Van Ness Feldman's environmental team has an active presence on these initiatives on Capitol Hill, thus providing us with early insight on where Congress is headed and the ability to support our clients' interests in the legislative arena as needed.

The attached matrix summarizes key CAA-related rulemakings and the anticipated timelines for each. Although the action dates, in some cases extend into 2011 and beyond, discussions on these issues are taking place now, and we encourage clients to be aware of the panoply of developing regulations to inform their planning for the future.

Please do not hesitate to contact your usual Van Ness Feldman contact with questions, or to discuss how we can be of assistance.

This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.

Key EPA Regulatory Activity for the Electricity Sector

(as of June 28, 2010)

	EPA Action	Subject	Date of Proposal (Publication in the Federal Register)	Date of Final Agency Action (Publication in the Federal Register)	Applicable to New ("N") or Existing ("E") Facilities?
Criteria Pollutants (e.g. SO ₂ , Ozone, PM)	CAIR Replacement Rule	EPA to replace Clean Air Interstate Rule (CAIR) (controls on SO ₂ and NO _x in the Eastern U.S.) that was remanded by D.C. Circuit in 2008.	Expected July 2010	Expected April 2011	N, E
	New PM _{2.5} Ambient Air Quality Standard	EPA to evaluate whether to tighten existing (2006) fine particulate standard pursuant to court remand.	Expected December 2010	Expected August 2011	N, E
	New SO ₂ Ambient Air Quality Standard	EPA proposed rule to replace current annual and 24-hour sulfur dioxide standards with a more stringent 1-hour standard.	December 8, 2009	June 22, 2010	N, E
	New NO ₂ Ambient Air Quality Standard	EPA finalized a new 1-hour NO ₂ standard at the level of 100 parts per billion.	July 15, 2009	February 9, 2010	N, E
	New Ozone Ambient Air Quality Standard	EPA proposed rule to enact more stringent NAAQS for 8-hour "primary" ozone standard, and establish a distinct cumulative, seasonal "secondary" standard to protect "sensitive vegetation and ecosystems."	January 19, 2010	Expected August 2010	N, E
Greenhouse Gases	GHG Reporting Rules for New Sectors	EPA proposed additions to GHG Reporting Rule (finalized October 30, 2009) for fugitive and vented emissions from oil and natural gas systems, CO ₂ injection and geologic sequestration, and producers and emitters of some fluorinated GHGs	April 12, 2010	Expected September 2010	N, E
	"Johnson Memorandum"	EPA revised guidance to defer effective date of BACT and Title V permit requirements for GHG emissions from stationary sources until at least January 2, 2011	October 7, 2009	April 2, 2010	N/A
	"Tailoring Rule"	Proposed rule would raise GHG threshold for BACT and Title V for GHGs; expected phase-in starting in 2011 with sources already subject to PSD and Title V	October 27, 2009	June 3, 2010	N
	BACT and Title V Implementation				
	- BACT Guidelines	Rule to define what constitutes BACT for GHG emissions from new and modified power plants.	Expected 2010-2011		N
	- Definition of Modification	Rule to define what constitutes a "modification" that triggers BACT for existing power plants.	Expected 2010-2011		N
	- SIP Modifications	Modification of State Implementation Plans (SIPs) to reflect higher Tailoring Rule thresholds	Expected 2010-2011		N/A
	- Permit Streamlining	Simplifying Title V process and reducing permit fees	Expected 2010-2011		N/A
	New Source Performance Standards	GHG emission standards for new and modified power plants	Expected 2010	Expected 2011	N
	Performance Standards for Existing Plants	GHG emission standards for existing (unmodified) power plants	Expected 2011(?)	Expected 2012 (?)	E
NEPA Guidance from Council on Environmental Quality (CEQ)	Draft guidance from CEQ addresses treatment of direct and indirect GHG emissions that may result from proposed federal actions, and potential impact of climate change upon proposed federal actions.	February 18, 2010	No earlier than July 2010; likely later in 2010	N	
Hazardous Air Pollutants (e.g. mercury, acid gases)	MACT Rulemakings for Mercury and other HAPs	EPA to set Maximum Available Control Technology (MACT) standard for all coal-fired power plant mercury emissions; and a range of other hazardous air pollutants emitted by coal and oil-fired power plants.	Expected March 2011	Expected November 2011	N, E
Waste and Water	Coal Combustion Waste	RCRA rules on disposal of coal combustion wastes – possible treatment as hazardous waste.	June 21, 2010	Expected 2011	N, E
	Waste Water Discharge Regulations under Clean Water Act (CWA)	Regulation of waste water discharges from thermal generating units.	Expected 2011	Expected 2012	N, E
	CWA Section 316(b)	EPA rule to replace remanded rule for regulating cooling water intake structures at existing facilities.	Expected early Fall 2010	Expected 2011-2012	E