



This Week in Review – July 18-22, 2005

(1) EPA Assistant Administrator Jeff Holmstead Submits Resignation (July 20, 2005) – Jeff Holmstead, EPA Assistant Administrator for Air and Radiation, submitted his resignation to President Bush, effective August 30, 2005. In his letter to the President, Holmstead wrote that he is resigning to devote more time to his wife and children. He cited several accomplishments achieved during his four-and-a-half year tenure, including the Clean Air Interstate Rule, the Nonroad Diesel Rule, New Source Review program changes, regional haze rule modifications, voluntary programs to reduce greenhouse gas emissions and the Clean Air Mercury Rule. [For further information: Air Web – In the News page]

(2) Energy Conferees Still Hope to Complete Report Next Week (July 18-22, 2005) – Congressional conferees held meetings this week to begin ironing out differences between their respective energy bills. On Tuesday, conferees amended and approved seven titles: vehicles and fuels (though not in its entirety), energy efficiency, coal, nuclear, hydrogen, Department of Energy (DOE) management and personnel and training. With respect to vehicles and fuels, conferees agreed to amendments 1) to provide that dual-fuel vehicles can qualify for fuel economy incentives if a label is affixed to the fuel compartment notifying the driver that the vehicle can operate on gasoline or an alternative fuel and 2) relative to the Alternative Fueled Vehicle Purchasing Requirements section, to allow vehicles used for emergency repair of transmission lines and restoration of electrical services to qualify for an emergency exemption. Conferees rejected two amendments to increase Corporate Average Fuel Economy standards for cars and light trucks: one to increase the standards by one mile per year for each of the next 10 years and another to increase the standards by one mile per year for each of the next five years. With respect to energy efficiency, conferees adopted an amendment requiring DOE to report to Congress when it misses a deadline for issuing an energy efficiency standard. On Thursday, conferees took up numerous electricity issues, and also addressed Indian energy, coal leasing and renewable energy. Among the amendments agreed to was a compromise on daylight savings time, to extend it by four weeks (beginning on the second Sunday of March 2007) and also calling for a DOE study on the impact of daylight savings on energy consumption, to be completed no later than nine months after enactment of the act. Conferees still hope to complete a report by Tuesday, July 26, 2005, to enable final votes in both chambers by Friday, July 29, 2005, when Congress is scheduled to adjourn for its summer recess. Accordingly, negotiations will continue over the

weekend and early next week. A renewable portfolio standard, climate change, ethanol and fuels, hydropower and geothermal energy and research and development are on the schedule for Sunday and oil and gas and incentives are on the schedule for Monday, with time to be allotted, as well, for completion of the Indian energy and electricity titles. Top congressional negotiators were also scheduled to meet today to discuss resolution of the MTBE issue; among the issues at stake are a House provision for a liability waiver for MTBE manufacturers and who pays for the clean up of contamination caused by MTBE. Meanwhile, on Wednesday, July 20, 2005, Rep. Henry Waxman (D-CA) released a report, *Energy Bill Preempts States and Localities*. The report includes the results of an analysis of the House and Senate energy bills, concluding that the House-passed bill preempts or limits state authority in 11 key areas. Among these are a preemption of state authority over the siting of oil refineries, limits on state authority to require gasoline and other fuels to meet state clean fuel requirements, a block on state lawsuits to clean up MTBE contamination of drinking water and a preemption of state energy efficiency standards. The analysis further concludes that the Senate-passed energy bill also preempts or restricts important states rights. [For further information: energy.senate.gov and www.democrats.reform.house.gov/story.asp?ID=894&Issue=Energy+Policy]

(3) Senators Seek to Overturn EPA's Mercury Rule (July 18, 2005) – Senator Patrick Leahy (D-VT) and 31 other senators signed a Discharge Petition to bypass the Senate Environment and Public Works Committee and go to the full Senate for vote on a resolution that would overturn a provision in EPA's mercury rule exempting coal-fired power-plants from MACT requirements. The petition was filed under the Congressional Review Act of 1995, which allows members of Congress to overturn federal regulations by a majority vote. A similar resolution was introduced in the House by Rep. Martin Meehan (D-MA). [For further information: Air Web – Air Toxics Committee page]

(4) Environmental Groups Sue on CAMR, Petition EPA for Reconsideration (July 18, 2005) – Five environmental groups filed suit challenging EPA's Clean Air Mercury Rule (CAMR), which calls for the regulation of emissions of mercury from power plants through a cap-and-trade program under Section 111 of the Clean Air Act. A group of states has already filed suit against EPA over the CAMR. Previously, a coalition of environmental groups and a group of states sued EPA on the related rule to delist power plants from the Section 112 list of source categories that must be subject to hazardous air pollutant regulations. In addition to the lawsuits, several environmental groups have petitioned EPA to reconsider the CAMR, stating that EPA's rule includes "a number of issues on which it was impracticable to raise objections during the period provided for public comments" (see related article, below). [For further information: Air Web – Air Toxics Committee page]

(5) EPA Defends Mercury Rule in Brief Opposing Stay (July 18, 2005) – The Department of Justice (DOJ) filed briefs opposing the stay sought by environmental petitioners in the litigation challenging EPA's mercury rule. Environmental groups, led by the Natural Resources Defense Council (NRDC), filed briefs earlier this month attempting to persuade the U.S. Court of Appeals for the District of Columbia that

electric utilities should not be delisted from the list of source categories subject to regulation, but rather should be required to install Maximum Achievable Control Technology (MACT) to reduce mercury emissions. Their stay motion sought to establish that they are likely to prevail on the merits and that EPA's rule causes imminent harm to public health. The government claims in its opposition to the stay that stopping the delisting would "frustrate ongoing implementation" of EPA's cap-and-trade program for mercury emissions. Moreover, DOJ claims that if the court were to issue an injunction preventing EPA from implementing the delisting provisions, "it would severely upset this carefully coordinated regulatory regime, rendering worthless comprehensive technical, policy and legal analyses before EPA ever had a chance to present its full case to the court." In addition to the brief opposing the stay, EPA's Assistant Administrator for Air and Radiation, Jeffrey Holmstead, filed a declaration in support of the mercury rule. A group of 14 states also sued EPA over its delisting of electric utilities from mercury MACT requirements, but did not join with environmental petitioners in seeking to stay the delisting.

(6) EPA Sued on 8-Hour Ozone NSR (July 21, 2005) – The American Lung Association, the Natural Resources Defense Council, Environmental Defense and the Sierra Club filed an action against EPA in the U.S. Court of Appeals for the District of Columbia alleging that EPA's 8-hour ozone implementation rule (*70 Federal Register* 30592; *70 Federal Register* 39413) will cause unlawful regression, or "backsliding" in emissions controls and air quality. Under EPA's rule, new and modifying facilities in many areas of the country will no longer be subject to the requirements for offsets and installation of Lowest Achievable Emission Rate (LAER) technology required formerly under the 1-hour ozone standard. On July 1, 2005, EPA finalized its administrative reconsideration of the rule, leaving unchanged the requirements that it had announced in phase one with respect to New Source Review (NSR): NSR requirements applying to large sources in 8-hour ozone nonattainment areas are based on the area's classification for the 8-hour standard, not on the area's classification under the revoked 1-hour standard and 2) a state may remove a 1-hour major NSR program from its SIPs and replace it with an NSR program that is applicable to the 8-hour standard.

(7) Senate EPW Committee Approves President's Nominees for Top EPA Posts (June 20, 2005) – By voice vote, the Senate Environment and Public Works Committee sent to the full Senate for consideration the nominations of Marcus Peacock for Deputy Administrator of EPA, Granta Nakayama for Assistant Administrator of the Office of Enforcement and Compliance Assurance and Susan Bodine for Assistant Administrator of the Office of Solid Waste and Emergency Response. Alleging conflict of interest, Senator Max Baucus (D-MT) voted against confirmation of Nakayama because Nakayama's law firm represents W.R. Grace & Co., owner of a Libby, Montana mine that is involved in a lawsuit over asbestos contamination. Senator Barbara Boxer (D-CA) abstained from the vote on Susan Bodine, saying that she will place a hold on the nomination until EPA provides information she has requested regarding 103 high-risk Superfund sites. Consideration of the nominations by the full Senate has not yet been scheduled.

(8) STAPPA and ALAPCO Urge Preservation of States' Rights (July 18, 2005) – STAPPA and ALAPCO sent a letter to the National Research Council Committee on State Practices in Setting Mobile Source Emissions Standards urging that the Committee's final recommendations "include an endorsement of existing state authorities and not include recommendations to diminish these authorities or establish additional hurdles to their use." The associations explain in their letter that the process by which a state adopts a California motor vehicle emission standard is extremely robust, with at least three distinct, comprehensive analyses: that conducted by California when it develops its regulations; that conducted by EPA pursuant to California's request for a waiver of federal preemption (for onroad sources) or authorization to enforce (for nonroad sources); and that conducted by any other state that evaluates potential adoption of California's standards. Citing the significant contribution of mobile source emissions to critical air pollution and environmental problems, and the forthcoming efforts of states and localities "to design individual plans for achieving and sustaining health-based air quality standards and otherwise seek to realize clean air and environmental goals," the associations explain that states and localities will need to have at their disposal "a full array of 'tools in the toolbox' so that strategies can be tailored to best meet the needs and circumstances of each particular area. The existing state authorities for adopting mobile source and fuel programs are among these tools." [For further information: Air Web – Mobile Sources and Fuels Committee page – and www.4cleanair.org]

(9) Senate Hearing Focuses on Actions Necessary to Abate Global Warming (July 21, 2005) – The Senate Energy and Natural Resources Committee held a hearing on global warming that focused on actions the U.S. needs to take to address global warming, especially in the near term. Committee Chair Pete Domenici (R-NM) opened the hearing by saying that he has "come to accept that something is happening to this Earth's climate" and the questions that now need to be addressed are "who, what, where and when." Committee Ranking Member Jeff Bingaman (D-NM) said that global warming is one of the most significant issues this Congress will have to deal with. The panelists – all scientists, including Nobel Prize-winner Mario Molina and Dr. Ralph Cicerone, President of the National Academy of Sciences – all agreed that human activity is contributing to global warming. When pressed by Senator Lisa Murkowski (R-AK) on how much of the global warming we are witnessing is caused by humans and how much is due to natural variability, Dr. Jim Hurrell, Director of the Climate and Global Dynamics Division at the National Center for Atmospheric Research, said that the modeling is clear that "nearly all the warming in recent decades is attributable to humans." However, it is less clear how much warming or how many extreme events at a local or regional level – like the significant warming experienced in the Arctic region – is due to natural variability, though that natural variability is affected by global warming. Senator Lamar Alexander (R-TN) expressed concern that the scientific community, including those who testified at the hearing, has urged that action needs to be taken in this generation to reduce, avoid or sequester emissions, and yet scientists have no consistent recommendations on the necessary actions. He stated his view that in order to aggressively reduce emissions, the U.S. needs to do the following: first, increase conservation and efficiency and, second, increase nuclear power. Domenici agreed, and said that the U.S. "will make

giant strides in nuclear power and I submit to you that we will see a new nuclear power plant in the U.S. in the next three years." He added that the solution is not a mandated cut in emissions or the Kyoto Protocol. (The Committee ran out of time before a second panel – with a focus on economic strategies – could testify; these speakers will testify at a future hearing.) The previous day, the Global Climate Change Impacts Subcommittee of the Senate Commerce, Science and Transportation Committee heard from members of the U.S. government about the Administration's approach to climate change, as well as from Dr. Cicerone. Senator Ted Stevens (R-AK) noted with concern that the Arctic is being profoundly affected by rapid warming. Dr. Cicerone commented that at first scientists theorized that the North Atlantic oscillation was responsible for the rapid Arctic warming, but that this theory does not explain all the warming in the Arctic; for this reason, it is "essential" that different sources of money fund different scientists to look at these kinds of issues, so that various theories can be tested out. [For further information: Air Web – Global Warming Committee page]

(10) Senate Committee Approves Diesel Retrofit Bill (July 20, 2005) – In follow up to a Clean Air, Climate Change and Nuclear Safety Subcommittee legislative hearing last week (see July 11-15, 2005 *Washington Update*), the Senate Environment and Public Works Committee unanimously approved S. 1265 – the Diesel Emissions Reduction Act of 2005 – introduced last month by Senator George V. Voinovich (R-OH) with strong bi-partisan support. Although the bill has also been included as an amendment to the comprehensive Senate energy bill, which is currently the subject of conference negotiations, Senator Voinovich is seeking to expedite final action on the legislation by moving a stand-alone bill to the Senate floor. Full Senate consideration of the bill has not yet been scheduled.

(11) EPA Releases Proposal for Emissions Trading Substitute for BART (July 21, 2005) – EPA released proposed revisions to its Regional Haze Rule governing alternative trading programs. The proposed revisions are intended to help states that want to propose emissions trading programs as a substitute for Best Available Retrofit Technology (BART) determinations under the Regional Haze Rule. First, EPA is proposing to amend the regulations prescribing the type of analysis used to determine emissions reductions achievable from source-by-source BART, for purposes of comparison to an alternative trading program; the amendments are intended to address deficiencies identified by a court decision (*Center for Energy and Economic Development (CEED) v. EPA*). Second, EPA is proposing new regulatory text to provide minimum elements for cap-and-trade programs in lieu of BART. Finally, EPA is proposing amendments to enable certain western states and tribes to continue to use the strategies contained in Section 51.309 as an optional means to satisfy reasonable progress requirements for certain Class I areas, for the first long-term planning period, in order to implement the recommendations of the Grand Canyon Visibility Transport Commission consistent with the *CEED* decision. These changes would provide states and tribes with an opportunity to revisit the details of the backstop sulfur dioxide emissions trading program without being required to assess visibility on a cumulative basis when determining emissions reductions achievable by source-by-source BART. EPA will accept comment on the proposal for 45 days after

its publication in the *Federal Register*. EPA expects to finalize the rule by November 2005. [For further information: Air Web – In the News and Criteria Pollutants Committee pages]

(12) EPA Issues Notice of Reconsideration of NESHAP for Plywood and Composite Wood Products (July 18, 2005) – EPA requested public comment on various issues relating to the risk-based exemption adopted in its rule setting a National Emission Standard for Hazardous Air Pollutants for the plywood and composite wood products industry. The rule, promulgated July 30, 2004, contained a risk-based approach “to avoid imposition of regulatory controls on facilities that pose little risk to public health and the environment.” Facilities that qualify as low-risk are not subject to the Section 112(d) Maximum Achievable Control Technology (MACT) emission limitations, operating requirements or work practice requirements contained in the final rule. The Natural Resources Defense Council (NRDC) and the Environmental Integrity Project (EIP) petitioned EPA for review of the rule. Joined by STAPPA and ALAPCO as *amici*, NRDC and EIP also filed a lawsuit in the D.C. Circuit Court of Appeals alleging the illegality of the low-risk exemption provisions under Section 112 of the Clean Air Act. EPA granted the petition for reconsideration on December 6, 2004, and is now taking comment on the following aspects of the rule: 1) risk assessment methodology; 2) background pollution and co-located emission sources, 3) the dose-response value used for formaldehyde, 4) costs and benefits of establishing a low-risk subcategory, 5) ecological risk, 6) the legal basis for the risk-based approach, 7) the MACT compliance date for affected sources previously qualifying for the low-risk subcategory and 8) a Title V implementation mechanism for the risk-based approach. The public comment period will close 45 days after publication of the notice in the *Federal Register* and a public hearing will be held, if requested, 15 days after publication of the notice. Meanwhile, EPA refused the petitioners’ request for an administrative stay of the rule, and a stay has not been sought in the judicial action. The notice states, “EPA conducted low-risk demonstrations for eight facilities, and EPA will not require further demonstration from them before they become part of the delisted low-risk subcategory.” [For further information: www.epa.gov/ttn/oarpg/t3/fr_notices/pcwpreconsiderationprop.pdf]

(13) EPA Proposes Amendments to the NESHAP for Plywood and Composite Wood Products (July 18, 2005) – EPA proposed amendments to some of the final rule requirements (see related article, above) in response to issues raised by plywood and composite wood products (PCWP) industry representatives. These amendments include definitions, the emissions testing procedures required for facilities demonstrating eligibility for the low-risk subcategory, stack height calculations to be used in low-risk subcategory eligibility demonstrations and permitting and timing issues relating to the low-risk subcategory. EPA also notes that it is clarifying some common applicability questions relating to eligibility for the low-risk exemption. Moreover, the agency is proposing to amend the rule “to reduce the number of emissions tests required while ensuring that emissions from all PCWP process units are considered” and is proposing “that emissions tests may be conducted after the low-risk demonstration is submitted.” A final proposal would allow physical changes necessary to ensure low risk to be completed after the low-risk demonstration is submitted. EPA

notes that these proposed amendments are relevant to some of the environmental petitioners' issues because they address the contested risk provisions. The agency notes that it intends to address all comments received on the notice of reconsideration and the proposed amendments "by the time we finalize the amendments." As with the reconsideration, the public comment period on the proposed amendments closes 45 days after publication in the *Federal Register* and a public hearing will be held, if requested, 15 days after publication. [For further information: www.epa.gov/ttn/oarpg/t3/fr_notices/pcwpmamend1prop.pdf]

(14) Environmental Groups Issue Notice of Intent to Sue to Mirant Corporation (July 21, 2005) – The Chesapeake Bay Foundation, Chesapeake Climate Action Network, Environmental Integrity Project and Maryland Public Interest Research Group announced their intent to file suit against Mirant Corporation within 60 days if no action is taken by the coal-fired power plant to reduce emissions of nitrogen oxide. The environmental groups allege that the Chesapeake Bay is impacted by the emissions of Mirant and others, creating low-oxygen "dead zones" in the bay. Previously, the State of Virginia had issued a notice of violation (NOV) to Mirant for emissions from a plant in Alexandria. A consent decree resulting from that NOV has not yet been judicially approved. The environmental groups allege that Mirant's Dickerson plant installed pollution control equipment in 2003 that does not appear to be utilized in the winter months. [For further information: www.environmentalintegrity.org/pub323.cfm]

(15) House Members Urge Increased CAFE Standards (July 19, 2005) – In a letter to Dr. Jeffrey W. Runge, Administrator of the National Highway Traffic Safety Administration (NHTSA), 37 House members from both sides of the aisle urged NHTSA "to significantly increase fuel economy standards." The legislators offered three principles upon which they believe a successful policy must be based: significantly increase overall fuel economy and safety, do not allow overall fuel economy or safety to be undermined and encourage technology innovation to improve fuel economy and safety. The Congressmen close their letter by urging Administrator Runge to "increase CAFE standards significantly to reduce our dependence on foreign oil and cut pollution from our U.S. vehicles, and to ensure that any reforms to the CAFE system decrease our dependence on oil."

(16) EPA Publishes DFR and NPRM to Provide Incentives for Early Diesel Fuel Distribution (July 15, 2005) – EPA published in the *Federal Register* a direct final rule (DFR) and accompanying notice of proposed rulemaking (NPRM) to "correct, amend and revise certain provisions" of the onroad and nonroad diesel rules with regard to fuel distribution systems and program implementation and compliance. The changes offered by EPA (described in the July 4-9, 2005 *Washington Update*) clarify the regulations governing compliance with the diesel fuel standards; amend the "designate and track" provisions to account for companies within the fuel distribution system that perform more than one function related to fuel production or distribution; and revise regulatory text to "allow refiners better access to early highway diesel fuel credits." EPA states in its notice that "The intention of this amendment is to help ensure a smooth transition to ultra low-sulfur diesel fuel nationwide." The DFR will take effect August 29, 2005 unless EPA receives adverse comments by August 15, 2005. EPA

does not intend to hold a public hearing unless one is requested. [For further information: 70 *Federal Register* 40889 and 40949]

(17) Bay Area Air Quality Management District Adopts Refinery Flare Rule (July 20, 2005) – The Board of Directors of the Bay Area Air District in San Francisco, California adopted a rule to reduce flaring at the area's five oil refineries. Flaring occurs when excess gas trapped in underground rock formations above oil deposits is burned off, releasing carbon dioxide and other natural gas byproducts. In June 2003, the Board adopted a flare monitoring rule that required refineries to monitor and report flare emissions data to the District. According to the District's press release, the 2003 monitoring requirements resulted in installation of compressors to recover refinery gases and better operating practices, reducing by 75 percent releases of total organic compounds – from eight to two tons per day. The new rule builds on the 2003 rule. Each refinery must now prepare a Flare Minimization Plan, subject to approval by the District, which details how it will further minimize flaring. The rule also requires that refineries analyze the causes of flaring events involving emissions of more than 500,000 cubic feet of gases. The analyses must be included in required annual reports and feasible prevention measures must be included. The District notes that "[t]he new flare reduction rule was developed through a broad participatory process that included a working group of community and environmental representatives, refinery operators, federal, state and local agency representatives and District staff." [For further information: www.baaqmd.gov/pln/ruledev/regulatorypublichearings.htm]

The Week Ahead

- Energy Conference Negotiations Continue, in Washington, DC – July 23-26, 2005
- Senate Environment and Public Works Committee Hearing on the Kyoto Protocol: Assessing the Status of Efforts to Reduce Greenhouse Gas Emissions, in Washington, DC – July 27, 2005
- Senate Energy and Natural Resources Subcommittee Hearing on Hydrogen and Fuel Cell Technology, in Washington, DC – July 27, 2005
- EPA Clean Air Act Advisory Committee and Subcommittee Meetings, in Arlington, Virginia – July 27-28, 2005

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