K&L GATES

ENVIRONMENTAL POLICY QUARTERLY

Spring 2015



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By Craig P. Wilson, Cliff L. Rothenstein

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EPA Proposes Update to National Ambient Air Quality Standards for Ground-Level Ozone

By Perrin Q. Dargan, III, Alyssa A. Moir, Elizabeth M. Elliott

On November 25, 2014, the EPA proposed to reduce both the primary and secondary National Ambient Air Quality Standards ("NAAQS") for ground-level ozone from 75 parts per billion ("ppb") to within the range of 65–70 ppb. However, EPA is also soliciting comments on alternative levels as low as 60 ppb, indicating that it may ultimately promulgate an even lower standard. The Clean Air Act ("CAA") requires EPA to review, and if necessary, revise, these standards every five years; the standards were last revised in 2008. Pursuant to a court order, EPA must finalize its new standards by October 1, 2015.

Read This Article

Decades after Congress Passed the CWA, the Fight Continues about Standards for Cooling Water Intake Structures By Maureen O'Dea Brill

Last May, the EPA finalized a rule regulating cooling water intake structures at existing facilities under Section 316(b) of the CWA. Affecting approximately 1,065 existing power plants and manufacturing and industrial facilities, the rule regulates facilities such as electric generating plants, petroleum refineries, chemical manufacturing plants, iron and steel mills, and aluminum production and processing plants. In the past year, multiple parties across the county have challenged the rule, either arguing it is too strict or too lax.

Read This Article

EPA's New Rule Raises the Bar for Recycling of Hazardous Secondary Materials

By David J. Raphael and Stephen J. Matzura

On January 13, 2015, the EPA published a final rule that modifies the definition of "solid waste" (the "DSW Rule" or "Rule") under the Resource Conservation and Recovery Act ("RCRA") regulations, which was previously amended in 2008. The Rule affects all recycling of hazardous secondary materials ("HSM") and is primarily directed at generators, intermediate facilities, and recyclers. It will broadly affect manufacturing, including, for example, the metal products, machinery, computer and electronics, petroleum and coal products, chemical plastics, and rubber products industries.

Read This Article



FROM THE EDITORS

Welcome to the Spring 2015 edition of *Environmental Policy Quarterly*, published jointly by the Environmental, Land and Natural Resources Practice Group and the Public Policy and Law Practice Group of K&L Gates. *Environmental Policy Quarterly* highlights significant developments and issues of public policy relating to the environment and natural resources in the United States and globally.

This edition focuses on changes in U.S. environmental policy as led by the EPA—what's pending and on the horizon in the areas of air, water, and waste regulation. We are delighted to include contributions by a number of K&L Gates lawyers who focus on these matters on a daily basis.

We hope you find this edition of *Environmental Policy Quarterly* of interest, and we welcome your feedback.

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OUR PRACTICES

Environmental, Land, and Natural Resources

K&L Gates has experienced lawyers in the United States, Europe, and Asia Pacific who are dedicated to developing creative and cost-effective solutions to the environmental, land use, and natural resource challenges confronting our clients. A number of our environmental lawyers are former regulatory lawyers and prosecutors, having served with the EPA, Department of Justice, Department of Energy, National Marine Fisheries Service, and state agencies. Our environmental practice was named "Law Firm of the Year" for environmental law in the 2013 *U.S. News-Best Lawyers®* survey, a recognition given to only one law firm in each practice area.

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The K&L Gates policy group is the largest of any fully integrated global law firm. The group has nearly 50 bipartisan lawyers and policy professionals with 500 years of combined experience in federal and state government. In 2014, we were ranked among the top five law firms in the National Law Journal's "Influence 50" survey. Our goal is to understand a policy issue from every direction—substantively and politically—and to use the collective knowledge and experience of our team to help a client achieve its objectives. This approach has worked for four decades, which is why the policy group has thrived through eight administrations and 22 Congresses.

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Obama's EPA—What's Been Done and Yet to Come

By Craig P. Wilson and Cliff L. Rothenstein

With baseball season underway, we thought it would be appropriate to see the Obama Administration's environmental box score. Since 2009, the Administration, especially the EPA, has been very prolific in rulemaking, proposing 275 major regulations and promulgating 146 of the rules. Just looking at this year, EPA has 86 rules in the hopper in the pre-proposal and proposal stage. Of these there are 39 air rules—including, the controversial ozone NAAQS, 19 water rules, as well as several rulemakings addressing waste and chemical issues.

With the presidential election just 17 months away, and the next president taking office in less than two years, the immediate question is what rules will EPA issue by January 20, 2017. Our best guess is that EPA will make every effort to issue as many of its highest profile rules as possible before then, including — the clean power rules for both new and existing utilities, greenhouse gas emissions for heavy-duty trucks, ozone NAAQS, steam electric effluent limitation guidelines, among other rules. The longer-term question is, will the next president continue on the current path or try to overturn some of the rules, like Presidents Bush and Obama did when they took office?

In this edition of *Environmental Policy Quarterly*, the authors focus on several of the more high profile rules that are expected to move before the end of the current Administration.



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Obama Score Card

EPA Regulatory Agenda (Major Rules) 1 2 3 4 5 Year (2010) (2011) (2009) (2012) (2013)Proposed RCRA Hard Ozone NAAQS Ozone NAAQS MATS **RFS2** lowered Rock mining withdrawn mandates (italics -Boiler MACT Greenhouse gas (chemical, projected) Steam Electric Underground standards for petroleum ANPR lead Effluent Storage Tanks new utilities and electric renovation, repair Limitation power) Financial and painting Cooling Water Guidelines Responsibility in public and Intake Structures commercial Definition of Solid Waste buildings Coal combustion waste Promulgated GHG Reporting Renewable Fuel Medium and Light Duty MATS Rule (italics -Standards RFS2 Heavy Duty Motor Vehicle Endangerment PM NAAQS Vehicle GHG emission projected) finding Light Duty standards Model **Boiler MACT** Motor Vehicle NAAQS reviews Years 2017repromulgated GHG emission for SO2, NO, CO 2025 standards Model nitrogen dioxide Deferring action Years 2012-2016 Climate Rule on stormwater Cross-state air for New Power rule Steam GHG Tailoring pollution rule Plants Rule Boiler MACT **RFS2** lowered Ocean-going ships issued and mandates ECA reconsidered

Year	6 (2014)	7 (2015)	8 (2016)	9 (2017)	Total (Reviewed by OMB)
Proposed (italics – projected)	Climate Rule for New & Existing Power Plants (2012 GHG proposal withdrawn) Ozone NAAQS Waters of the US TSCA Hydraulic Fracturing Chemical disclosure	Phase 2 medium and heavy duty truck greenhouse gas emission standards 2015 RFS Effluent guidelines oil and gas extraction PM NAAQS Review	Perchlorate Primary Drinking Water Standards NESHAP's & NAAQS reviews and rules	?	275
	1hr SO2 NAAQS data requirements				
Promulgated (italics – projected)	Tier 3 Motor Vehicle Emission and Fuel Standards Coal and Oil-fired EGU NESHAP	Climate rules for new and existing power plants expected Coal combustion Definition of Solid Waste Cooling Water Intake Structures Steam Electric Effluent Limitation Guidelines Waters of the US Underground Storage Tanks Ihr SO2 NAAQS data	Phase 2 medium and heavy duty truck greenhouse gas emission standards RCRA Hard Rock Financial Responsibility Effluent guidelines oil and gas extraction NESHAP's & NAAQS reviews and rules	?	146



EPA Regulations – by the Numbers

Media
Air
Water
Waste
Chemical/Pesticides
Miscellaneous
TOTAL

Key Rulemakings 2015 (Pre-proposal & Proposal Stage)

 3 86
19
6
19
39

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EPA's Plan to Reduce Methane and VOC Emissions from Oil and Gas Sources

By Anthony R. Holtzman and Tad J. Macfarlan

In recent years, the proliferation of oil and gas production, transmission, and distribution activities in the United States has led to a number of regulatory initiatives by state and federal agencies designed to manage new and evolving issues associated with the growing industry. Continuing with this trend, the EPA announced in January 2015 that it will take several steps to curb methane and VOC emissions from oil and gas facilities. *See EPA, Fact Sheet: EPA's Strategy for Reducing Methane and Ozone-Forming Pollution from the Oil and Natural Gas Industry* (Jan. 14, 2015) ("EPA Fact Sheet") (link).

Invoking the CAA, the EPA, in particular, announced that it will (1) issue new regulations to establish standards regarding methane and VOC emissions from new and modified oil and gas sources, (2) extend VOC reduction requirements to existing oil and gas sources that are located in ozone nonattainment areas and states in the Ozone Transport Region ("OTR"), and (3) expand its Natural Gas STAR program, which is designed to facilitate voluntary reductions of oil and gas-related methane emissions.

The Obama Administration says that these steps, in conjunction with actions that other federal agencies will take,¹ will put the United States on a path to achieving the Administration's goal of cutting "methane emissions from the oil and gas sector by 40–45 percent from 2012 levels by 2025[.]" The White House, Office of the Press Secretary, *Fact Sheet: Administration Takes Steps Forward on Climate Action Plan by Announcing Actions to Cut Methane Emissions* (Jan. 14, 2015).



^{1.} A Fact Sheet that the White House published in January 2015 indicates that, in addition to EPA's planned actions that are discussed in this article, other federal agencies will take actions to reduce methane emissions, as follows: (1) the Department of the Interior's Bureau of Land Management will update standards to reduce venting, flaring, and leaks of natural gas from new and existing oil and gas wells on public lands; (2) the Department of Transportation's Pipeline and Hazardous Materials Safety Administration will, in 2015, propose new natural gas pipeline safety standards; and (3) the Department of Energy will issue energy efficiency standards for natural gas and air compressors; advance research and development for reducing the cost of detecting natural gas leaks; work with the Federal Energy Regulatory Commission to modernize natural gas infrastructure; and partner with the National Association of Regulatory Utility Commissioners and local distribution companies to accelerate pipeline repair and replacement activities at the local level.

The EPA's initial deadlines identified in its announcement are fast approaching and, as a result, interested parties should carefully monitor its next steps. The agency's upcoming regulatory actions should provide significantly more insight into the trajectory of its approach to regulating air emissions from oil and gas sources.

NEW EMISSIONS STANDARDS FOR NEW AND MODIFIED SOURCES

Relying on Section 111(b) of the CAA,¹ the EPA intends to craft new regulations that will establish standards related to methane and VOC emissions from certain new and modified oil and gas sources.

Under Section 111(b), the EPA may, by regulation, set "standards of performance" for new and modified sources of air pollutant emissions that fall within a category of stationary sources that it has judged and published to be one that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."² A "standard of performance," in this context, is a standard for limiting air pollutant emissions that, "taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements," is based on the "best system of emission reduction" that has been "adequately demonstrated."³

Relying on these principles, the EPA issued regulations in 2012 that establish new source standards of performance for VOC and sulfur dioxide emissions from various types of new and modified oil and gas sources.⁴ Those regulations, which the EPA most recently revised in December 2014,⁵ are codified at 40 C.F.R. Part 60, Subpart 0000 ("Quad-O") and set standards that address emissions from

1. 42 U.S.C. § 7411(b).

2. Id. § 7411(b)(1)(A)

4. See 77 Fed. Reg. 49490 (Aug. 16, 2012).

the following sources: hydraulically fractured gas wells; certain fugitive equipment components at onshore gas processing plants; gas-sweetening units at those plants; and centrifugal compressors, reciprocating compressors, continuous-bleed pneumatic controllers, and storage vessels to the extent that, in each case, they are used in one or more industry segments.¹

The standard for hydraulically fractured gas wells, as one example, requires a well operator to use special equipment to separate gas, liquid hydrocarbons, and water that come from the well during the completion (or "flowback") stage and then sell, reinject, or use the gas, or, if those things are not feasible, flare it.²

In its January 2015 announcement, the EPA says that it will "build on" the Quad-O standards "to achieve both methane reductions and additional reductions in VOCs."³ This statement has been widely viewed as a signal that the agency will, for the first time, use Section 111(b) to directly regulate methane emissions from the oil and gas source category. (Its current Quad-O regulations were designed to achieve significant reductions in methane emissions, but only as a "co-benefit").

The sources that will be covered by the EPA's new rulemaking "could include completions of hydraulically fractured oil wells, pneumatic pumps, and leaks from new and modified well sites and compressor stations."⁴ The agency says that, in developing the rulemaking, it will consult with the industry, states, and tribes, and evaluate a "range of approaches that can reduce methane and VOC emissions" from those sources.⁵

As the EPA notes in its announcement, it identified some of the potential approaches in a collection of draft white papers that it published in April

^{3.} d.§7411(a)(1).

^{5.} See 79 Fed. Reg. 79018 (Dec. 31, 2014).

See 40 C.F.R. § 60.5365. On March 23, 2015, the EPA "re-proposed" for public notice and comment the definition of "low pressure gas well" in the Quad-O standards, a definition that it adopted in December 2014. See 80 Fed. Reg. 15180, 15183 (March 23, 2015). The EPA, at the same time, proposed to revise the Quad-O standards by removing provisions concerning storage vessels that are connected or installed "in parallel" (provisions that it likewise adopted in December 2014) and making accompanying amendments to the definitions of "returned to service" and "storage vessel," respectively. *Id*.

^{2.} See 40 C.F.R. § 60.5375(a).

^{3.} EPA Fact Sheet at 1.

^{4.} *Id.*

^{5.} *Id.*

2014. In one of those papers, for example, it addressed techniques for mitigating methane emissions from completion and recompletion operations at hydraulically fractured oil wells, including the use of reduced-emission completions, completion combustion devices, and "emerging control technologies for control of associated gas," a category that includes natural gas liquids recovery, natural gas reinjection, and electricity generation for onsite use.¹ In another one of the papers, the EPA discussed methods for reducing methane emissions from pneumatic devices that are used in oil and gas facilities, including, for pneumatic pumps, the use of instrument-air, solar power, or electricity as a power source, instead of gas.² In a third white paper, the EPA addressed techniques for controlling methane leaks at oil and gas facilities, including the use of leak-detection equipment (such as portable analyzers, optical gas imaging cameras, acoustic leak detectors, and ambient monitoring devices) and methods for repairing leaks when they are discovered.³

The EPA plans to issue proposed regulations in the summer of 2015 and final regulations in 2016.

REGULATION OF EXISTING SOURCES IN OZONE NONATTAINMENT AREAS AND THE OZONE TRANSPORT REGION

The EPA also plans to develop new Control Techniques Guidelines ("CTGs") to reduce emissions from existing oil and gas facilities that are located in ozone nonattainment areas and states within the OTR. These guidelines would directly regulate VOC emissions, but would also have the effect of reducing methane emissions.

Under Section 182(b)(2) of the CAA,¹ the EPA's issuance of CTGs triggers a requirement for states, as part of their State Implementation Plans ("SIPs"), to develop rules that impose reasonably available control technology ("RACT") requirements on covered sources. Each CTG includes a "presumptive RACT," reflecting the EPA's determination as to what constitutes an adequate level of VOC control for sources in the category.² While state regulations can deviate from the presumptive RACT determination, the EPA's approval of each SIP revision is ultimately required. Imposition of RACT would be a new layer of regulation for many oil and gas facilities that are located in ozone nonattainment areas and the OTR.

The OTR is comprised of 11 northeastern states and regions (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont; the District of Columbia; and Northern Virginia)³, and there is an outstanding petition to the EPA, submitted by several of the 11 states, requesting the inclusion of nine others (Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia).⁴ On November 25, 2014, moreover, the EPA proposed a downward revision to its national ambient air quality standards ("NAAQs") for ozone, which, if adopted, would result in the designation of significantly more ozone nonattainment areas across the nation.⁵ The confluence of EPA's planned rulemakings, therefore, has the potential to force meaningful emissions reductions from existing oil and gas facilities in many areas of the country.

EPA plans to proceed with the CTG rulemaking in accordance with the same timeline as the Section 111(b) rulemaking, with the issuance of proposed guidelines in the summer of 2015 and final guidelines in 2016.

5. See 79 Fed. Reg. 75234 (Dec. 17, 2014). Maps that depict current and potential future ozone nonattainment areas are available at

^{1.} See EPA, Oil and Natural Gas Sector Hydraulically Fractured Oil Well Completions and Associated Gas during Ongoing Production (April 2014) at 23–43.

^{2.} See EPA, Oil and Natural Gas Sector Pneumatic Devices (April 2014) at 50–55.

^{3.} See EPA, Oil and Natural Gas Sector Leaks (April 2014) at 36–54. The EPA also issued draft white papers on compressors and the liquids unloading process, respectively. See EPA, Oil and Natural Gas Sector Compressors (April 2014) and EPA, Oil and Natural Gas Sector Liquids Unloading Process (April 2014).

^{1. 42} U.S.C. § 7511a(b)(2); see also id. § 7511c(b)(1)(B).

^{2.} See 62 Fed. Reg. 44672, 44674 (Aug. 22, 1997).

^{3.} See 42 U.S.C. § 7511c(a).

^{4.} See Petition to the United States Environmental Protection Agency for the Addition of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the Ozone Transport Region Established Pursuant to Section 184 of the Federal Clean Air Act as Permitted by Section 176A of the Federal Clean Air Act (Dec. 10, 2013), available at http://www.dec.ny.gov/docs/air_pdf/ otrpetition1213.pdf.

See 79 Fed. Reg. 75234 (Dec. 17, 2014). Maps that depict cu http://www.epa.gov/groundlevelozone/maps.html.

EXPANSION OF NATURAL GAS STAR PROGRAM

The EPA also plans to expand its Natural Gas STAR Program by "launching a new partnership in collaboration with key stakeholders later in 2015."

The Natural Gas STAR Program is an initiative that is designed to encourage members of the oil and gas industry to voluntarily reduce methane emissions from their facilities.¹ If a company opts to participate in the program, it signs a memorandum of understanding that reflects its intent to evaluate technologies and practices for reducing methane emissions, use them in its facilities when it is cost-effective to do so, and report to EPA on those efforts.² The company, in turn, develops and executes a continuously evolving plan for implementing and tracking "non-regulatory" steps for reducing methane emissions from its facilities.³ And then, each year, it submits a "progress report" to the EPA in which it documents (for the year) the activities that it has undertaken, and emissions-reductions that it has achieved, under its plan.⁴

In the January 2015 announcement, the EPA says that it will expand this program by "work[ing] with the departments of Energy and Transportation and leading companies... to develop and verify robust commitments to reduce methane emissions."⁵ It is currently unclear what, in particular, that process will entail. Needless to say, the EPA emphasizes that "[a]chieving significant reductions through these voluntary industry programs and state actions could reduce the need for future regulations."⁶

CONCLUSION

The Obama Administration, and in particular the EPA, has staked out a relatively aggressive, multi-prong strategy for effectuating additional reductions in methane and VOC emissions from oil and gas facilities. "While methane emissions from the oil and gas industry have declined 16 percent since 1990," the EPA asserts, "they are projected to increase by about 25 percent over the next decade if additional steps are not taken to reduce emissions from this rapidly growing industry."¹

As the EPA's processes unfold, members of the industry should carefully monitor and participate in it as focused and watchful advocates for their interests.

- 3. Id.
- 4. Id.
- 5. EPA Fact Sheet at 2.
- 6. Id. at 3.

1. EPA Fact Sheet at 1.

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^{1.} See EPA, "Key Components of Natural Gas STAR," available at http://www.epa.gov/gasstar/guidelines/keycomponents.html.

^{2.} Id.

EPA Proposes Update to National Ambient Air Quality Standards for Ground-Level Ozone

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On November 25, 2014, the EPA proposed to reduce both the primary and secondary NAAQS for ground-level ozone from 75 parts per billion ("ppb") to within the range of 65-70 ppb; however, EPA is also soliciting comments on alternative levels as low as 60 ppb, indicating that it may ultimately promulgate an even lower standard. The CAA requires EPA to review, and if necessary, revise, these standards every five years; the standards were last revised in 2008. Pursuant to a court order, EPA must finalize its new standards by October 1, 2015.

NAAQS are health-based ambient-air standards for six "criteria pollutants," as opposed to facility-specific emissions standards. As such, NAAQS apply to geographic areas. An area is designated as being in "attainment" for a given pollutant if the area meets the NAAQS for that pollutant, or in "nonattainment" if it does not. If an area is in attainment for a given pollutant, the standards are designed to ensure that the area maintains its attainment status. If an area is in nonattainment for a given pollutant, the state and local governments have three years to develop an implementation plan outlining how they will expeditiously achieve and maintain attainment by reducing emissions that contribute to the nonattainment status. These implementation plans can dramatically affect the types of pollution controls required for facilities as well as the development of new facilities and the expansion of existing ones.

Ozone is a key component of smog and forms in the atmosphere when emissions of nitrogen oxides and VOCs are exposed to sunlight. The major man-made sources of ozone-forming emissions include emissions from motor vehicles, power plants, and products such as solvents and paints. In drafting its proposed revised rule, EPA has considered recommendations from the EPA Clean Air



A considerable amount of the cost of meeting the proposed NAAQS will likely fall on emitting industries such as power plants, coal mines, petroleum and natural gas wells.



Scientific Advisory Committee ("CASAC"), an independent scientific advisory committee established by the CAA that is charged with providing advice to the EPA Administrator. EPA also considered comments from the general public. As a basis for the proposed change, EPA states that this revision will provide increased public health protection, particularly for "at-risk" populations such as children, older adults, and people with asthma or other lung diseases.

IMPLICATIONS OF PROPOSED STANDARDS

Attainment Implications

Should EPA's current proposed rule be finalized, many areas of the United States that are currently in attainment will likely immediately become nonattainment. According to the *Los Angeles Times*, "[o]f the 715 counties nationwide with EPA-certified air quality monitoring equipment, 185 do not meet the existing ozone standard," and that number would "more than double if a stricter limit of 70 parts per billion were in effect today."¹ Of course, those areas that are unable to meet the *current* standards would face even steeper challenges to reach attainment under the proposed *lower* standard. Some states with nonattainment areas, particularly California, project that they will not be able to meet the current standard until 2032, and only then by cutting more than 75% of the nitrogen oxides being produced in areas with particularly severe ozone problems, such as Los Angeles and Orange counties.² Under the proposed rule, these areas would have until 2037 to meet the new standard.

In an effort to meet the new standard, states will likely impose stricter pollution controls on power plants and other emitting industries. The National Association of Manufacturers expressed concern that the proposed standard "could jeopardize recent progress in manufacturing by placing massive new costs on manufacturers and closing off counties and states to new business by blocking projects at the permitting stage."¹ The American Petroleum Institute predicts that the proposed standard could reduce US GDP by \$270 billion per year.²

EPA counters with projections that show that most counties in the United States will meet the proposed standards by 2025 with the rules and programs currently in place.³ The agency further asserts that a combination of recently finalized or proposed air pollution rules will cut ozone-forming emissions from industry and transportation, helping areas meet the proposed standards. For example, for stationary sources, EPA's 2005 Clean Air Interstate Rule ("CAIR") reduces ground level ozone in the east by permanently capping emissions of sulfur dioxide and nitrogen oxides, and the 2011 Mercury and Air Toxics Standards reduce emissions of sulfur dioxide and fine particles. Examples of current rules governing mobile sources include the 2014 Tier 3 Motor Vehicle Emission and Fuel Standards, which proposes to set new vehicle emissions standards and lower the sulfur content of gasoline beginning in 2017, and corporate average gasoline sulfur standards which reduced the sulfur content of fuel in both 2004 and 2006.⁴

Cost Implications

^{1.} EPA expected to propose stricter ozone limits," Los Angeles Times, November 25, 2014.

^{2.} EPA staff recommends significantly lower ozone standard," Los Angeles Times, August 29, 2014.

^{1. &}quot;New Ozone Regulation Jeopardies Manufacturing Comeback," National Association of Manufacturers, November 26, 2014.

^{2.} American Petroleum Institute, citing study by NERA Economic Consulting at http://www.api.org/policy-and-issues/policy-items/environment/ economic-impacts-of-ozone-regulations.

^{3.} EPA "Overview of EPA's Proposal to Update the Air Quality Standards for Group-Level Ozone," available at http://www.epa.gov/airquality/ ozonepollution/pdfs/20141125fs-overview.pdf.

^{4.} Other current rules that will reduce ozone-forming emissions include regional haze regulations, the proposed Clean Power Plan, the Tier 2 Vehicle Emissions Standards, the Mobile Source Air Toxics Rule, the Heavy-Duty Vehicle Greenhouse Gas Rule, the RICE NESHAP, and the Industrial/Commercial/Institutional Boilers and Process Heaters MACT and amendments.

EPA estimates that annual compliance costs would be \$3.9 billion for a 70 ppb standard and \$15 billion for a 65 ppb standard. However, the Agency concludes that these costs would be outweighed by significant health benefits, which it values at \$6.4 to \$13 billion annually in 2025 for standard of 70 ppb and \$19 to \$38 billion annually in 2025 for a standard of 65 ppb nationwide, excluding California.¹

Industry Implications

A considerable amount of the cost of meeting the proposed NAAQS will likely fall on emitting industries such as power plants, coal mines, petroleum, and natural gas wells. Vehicle emissions will also likely be affected. According to the National Association of Manufacturers, the new regulation "threatens to be the most expensive ever," due in part to the fact that it "comes at the same time dozens of other new EPA regulations are being imposed that collectively place increased costs, burdens and delays on manufacturers, threaten our international competitiveness and make it nearly impossible to grow jobs."² Costs will likely include increased price of electricity and installation of new and expensive technology designed to clean pollutants and reduce emissions from their facilities.³ States will also need to limit permits for new and expanding manufacturing and construction operations in an effort to remain compliant with the new ozone regulations.⁴ In areas where vehicle emissions are key contributors to ozone, achieving the pollution reduction needed to meet the new standard could require a large-scale transformation of the transportation sector, including advances in alternative-fuel cars and trucks and cleaner ships, trains, and

4. Id.

CURRENT STATUS

EPA held three public hearings in early 2015 in Arlington, Texas, Washington, D.C., and Sacramento, California. Speakers included the American Lung Association, the American Petroleum Institute, the American Wood Council, several mining interest groups, farm bureaus, utilities, various public health districts, and various environmental groups. Transcripts of these public hearings are available at (link). The comment period closed on March 17, 2015, with EPA receiving nearly 3,500 written comments. Commentators include the National Park Service, American Lung Association, American Petroleum Institute, state and local utilities, state oil and gas associations, the National Association of Clean Air Agencies, several manufacturing groups, and others. Those commentators that supported the new standard pointed to various research studies related to the effect of ozone exposure on public health in support of the lower ppb level. Some commentators challenged EPA's authority to grandfather certain permit applicants. Those advocating for a higher ppb level criticized EPA's methodology in its risk assessment and the lack of certainty that reducing the ozone standard further will cause any health benefits. Many commentators also cited the potential loss in jobs and economic expansion that could results from lowering the ppb levels.

Additionally, the National Association of Counties met with EPA on April 3, 2015, to discuss the proposed revisions. EPA laid out a tentative timeline for designations, implementation, and attainment during that meeting.

construction equipment, or the imposition by local regulation of "transportation" demand management" initiatives, seeking to reduce or limit automotive and truck

^{1.} EPA analyzed the benefits and costs for California separately because a number of areas in California will have longer to meet the proposed standards. In California, EPA estimates that the added value of benefits would be \$1.1 to \$2 billion annually for a standard of 70 ppb and \$2.2 to \$4.1 for a standard of 65 ppb.

^{2. &}quot;New Ozone Regulation Jeopardizes Manufacturing Comeback," National Association of Manufacturers, November 26, 2014, available at http://www.nam.org/Newsroom/Press-Releases/2014/11/New-Ozone-Regulation-Jeopardizes-Manufacturing-Comeback/.

^{3. &}quot;New EPA Ozone Regulations Could Be Troublesome for Manufacturers," Manufacturing Business Technology, December 4, 2014, available at http://www.mbtmag.com/blogs/2014/12/new-epa-ozone-regulations-could-be-troublesome-manufacturers.

Designation Schedule					
State and Tribe Recommendations	Within one year after NAAQS promulgation (October 2016)				
Final Designation	Within two years after NAAQS promulgation (Administrator has discretion to extend the deadline by one year to collect sufficient information.) (October 2017, Effective date may vary.)				
Implementation Schedule					
Infrastructure SIP	Within three years after NAAQS promulgation (October 2018)				
Attainment Plans Due	Within three–four years after designations depending on classification (October 2020–2021)				
Attainment Schedule by Classification*					
Marginal	Three years to attain				
Moderate	Six years to attain				
Serious	Nine years to attain				
Severe	Fifteen–17 years to attain				
Extreme	Twenty years to attain				

*Areas must attain as expeditiously as practical, but not later than the schedule in this table. Two one-year extensions are available in certain circumstances based on air quality.

The agency aims to issue the final ozone standards by October 1, 2015.

IMPLICATIONS FOR THE CAA

Due to the broad opposition to the tighter standard proposed by EPA, EPA's final decision on the standard will be controversial. For example, in reaction to EPA's plan to reduce the ozone standard, the San Joaquin Valley Air Pollution Control District ("District") has proposed legislation that would relax the CAA's deadline for states and local areas to comply with the NAAQS and would insert language to take into account the technological feasibility of meeting the limits. The District spokesman stated that even attaining the current 75 ppb standards would be "total economic devastation" in the timeline proposed, and emphasized that the proposed legislation would put "the burden of proof on the states" to show that they are doing everything possible to reach attainment.

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Decades after Congress Passed the CWA, the Fight Continues about Standards for Cooling Water Intake Structures

By Maureen O'Dea Brill

Last May, the EPA finalized a rule regulating cooling water intake structures at existing facilities under Section 316(b) of the CWA (link). Affecting approximately 1,065 existing power plants and manufacturing and industrial facilities, the rule regulates facilities such as electric generating plants, petroleum refineries, chemical manufacturing plants, iron and steel mills, and aluminum production and processing plants. In the past year, multiple parties across the county have challenged the rule, either arguing it is too strict or too lax.

Although the history of legal challenges advanced under Section 316(b) spans decades, a new courtroom battle is just heating up in the U.S. Court of Appeals for the Second Circuit. With much at stake for parties on both sides, *Cooling Water Intake Structure v. United States Environmental Protection Agency* is a case to watch for those interested in issues of environmental regulation and agency authority. Time will reveal whether this rule ultimately serves as the long-term provision regulating cooling water intake structures at existing facilities or if the Second Circuit will once again remand to EPA for reconsideration.



A 40-YEAR ROAD TO THE FINAL RULE

Passed into law in 1972, the CWA requires that EPA issue a rule protecting aquatic organisms, such as fish and shellfish, that become pinned against cooling water intake structures ("impingement") or are drawn into cooling water systems ("entrainment"). The core requirement of Section 316(b) is that the location, design, construction, and capacity of cooling water intake structures for facilities having a National Pollutant Discharge Elimination System ("NPDES") permit must "reflect the best technology available ("BTA") for minimizing adverse environmental impact."¹

In 1976, soon after the passage of the CWA, EPA first promulgated regulations under Section 316(b). However, after the U.S. Court of Appeals for the Fourth Circuit invalidated the regulations based on a procedural defect, EPA did not take further action until forced to do so in 1993, when environmental groups sued the EPA to compel the issuance of Section 316(b) regulations. In response, EPA entered into a consent decree which prescribed deadlines for three separate rulemakings implementing Section 316(b). Performing under this consent decree, EPA issued cooling water intake structure regulations for all new facilities in December 2001 ("Phase I"), for all existing large electric-generating facilities and manufacturing facilities in June 2006 ("Phase III"). As a result of further legal challenges, the Phase II rule and aspects of the Phase III rule were remanded to EPA for reconsideration.² In another settlement in 2010, EPA agreed to issue a final rule by July 2012. EPA published a proposed rule in April 2011 and two Notices of Data Availability in June 2012.³ On May 19, 2014, EPA released the long-delayed final rulemaking regulating cooling water intake structures at existing facilities. The rule was promulgated on August 15, 2014, and became effective on October 14, 2014.¹ The final rule replaced the remanded rules and satisfied EPA's responsibility under the 2010 settlement agreement.

OVERVIEW OF THE FINAL RULE

The final rule (link) applies to existing facilities that have or are required to have an NPDES permit under Section 402 of the CWA, that are designed to withdraw more than two million gallons per day ("mgd") from waters of the United States, and that use at least 25 percent of the withdrawn water exclusively for cooling purposes. Seeking to minimize environmental harm, the rule requires cooling water intake structures to implement the BTA to reduce impingement and entrainment for certain categories of existing facilities and new units at existing facilities through NPDES permits. Generally, the rule requires these existing facilities to achieve a national BTA standard for impingement mortality through one of seven specified alternatives and to implement site-specific entrainment requirements as decided by the permitting agency.² In addition, existing facilities that actually withdraw at least 125 mgd must conduct an "Entrainment Characterization Study" intended to assist the permitting agency in assessing which, if any, site-specific controls are necessary to achieve BTA for entrainment. New units at existing facilities subject to the rule must achieve national BTA standards for impingement mortality and entrainment through one of two alternatives. Most facilities have until July 14, 2018, to comply with the final rule.

^{1. 33} U.S.C. 1326(b).

^{2.} *Riverkeeper, Inc. v. EPA*, 358 F.3d 174 (2d Cir. 2004) (remanding those provisions of the Phase I Rule that allow compliance through restoration measures); Riverkeeper, Inc. v. EPA, 475 F.3d 83 (2d Cir. 2007) (remanding for further clarification EPA's decision to reject closed-cycle cooling as BTA, among other provisions).

Proposed Rule, 76 Fed. Reg. 22174 (April 20, 2011); Notice of Data Availability—Impingement Mortality Control Requirements, 77 Fed. Reg. 34315 (June 11, 2012); Notice of Data Availability—Stated Preference Survey 77 Fed. Reg. 34927 (June 12, 2012).

^{1.} Final Rule, 79 Fed. Reg. 48300-439 (Aug. 15, 2014).

^{2.} Currently, 46 states administer an NPDES program, with EPA officials issuing permits in the remaining states.

A CONSOLIDATED LEGAL CHALLENGE IN THE SECOND CIRCUIT

Adding to the lengthy history of Section 316(b) court challenges and administrative proceedings, industry groups and environmental groups have challenged the rule in six federal circuit courts across the country.¹ In September, the U.S. Judicial Panel on Multidistrict Litigation consolidated the six lawsuits into one case, Cooling Water Intake Structure v. United States Environmental *Protection Agency*, and assigned the case to the U.S. Court of Appeals for the Fourth Circuit.² Any advantage industry groups might have gained by the random selection of the Fourth Circuit was quickly lost when the Fourth Circuit, granting a motion filed by one environmental group, transferred the case to the Second Circuit without providing a basis for the decision. Facing opposition from both the industry and EPA, the environmental group had argued in part that EPA had promulgated the final rule in response to the Second Circuit's remand of prior versions of the rule. Although the Second Circuit has not yet established a deadline for parties to file their substantive briefs in the case, much is already known about the anticipated legal arguments due to parties' statements previously filed in the circuit courts and issued to the press.

Environmental groups will likely challenge whether the rule violates the CWA or the Administrative Procedure Act because it does not establish a national categorical impingement standard and does not establish performance standards reflecting closed-cycle cooling as the BTA. The lack of a national performance standard for entrainment will also likely be challenged. New units face a BTA for impingement and entrainment of closed-cycle cooling systems; seeking broader application of this stricter standard, environmental groups might maintain that EPA too narrowly defined "new units at existing facilities." Targeting the National Marine Fisheries Service's ("NMFS") and the U.S. Fish and Wildlife Service's ("FWS") biological opinion which assessed how the final rule would affect species and habitats governed by the Endangered Species Act is also anticipated. On this issue, enviornmental groups are expected to argue that, in developing the biological opinion and determining whether the rule would harm species or habitats, the agencies failed to study the full range of existing scientific data and relied too heavily on EPA's promise to prevent potentially harmful activity by exercising its individual NPDES permit veto authority.

Industry challenges are expected to focus on whether EPA established an unreasonably low minimum intake flow of two mgd and whether the agency exceeded its statutory authority by extending its Section 316(b) regulations to facilities that have an intake structure where less than 25 percent of the water flowing through the facility is used for cooling by requiring agencies to regulated such facilities on a case-by-case, best professional judgment basis. Another provision that faces a potential challenge is the final rule's requirement that, prior to a state permitting agency's public notice of a draft or proposed permit, the FWS or the NMFS must receive a 60-day period to consider the potential effects of an NPDES permit application on threatened and endangered species and designated critical habitat and to issue recommendations to the permitting agency.

THE POTENTIAL FOR FUTURE OF PERMIT-SPECIFIC LAWSUITS

If the final rule withstands legal challenge, it is widely anticipated that environmental groups will advance permit-specific challenges. Abundant opportunities for disagreement will surely result from the permitting agency's permit-by-permit determination of BTA entrainment requirements based on its consideration of mandatory factors such as the numbers and types of organisms entrained and the quantified and qualitative social benefits and costs of available technologies, as well as permissible factors such as effects to energy delivery

^{1.} Parties involved include the Cooling Water Intake Structure Coalition, the Utility Water Act Group, Entergy Corporation, the American Petroleum Institute, Riverkeeper, Sierra Club, Environment America, and Environment Massachusetts.

^{2.} Consolidation Order, In Re: Environmental Protection Agency, Final Rule: National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase 1 Facilities, United States Judicial Panel on Multidistrict Litigation (Sept. 22, 2015).



reliability within the immediate area and credit for flow reductions associated with a recently implemented unit retirement. The timeline for demonstrating compliance with the national BTA impingement mortality standard also might invite legal challenges. Under the rule, a facility must demonstrate compliance with the BTA impingement standard through one or more of the seven alternatives as soon as practicable after issuance of a final permit establishing entrainment requirements. Flexibility within the rule will undoubtedly provoke debate and fuel litigation about such elements as the appropriateness of a site's BTA entrainment standard and the timing of a facility's demonstration of compliance.

CONCLUSION

Time will reveal whether this rule ultimately serves as the long-term provision regulating cooling water intake structures at existing facilities or if the Second Circuit will once again remand to EPA for reconsideration. For now, however, the more than 1,000 facilities facing significant compliance requirements need to understand what they must do to fulfill their legal obligations, avoid penalties, and steer clear of permit-specific legal challenges.

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EPA's New Rule Raises the Bar for Recycling of Hazardous Secondary Materials

By David J. Raphael and Stephen J. Matzura

On January 13, 2015, the EPA published a final rule that modifies the definition of "solid waste" (the "DSW Rule" or "Rule")¹ under RCRA regulations, which was previously amended in 2008.² The Rule affects all recycling³ of HSM⁴ and is primarily directed at generators, intermediate facilities, and recyclers. It will broadly affect manufacturing, including, for example, the metal products, machinery, computer and electronics, petroleum and coal products, chemical plastics, and rubber products industries.

Only HSM that are "discarded" are considered "solid waste" and, therefore, "hazardous waste" under RCRA. The DSW Rule addresses whether HSM are "discarded" or, instead, are excluded from regulation as hazardous waste because they are recycled. Three major components of the Rule include⁵:

- "Legitimate recycling." The Rule establishes a four-pronged test for "legitimate recycling" that must be satisfied to exclude HSM from the definition of "solid waste" (and, therefore, from hazardous waste regulation).
- **Storage of HSM.** The Rule modifies the meaning of "accumulated speculatively" to require labeling of stored HSM and adds a definition of "contained" to set forth standards for storage units.



^{1. 80} Fed. Reg. 1694 (Jan. 13, 2015).

^{2.} The Rule is the culmination of a long history of EPA rulemakings and litigation which need not be revisited here. It revises a final rulemaking from 2008 and retains some concepts from that regulation. See 73 Fed. Reg. 64668 (Oct. 30, 2008).

^{3.} The term "recycle" and variations thereof are used generically in this article for sake of simplicity, including in place of "use," "reuse," "reclaim," and variations of those terms.

^{4.} HSM are materials that are not the primary product of a manufacturing or commercial process (e.g., spent material, by-product, or sludge) which, when discarded, would be hazardous waste under RCRA. See 40 C.F.R. § 260.10.

^{5.} Among other changes, the Rule also revises the non-waste-determination and variance processes and sets forth an exclusion for remanufacturing of 18 high-value solvents.

Exclusions for recycled HSM. EPA finalized two exclusions for recycling HSM, both of which depend on a number of conditions, including that the recycling is "legitimate" and that the HSM are stored properly. The "generator-controlled" exclusion may apply where generators of HSM recycle HSM on site or at other facilities they control. The "verified recycler" exclusion might apply where generators of HSM send it off site to be recycled by verified recyclers.

The Rule creates uncertainty concerning how and when new requirements will apply in different states, which may also raise issues where HSM is transferred between states. It becomes effective on July 13, 2015, but only in those states where EPA administers the RCRA program; other states must first incorporate the new requirements into their programs to the extent the DSW Rule is more stringent than the states' requirements.

"LEGITIMATE RECYCLING"

To qualify for any exclusions or exemptions from hazardous waste regulation, all HSM recycling must be "legitimate," not a "sham." Unlike under the 2008 version of the Rule, recycling is "legitimate" only if all of the following are met:

- Useful contribution to the recycling process or a product of it. HSM must satisfy one of five criteria showing it adds value or is useful to the recycling process (e.g., as the source of a valuable constituent, such as a recovered precious metal).
- Valuable product is produced or used. Recycling must produce a valuable product or intermediate, meaning it is sold to a third party or used in an industrial process.

- Handled as a valuable commodity. Generators and recyclers must
- **Comparable to a legitimate product.** This element ensures that the product's intended use.

Those operating under the 2008 version of the Rule must comply with the new Rule to the extent it is more stringent. EPA has sent mixed messages regarding the Rule's effect on exclusions obtained before 2008. On one hand, EPA explained that the pre-2008 exclusions remain in effect, can continue to function as before, and do not require documentation showing "legitimate recycling" (in most cases) because the elements are merely a codification of existing policy. On the other, EPA cautioned that recycling must be "legitimate" to benefit from exclusions and that documentation might be required for pre-2008 exclusions to demonstrate that the product of recycling is comparable to a legitimate product. Therefore, all generators and recyclers should consider whether the four-part test is met. Failure to meet it renders the recycling a "sham," making the HSM hazardous waste under RCRA.

handle HSM as a valuable commodity, either consistent with analogous raw materials or by ensuring HSM are "contained" (discussed below).

product does not include toxics "along for the ride." The product of recycling must be comparable to a legitimate product or intermediate, as demonstrated by comparison to hazardous characteristics of analogous products, recognized commodity standards, or reuse in the process. Otherwise, a certified, written assessment must demonstrate that the product does not contain levels of hazardous constituents that pose a significant human health or environmental risk based on the

STORAGE OF HSM

The DSW Rule modified the definition of "accumulated speculatively" and added a definition of "contained," which will broadly affect whether HSM are considered hazardous waste based on how they are stored:

- "Accumulated speculatively." The definition of "accumulated speculatively" requires generators to label the unit in which material is stored with the first date that accumulation began or, if labeling is not practicable, to use another method documenting that date (e.g., a log). Because this requirement broadly applies to anyone subject to the speculative accumulation definition, those operating under pre-2008 exclusions must adjust their practices to comply.
- "Contained." The definition of "contained" requires units (including land-based units, like piles) to (a) be in good condition, (b) be properly labeled or utilize a system to immediately identify HSM in the unit (e.g., logging), and (c) hold HSM that are compatible with other HSM in the unit to prevent fires or explosions. If the unit does not meet these minimum standards, or standards for treatment, storage, or disposal ("TSD") or interim status facilities, all HSM in the unit may be considered discarded and, therefore, hazardous waste. Any HSM released into the environment is considered discarded "unless it is immediately recovered for the purpose of reclamation."

Proper storage will be essential to maintaining exclusions from hazardous waste regulation.

EXCLUSIONS FROM THE DEFINITION OF "SOLID WASTE"

The exclusions in the DSW Rule are not entirely self-implementing; both the "generator-controlled" exclusion and the "verified recycler" exclusion require prior notification to the relevant agency regarding the exclusion under which HSM will be managed, as well as re-notification every two years.¹

Exclusion for Recycling under "Generator-Control"

In 2008, EPA adopted the "generator-controlled" exclusion to exclude HSM that are recycled while "under the control of a generator." Generators using the prior version of the exclusion must comply with the new Rule to the extent it is more stringent. The exclusion may apply where a generator recycles HSM at the generating facility or at different facilities controlled by the generator, if the generator:

- determination.
- Maintains the legitimacy determination on site for three years after recycling.
- Ensures the HSM are "contained."
- Avoids speculative accumulation.
- Complies with the notification requirement.
- Maintains records of shipments if the HSM are shipped.

While other exclusions are subject to existing documentation requirements, EPA expects those using the generator-controlled exclusion to develop and maintain documentation showing each element of the "legitimate recycling" test is met.

• Meets the "legitimate recycling" test by developing a written legitimacy

• Complies with emergency preparedness and response requirements.

^{1.} Spent petroleum catalysts are now eligible for these exclusions. Certain other materials, including lead-acid batteries, are not.

Exclusion for Off-Site Recycling with "Verified Recyclers"

In 2008, EPA established the "transfer-based" exclusion to exclude certain HSM destined for recycling that a generator transfers off site to a recycler. The DSW Rule replaced the "transfer-based" exclusion with the "verified recycler" exclusion.

"Verified recyclers"

A "verified recycler" must either have a RCRA permit as a TSD facility (or interim status) or obtain a "variance." The variance process is subject to public notice, comment, and, potentially, a hearing. Variances may be granted for recyclers or intermediate facilities only if they:

- Meet the "legitimate recycling" test.
- Satisfy financial assurance requirements.
- Are not subject to formal enforcement actions for three years or considered significant non-compliers, or otherwise can demonstrate proper HSM management.
- Have necessary equipment and trained personnel.
- Comply with emergency preparedness and response requirements.
- Show proper management of any residuals through necessary permits, contracts, or other evidence.
- Conduct a risk assessment to address potential for risk to nearby populations from unpermitted releases of HSM, including consideration of potential cumulative risks.

A variance must be obtained before recycling begins and may not exceed 10 years. Facilities that receive a variance must comply with the notification requirement described above. If there is a change in circumstances regarding how HSM meets the criteria for a variance, the variance-holder must notify the appropriate agency, which may require the facility to re-apply.

General requirements for the "verified recycler" exclusion

To maintain the exclusion, generators, recyclers, and intermediate facilities must do the following with respect to the HSM:

- Meet the "legitimate recycling" test.
- Avoid speculative accumulation.
- porter, intermediate facility, or recycler).
- Comply with the notification requirement.

There are additional requirements directed at generators, recyclers, and intermediate facilities.

Additional requirements for generators of HSM

To meet the exclusion, generators must do all of the following:

- Use "verified recyclers" within the United States.
- Ensure the HSM are "contained."
- Maintain records of shipments and receipt confirmations for at least three years.
- Comply with emergency preparedness and response requirements.

• Handle and transport the HSM properly (only via the generator, trans-

Additional requirements for recyclers and intermediate facilities

To meet the exclusion, intermediate facilities must send HSM to the recycler chosen by the generator. Recyclers and intermediate facilities must also do all of the following:

- Meet the standards for "verified recyclers," including financial assurance.
- Send confirmations of receipt to the generator.
- Maintain records of shipments for at least three years.
- Properly manage the HSM like analogous raw material with similar properties.
- Properly manage any residuals, including by treating them as hazardous waste if required.

Transfer facilities that store HSM for more than 10 days become "intermediate facilities" subject to these requirements. Generators, transporters, intermediate facilities, and recyclers involved in the process will need to carefully coordinate their efforts to maintain the "verified recycler" exemption from generation through recycling.

CONCLUSION

The Rule adds layers of regulatory complexity to the recycling process for HSM. It imposes storage and tracking requirements and infuses agency oversight throughout the process. Failure to strictly comply jeopardizes coverage under HSM exclusions and may result in liability for mismanagement of hazardous waste. Stakeholders should remain attentive to developments in the states in which they operate to determine whether their HSM may be excluded from hazardous waste regulation. All states will need to reassess their regulatory programs in light of the significant changes required by this Rule. At the same time, there are still rumblings at the federal level about the Rule's legality. Several environmental and industry groups have petitioned the D.C. Circuit to review it. From the industry's perspective, the Rule may improperly authorize agencies to regulate materials that are not discarded "hazardous waste" in very much the same way they regulate actual hazardous waste—by tracking it from cradle to grave. Others will likely argue that the Rule does not go far enough to regulate the recycling process for HSM. One thing is certain—the DSW Rule saga is far from over.

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