



Current Developments

AIR POLLUTION

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Draft Air Toxics Strategy Identifies 37 Pollutants As Regulatory Priorities

A draft report developed by Environmental Protection Agency staff has identified 37 hazardous air pollutants that are considered high priorities for regulation under the air toxics program.

The report sets forth strategies the agency is considering for establishing an integrated air toxics program. It was submitted July 9 for review by high-level management in the agency's Office of Air and Radiation.

Under Section 112 of the Clean Air Act, the agency is required to set air toxics standards controlling emissions of 189 hazardous air pollutants.

Tim Smith, of the Air Quality Strategies and Standards Division of EPA's Office of Air Quality Planning and Standards, told BNA the integrated air toxics strategy is designed to better coordinate programs within OAQPS that are responsible for implementing Section 112. "It is intended to fit the various pieces together," he said. The draft report is still essentially an internal document, however, Smith added.

The list of 37 pollutants identified by EPA staff "represents those HAPs which, based on available data, are of high concern with regard to posing a public health or environmental concern," the report said. It added that the list "reflects an attempt to integrate the health and risk-based provisions of Section 112 into a single set of HAPs that [the Air Quality Strategies and Standards Division] can best support regulating."

The 37 hazardous air pollutants on the list are: acetaldehyde; acrolein; acrylamide; acrylonitrile; arsenic and compounds; antimony and compounds; benzene; beryllium and compounds; bis(2-chloroethyl) ether; 1,3-butadiene; cadmium and compounds; chloroform; chromium and compounds; coke oven emissions; 2,3,7,8-TCDF; dioxin (2,3,7,8-TCDD); ethylene dibromide; ethylene dichloride; ethylene oxide; formaldehyde; glycol ethers; hydrazine; lead and compounds; manganese and compounds; mercury and compounds; methylene chloride; MDI; nickel and compounds; phosgene; POM (PAHs); styrene; tetrachloroethylene; trichloroethylene; toluene; 2,4-toluene diisocyanate; vinyl chloride; and xylenes.

Great Waters, Urban Areas Considered

In determining whether a pollutant should be slated as a priority, EPA staff considered, among other things, whether it was listed as a problem pollutant in the agency's 1994 Great Waters report and whether the pollutant is identified in the agency's Urban Area Source Program. The Great Waters report identified pollutants threatening the Great Lakes, Chesapeake Bay, and other large surface water bodies in the United States.

In addition, EPA staff only flagged pollutants that are emitted by five or more facilities, based on 1993 data from the Toxic Release Inventory.

The report said, however, that the list "should not be construed to mean that other pollutants on the HAP list are not of concern." It said the list reflects those pollutants "for which we have the best supporting rationale to offer, based on data regarding their potential impact on public health."

The report specifically identified 18 other pollutants, including asbestos, DDT, and polychlorinated biphenyls. It said these pollutants were not included on the priority list because they are being phased out under Title VI of the Clean Air Act, are emitted by a small number of facilities, or already are regulated under a separate law, such as the Federal Insecticide, Fungicide, and Rodenticide Act.

Five Components

The integrated strategy would establish an "air toxics management model" that includes five components, according to the report. The first component involves establishing goals and identifying objectives for the program—including setting targets based on reducing health effects, risk, exposure, and emissions and improving air quality. The second component involves identifying specific sources of pollutants and determining the emission reductions needed from those sources to meet program objectives.

Setting up programs to meet emission-reduction goals, including regulatory programs at federal and state levels, and voluntary programs and initiatives, is the third component of the strategy. Implementing and enforcing these programs is the fourth component, and evaluating their effectiveness in achieving the stated goals is the fifth. This component would be implemented through both direct measurement of pollution levels and, where necessary, use of indirect or surrogate indicators, the report said.

The report also provided examples of "quantitative goals" for the air toxics program and "program objectives" for roughly the next decade. The goals identified in the report are:

- ▶ Reducing total U.S. emissions of hazardous air pollutants by 75 percent by 2000;
- ▶ Ensuring that by 2010, no source of hazardous air pollutants poses a cancer risk of more than one in 10,000 to the exposed population;
- ▶ Ensuring that by 2010 "the majority of people living in the vicinity of emission sources do not experience a cancer risk attributable to HAPs in excess of one in 1 million";
- ▶ Reducing airborne deposition of mercury into lakes and streams by 50 percent by 2010;
- ▶ Reducing incidences of childhood leukemia attributable to hazardous air pollutants by 75 percent by 2010; and
- ▶ Reducing incidences of "urban cancer" attributable to hazardous air pollutants by 75 percent by 2010.

Examples of program objectives provided in the report include:

- ▶ Developing emission standards for 174 source categories by the year 2000;
- ▶ Identifying and prioritizing the top 10 hazardous air pollutants found in urban air by 1997;
- ▶ Controlling, where feasible, all sources contributing to the top 10 urban pollutants by the year 2005; and

► Establishing health and environmental objectives for these top 10 pollutants by 2005 "which, when met, will result in adequate protection of public health and the environment from known or anticipated effects."

Action Plan

The report added that EPA should develop an "action plan" in the near future for developing and implementing the integrated air toxics strategy.

It identified three activities "that must take place" for the air toxics strategy to be effective. First, it said EPA should identify and begin to carry out, within the next three months, methods for involving interested parties in development of the strategy. Also within the next three months, the report said, EPA should develop plans to put the strategy in place for specific programs under the Office of Air Quality Planning and Standards that have responsibility for air toxics.

Finally, it said, EPA should, again within three months, "develop a management plan that ensures a continued proper focus on the air toxic program objectives, adequate resources, and delegation of program elements to program staff in such a manner as to foster communication, cooperation, and productive effort."

The report also identified a dozen "critical projects" for development of a strategy. These projects include establishing a team of EPA staff to identify existing health and environmental benchmarks, assessing the state of tools available for determining the severity of air toxics programs, setting up a team to analyze EPA's authority under Section 112, and identifying potential gaps in that authority.

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D.C. Circuit Rejects Consolidated Petitions Challenging Award Of Acid Rain Allowances

A series of challenges brought by utilities to the number of allowances awarded to them under the Clean Air Act's acid rain provisions either lacked merit or should have been brought to the Environmental Protection Agency first, a federal appeals court ruled July 23 (*Texas Municipal Power Agency v. EPA*, CA DC, No. 93-1325, 7/23/96).

The U.S. Court of Appeals for the District of Columbia Circuit found it had jurisdiction to review the utilities' claims that they received too few sulfur dioxide emission allowances and that their claims were, for the most part, before the proper court.

The court also determined that, for those claims that were not first required to be brought administratively, EPA had reasonably calculated the number of allowances allocated to the utilities based on the data available to it.

The court was specifically asked to address whether the agency properly used databases it had compiled and information submitted by the utilities in making its final allowance allocation decisions. The challengers included Texas Municipal Power Agency, American Municipal Power-Ohio Inc., Indiana Municipal Power Association, Wyandotte Municipal Service Commission, Nebraska Public Power District, Southwestern Public Service Co., and Arco Coal Co.

Methodology Attacked

The challengers generally attacked EPA's methodology for calculating baseline SO₂ emission levels from which allowances under Phase II of the acid rain programs would be calculated for 2,200 electric plants around the United States.

Those allowances were designed to reduce the total amount of SO₂ emissions by all covered plants to 8.95 million tons per year.

The baselines were generally to be arrived at by multiplying the average of the annual amount of fossil fuels consumed during 1985, 1986, and 1987 for a given plant times the lesser of either the plant's actual emissions rate or the regulatory ceiling for emissions from that plant. To that end, EPA sought to construct a National Allowance Database of fuel consumption data and SO₂ emissions data using existing government data sources such as reports submitted by utilities to the Energy Department and the emissions inventory in the National Utility Reference File of the National Acid Precipitation Assessment Program (NAPAP).

The appeals court began its review of the consolidated petitions by considering whether it even had jurisdiction over the dispute. The court ruled that Section 402(4)(C) of the Clean Air Act, which precludes review of corrections made by EPA to the NAPAP data, did not prevent utilities from challenging the data in the National Allowance Database, which is compiled from the NAPAP data.

The court also ruled that a provision requiring challenges to locally applicable rules to be brought in the judicial circuit where the source is located—in contrast to challenges to nationally applicable rules that must be filed in the D.C. Circuit—was a venue provision, not jurisdictional. As such, the D.C. Circuit said it was an appropriate forum for review of the agency's actions on the allowances for specific utilities, especially given EPA's failure to object to review by that court.

Review Of Substantive Concerns

AMP-Ohio claimed that EPA erred in its calculation of the number of allowances for which it was eligible because it did not justify its decision to use the average sulfur content of fuel burned by all Ohio utilities in 1985 in calculating the actual 1985 SO₂ emission rates for the company's Richard Gorsuch plant. The company claimed it was entitled to approximately 20,000 additional allowances.

The court, however, found that EPA's action was reasonable since there was no information on emission rates for the plant in the existing databases and since AMP-Ohio failed to submit more specific data supporting its claimed emission rate that could have verified the accuracy of the claimed rate. EPA's decision to allocate allowances to the plant based on the Ohio average, when it could have refused to allocate any allowances at all, was a reasonable accommodation, the court said.

"In this case, it would have made little sense for the EPA to allow AMP-Ohio, which failed to submit the supporting data, to benefit from its sin of omission and simply receive all the allowances AMP-Ohio claimed the Gorsuch units should receive," the court said. The court also concluded that the procedures followed by the agency insulated it from claims that it acted arbitrarily or capriciously in setting the baseline for the Gorsuch plant.

The court also said EPA was under no obligation to inform AMP-Ohio that it was required to submit data to support its proposed emission rate where that requirement had been clearly set out in EPA regulations. A second procedural flaw alleged by the company should have been raised in comments or during administrative proceedings, the court said in dismissing the claim on jurisdictional grounds.