



Happy Holidays!

This Week in Review – December 20-24, 2004

(1) Senate EPW Committee Assignments Announced (December 20, 2004) – Senate Republicans announced their committee assignments for the 109th Congress. With respect to the Environment and Public Works (EPW) Committee, Senator James Inhofe (OK) will return as Chair and has already indicated his intention to hold hearings on the Administration's Clear Skies proposal in January. Also returning to serve on the EPW Committee are John Warner (VA), Christopher Bond (MO), George Voinovich (OH), Lincoln Chafee (RI) and Lisa Murkowski (AK). Four freshman Senators will join the Committee – John Thune (SD), Jim DeMint (SC), Johnny Isakson (GA) and David Vitter (LA) – replacing departing members Mike Crapo (ID), John Cornyn (TX), Craig Thomas (WY) and Wayne Allard (CO). The assignments will go before the Senate Republican conference for approval when Congress reconvenes on January 4, 2005. As reported in the December 6-10, 2004 *Washington Update*, Senate Democrats recently announced that Senators Frank Lautenberg (NJ) and Barack Obama (IL) will replace Senators Harry Reid (NV), Bob Graham (FL) and Ron Wyden (OR) on the EPW Committee. Minority members returning to the Committee include Senators James Jeffords (I-VT), Max Baucus (MT), Joseph Lieberman (CT), Barbara Boxer (CA), Thomas Carper (DE) and Hillary Rodham Clinton (NY). [For further information: epw.senate.gov/pressitem.cfm?party=rep&id=230247]

(2) Court Approves EPA's Request to Extend Dates for PM and Ozone NAAQS Review (December 20, 2004) – The U.S. District Court for the District of Columbia approved EPA's request to extend the deadlines in the consent decree governing the dates for completing EPA's review of the NAAQS for PM and ozone. For PM, EPA committed to publish its second draft staff paper by January 31, 2005 for peer review and public comment. (This staff paper will discuss policy options for setting fine and coarse particle standards, including the form, level, averaging time and compliance test.) The final draft staff paper will be published by June 30, 2005, with a notice of proposed rulemaking on the PM NAAQS to be signed by December 20, 2005 and a notice of final rulemaking signed by September 27, 2006. For ozone, EPA agreed to publish the first draft criteria document by January 31, 2005 for peer review and public comment. By August or September 2005, EPA agreed to publish the second criteria document and the first draft staff paper for peer review and public comment. EPA also

committed to sign a notice of proposed rulemaking for ozone NAAQS by March 28, 2007 and a notice of final rulemaking by December 19, 2007.

(3) Climate Change Conference Concludes (December 20, 2004) – An international climate change meeting – the Tenth Session of the Conference of the Parties (COP-10) – taking place in Buenos Aires concluded over the weekend after marathon negotiations produced an agreement to hold a seminar in May 2005 to discuss policies and measures that countries have adopted to slow global warming and actions to continue to develop effective and appropriate responses to global warming. The agreement to hold a “Seminar of Governmental Experts” to promote an informal exchange of information evolved from an initial idea to hold two meetings during 2005 to discuss ways to mitigate climate change after 2012 (the Kyoto Protocol sets reduction commitments for the period 2008-2012). Because the U.S. is not a party to the Kyoto Protocol, it can only participate as an observer in discussions about implementing the Protocol; the idea of seminars in 2005 outside of formal discussions about the Protocol had been suggested in order to include the U.S. in discussions about future emission reduction commitments. However, according to press reports, the U.S. opposed any discussions of future commitments and insisted that any discussions in 2005 be focused only on implementation of current commitments. COP-10 negotiators also adopted a Buenos Aires Program of Work on Adaptation and Response Measures. Negotiations relating to a number of issues, including the Least Developed Countries Fund; the Special Climate Change Fund; submission of second, or where appropriate, third national communications from non-Annex I Parties; policies and measures; and Protocol Article 2.3 (adverse effects of policies and measures), were not completed and were forwarded to future meetings for further consideration. [For further information: unfccc.int/meetings/cop_10/items/2944.php and www.state.gov/g/oes/rls/rm/2004/39787.htm]

(4) Fourth Circuit Court of Appeals Will Hear NSR Arguments in Duke Energy (December 17, 2004) – The U.S. Court of Appeals for the Fourth Circuit has scheduled oral arguments in the Duke Energy case for February 3, 2005. The first of EPA’s “New Source Review initiative” cases to reach the Circuit Court level, Duke will require the court to rule on what constitutes a utility “modification” as opposed to “routine maintenance.” EPA claims that modifications made at seven coal-fired power plants owned by Duke violated the Clean Air Act because the utility failed to obtain permits and install pollution control equipment. Judge Frank Bullock of the North Carolina District Court ruled in August 2003, however, that Duke had not made unlawful modifications because there had not been increases in the hourly rates of emissions of the units in question. Furthermore, Judge Bullock held that whether modifications are – or are not – routine should be evaluated by comparison to the activities of the utility industry as a whole rather than by assessing a particular generating unit. EPA appealed this decision, and the parties briefed the issues during the fall. Judge Bullock’s decision contrasts sharply with the holding of Judge Sargus in the Ohio Edison case, which found that “routine” should be interpreted with regard to the lifetime of a particular unit and that annual tons per year of emissions – rather than hourly rates – should determine whether an increase has occurred. EPA has asserted in all of the NSR enforcement cases that whether or not activities are routine should be

judged on a case-by-case basis by examining their nature, extent, purpose, frequency and cost, which factors were originally embraced in the 1980 WEPCO decision. Eight states – Connecticut, Delaware, Maryland, Massachusetts, Illinois, New York, New Hampshire and Pennsylvania – and the District of Columbia have intervened on behalf of EPA and have filed *amicus* briefs.

(5) TVA Responds to North Carolina Notice of Intent to Sue (December 15, 2004)

–The Tennessee Valley Authority (TVA) responded forcefully to a November 19, 2004 letter sent by North Carolina (see November 15-19, 2004 *Washington Update*) setting forth the state's intent to sue for NSR violations of the Clean Air Act. In its response, TVA catalogues its emission reductions and asserts that North Carolina's utilities have failed to make their own emissions reductions. In addition, TVA states in its letter that "[New Source Review] litigation is wasteful and unnecessary, especially in light of TVA's ongoing emission reduction program and the additional reductions that Clear Skies or CAIR will mandate." TVA further asserts that a lawsuit threatens the economy of the region and North Carolina. [For further information: Air Web – NSR Subcommittee page]

(6) Georgia Power NSR Lawsuit Will Go to Trial in March (December 15, 2004)

– District Judge Jack Camp denied Georgia Power Company's motion to dismiss a lawsuit filed in 2002 by the Sierra Club, Physicians for Social Responsibility, Georgia ForestWatch and a private citizen, who claim that emissions from Georgia Power's Plant Wansley in Heard County are harmful and violate the Clean Air Act. Dismissing the arguments of the utility that excess emissions due to startup or malfunction were allowed under its permit, Judge Camp noted that even though the Georgia Environmental Protection Division could decide not to penalize the company, the emissions nonetheless violated particulate emissions standards under the Act. In contrast to this case, brought by private plaintiffs, the EPA enforcement case that alleged NSR violations by Georgia Power and Savannah Electric was stayed in fall 2003. The utility successfully argued for the stay pending the appeal by the government to the Supreme Court of the Eleventh Circuit decision holding EPA's administrative orders "legally inconsequential." So far, the stay has not been lifted even though the Supreme Court declined to hear the appeal in May 2004.

(7) EPA Proposes to Revise MSAT Gasoline Default Baseline Values (December 22, 2004)

– EPA signed a proposed rule revising the Mobile Source Air Toxics (MSAT) default baseline values for certain gasoline refiners and importers. EPA's final MSAT rule, published March 29, 2001, requires that the annual average toxics performance level of gasoline produced or imported beginning in 2002 be at least as clean as the average performance level during the baseline period of 1998-2000. The toxics performance level is determined separately for each refinery and importer and separately for reformulated gasoline (RFG) and conventional gasoline. The MSAT default baseline is applicable to the gasoline of those who cannot establish a unique individual MSAT baseline under the MSAT rules (e.g., those parties that did not exist during the MSAT baseline period or did not have sufficient gasoline production or import activity during that period). The default MSAT baseline is an estimate of the nationwide annual average toxics performance level of gasoline. At the time of the

March 2001 MSAT rulemaking, because toxics performance data for 2000 were not yet available, EPA committed to revise the default MSAT baseline values once the 2000 data became available. Under the proposal, the revisions would take effect beginning with the 2005 compliance period, which begins January 1. This proposal would also correct an error in the original MSAT rule affecting the RFG default baseline value; the corrected value would be effective for the 2002-2004 compliance periods. According to EPA, the proposed revised RFG default baseline value is slightly more stringent than the value in the final rule and the proposed revised conventional gasoline default baseline value is slightly less stringent than the value in the final rule. EPA will accept public comment on this proposal for 30 days following publication in the *Federal Register*; a public hearing will be held if requested within 20 days of publication. [For further information: www.epa.gov/otaq/toxics.htm]

(8) EPA Announces Proposal to Update I/M Program Requirements (December 22, 2004) – EPA announced a notice of proposed rulemaking to make “minor revisions” to the motor vehicle Inspection and Maintenance (I/M) program to update submission and implementation deadlines, evaluation dates and other timing-related requirements as they will apply to I/M programs under the 8-hour ozone standard. The proposal also amends the model year requirements in the modeling calculation that will establish the emission reduction target for I/M benefits. EPA will accept written comments on the proposal for 30 days following publication in the *Federal Register*. [For further information: www.epa.gov/otaq/epg/regs.htm]

(9) Governor’s Advisory Group Recommends Steps to Reduce GHG Emissions in Oregon (December 20, 2004) – An advisory group established by the Governor of Oregon’s developed 55 policy recommendations for reducing greenhouse gas (GHG) emissions in the state. Included in the advisory group’s report are the following reduction targets: by 2010, “arrest” the growth of Oregon’s GHG emissions and begin to reduce them; by 2020, reduce emissions to 10 percent below 1990 levels; and reduce GHG emissions 75 percent below 1990 levels in 2050. To help reach the reduction targets, the group recommended that Oregon adopt California’s plan to reduce GHG emissions from passenger vehicles. The goals reflected in the recommendations include saving 960 megawatts of electricity through energy efficiency measures, developing 130 megawatts of renewable energy by 2006 and creating a work group to advise the state legislature on how to best reduce carbon dioxide emissions from the utility sector. [For further information: www.energy.state.or.us/climate/Warming/Report/GWPlan.pdf]

(10) California PUC Requires Utilities to Consider GHG Costs (December 20, 2004) – The California Public Utilities Commission (CPUC) issued an order that requires California utilities – Pacific Gas & Electric, Southern California Edison and San Diego Gas & Electric – to include a value to account for the financial risk associated with greenhouse gas (GHG) emissions when the utilities conduct procurements. The CPUC adopted a range of values for a “GHG adder” of \$8 to \$25 per ton, to be used in the utilities’ evaluation of fossil generation bids. According to the order, the GHG value is to be added to the fossil prices bid in future procurements of electricity in order to develop a more accurate price comparison between fossil,

renewable and demand-side bids. [For further information: www.cpuc.ca.gov/published/comment_decision/41385.htm]

(11) Impacts of Global Warming on Nature More Severe than Expected (December 20, 2004) – The world's flora and fauna are more vulnerable to global warming than previously thought, according to a report by the World Wildlife Fund. Accordingly, the report's authors recommend that global temperature rise be limited to 1.5 degrees Celsius to avoid the worst impacts of climate change. (The Intergovernmental Panel on Climate Change has recommended a ceiling for global temperature rise of 2 degrees Celsius.) *Extreme Weather – Does Nature Keep Up?* shows that the effects of climate change are now visible in every part of the world and in every ecosystem – plants are flowering earlier than they have for the last 200 years; increased droughts have led to more forest fires; and glaciers are retreating. The report also shows for the first time that it is the weather extremes that determine how nature experiences climate change and not just the average temperature increases. [For further information: www.panda.org/downloads/climate_change/extremeweatherreportdoesnaturekeepup.pdf]

(12) EPA Proposes Amount of CFCs that May Be Used in 2005 in Inhalers, Finalizes Amount of Methyl Bromide for 2005 (December 22 and 23, 2004) – EPA proposed that manufacturers of metered-dose inhalers be allowed to use 1,524.58 metric tons of chlorofluorocarbons (CFCs) in 2005. CFCs are used as a propellant in metered-dose inhalers, which are used by people who suffer from asthma or chronic obstructive pulmonary disease. The use, sale or manufacture of CFCs is prohibited in the U.S. under the Clean Air Act and under the Montreal Protocol for Substances that Deplete the Ozone Layer; however, the Act and Protocol provide exemptions for "essential uses" of ozone-depleting substances in certain circumstances. One such approved essential use is for medical devices such as metered-dose inhalers. Written comments on this proposed rule must be received by EPA by January 21, 2005 unless a public hearing is requested, in which case comments are due 30 days following the public hearing. In a related notice, EPA finalized a critical use exemption for methyl bromide, an ozone-depleting substance that is supposed to be phased out under the Act and Protocol; however, it is also a pesticide used for agricultural purposes and the U.S. successfully convinced parties to the Protocol that U.S. agricultural producers should be able to continue to use it since adequate substitutes are not available. EPA has determined that 8,942,214 kilograms of methyl bromide are required to satisfy critical uses for 2005. [For further information: 69 *Federal Register* 76655 and 69 *Federal Register* 76981]

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