

EPA Expands Climate Agenda to the Current Fleet of Power Plants and Refineries

By Kyle Danish, Stephen Fotis, and Henry Stern

On December 23, 2010, the Environmental Protection Agency (EPA) announced a proposed rulemaking timeline for Clean Air Act “New Source Performance Standards” (NSPS) for greenhouse gas emissions from power plants and petroleum refineries. These new regulations have potentially broader reach and impact than the New Source Review (NSR) greenhouse gas rules that became effective on January 2, 2011 under the “Tailoring Rule” timetable. Most notably, the NSPS, notwithstanding their name, can reach not only new and modified facilities but also existing facilities.

PROPOSED RULEMAKING AND COMPLIANCE SCHEDULE

The rulemaking timeline proposed by EPA is set forth in two proposed settlement agreements with various states (New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, Washington, Massachusetts, the District of Columbia, and the City of New York) and environmental groups (Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund). The agreements—which may still be altered by EPA or the Department of Justice based on their review of public comments received by January 31, 2011—would settle pending legal challenges alleging EPA’s failure to update NSPS for the steam-generating power plants and petroleum refineries.

The proposed agreements stipulate the following schedule:

- EPA is required to propose NSPS rules for power plants by July 26, 2011, and finalize the NSPS by May 26, 2012; and
- EPA is required to propose NSPS rules for refineries by December 10, 2011, and finalize them by November 10, 2012.

The agreements do not include a timeline by which facilities must comply with NSPS. The Clean Air Act provides significant discretion to EPA and state permitting authorities on compliance timetables. New and modified affected units must comply with the applicable EPA-established performance standard upon commencement of operation if the unit started construction after the date that the NSPS regulations were published in the *Federal Register*. In the case of existing affected units, EPA will set “guidelines” for performance standards that states must adopt and implement. Under existing EPA regulations, states must generally submit their plans to implement guidelines for existing sources to EPA within nine months after



publication of the federal guidelines. In these implementation plans, states may also extend or shorten the compliance schedules set forth in the federal guidelines.

MORE INFORMATION ON NSPS

The Clean Air Act’s NSPS provisions—which require EPA to set industry-specific performance standards for facilities that emit significant quantities of certain air pollutants—include separate tracks for new and modified facilities (section 111(b)) and existing facilities (section 111(d)). Under section 111(b), EPA directly establishes NSPS for new and modified facilities. Section 111(d), by contrast, establishes a cooperative federal-state process under which EPA first establishes “emissions guidelines” for facilities in the relevant category.

These guidelines are then translated by states into enforceable performance standards for facilities within their boundaries. States may apply less stringent standards or longer compliance schedules if they demonstrate that following the federal guidelines is unreasonably cost-prohibitive, physically impossible, or that there are other factors that reasonably preclude meeting the guidelines. States may also impose more stringent standards or shorter compliance schedules in appropriate cases. In the end, much of the debate during the NSPS process could focus on the flexibility of federal guidelines, and how states exercise their discretion in implementing more or less stringent standards and compliance schedules than those recommended by EPA.

The Clean Air Act allows EPA significant discretion in the timing and stringency of NSPS. “Standard of performance” is defined in the Act as a standard which generally reflects “best demonstrated technology,” taking into account costs of compliance and other factors. Relative to other standards outlined in the Clean Air Act this standard-setting process can be interpreted to provide EPA with wide latitude in setting a performance standard for GHG emissions from power plants and refineries.

In the past, EPA has asserted that the NSPS provisions authorize various kinds of market-based approaches, including allowance trading programs. However, EPA Assistant Administrator for Air & Radiation Gina McCarthy has already made clear that the agency does not intend to use NSPS to impose a top-down cap on overall GHG emissions, akin to a cap-and-trade program. Nevertheless, market-based approaches might be implemented at the state level.

INTENT TO “COORDINATE” NSPS WITH OTHER CLEAN AIR ACT RULES

In a Fact Sheet accompanying the announcement of the NSPS settlements, EPA states it is “coordinating” the NSPS rulemaking process for the power sector with other impending Clean Air Act regulatory actions facing the sector, including the hazardous air pollutant rule for utilities (i.e. Utility “MACT” rule), the Clean Air Transport Rule and revisions to the National Ambient Air Quality Standards for criteria pollutants. According to EPA, such coordination will allow the power sector to “develop strategies to reduce all pollutants in a more efficient and cost-effective way than addressing these pollutants separately.” The EPA Fact Sheet is available at: <http://www.epa.gov/airquality/pdfs/settlementfactsheet.pdf>.



LOOKING AHEAD

In the coming months, this end-of-the-year announcement is likely to attract significant scrutiny from the incoming Congress, and emerge as a key issue in efforts to defund, delay, or de-authorize EPA's regulation of GHG emissions. Notably, the proposed settlement agreements make clear that EPA's commitments to develop regulations are conditioned on the availability of appropriated funds.

Notices of these proposed settlement agreements were published in the Federal Register on December 30, 2010. (75 Fed. Reg. 82,390, 82,392) Comments are due by January 31, 2011. In addition, EPA will be conducting stakeholder outreach and "pre-regulatory" listening sessions in early 2011 as the agency develops the proposed rules.

FOR ADDITIONAL INFORMATION

Van Ness Feldman closely monitors federal and state developments on climate change, air quality, and energy policy, and is in a strong position to provide expert analysis and advice on emerging legislation and regulatory activity, the surrounding policy and political debate, and the implications for your organization. If you would like more information, please contact Kyle Danish, Stephen Fotis, Doug Smith or any member of the firm's Climate Change and Emissions Trading practice at (202) 298-1800. Those interested in on-going coverage of climate change policy developments may wish to subscribe to the weekly Climate Change Policy Update here: <http://www.vnf.com/news-signup.html>.

© 2011 Van Ness Feldman, P.C. All Rights Reserved.

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.