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Clean Air Act Implementation: An Industry Perspective

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The subject of this panel discussion is to look at the successes and failures associated with the Clean Air Act (CAA).¹ As the earlier panelists have made clear in many ways it is too early to say what the successes and failures of the CAA amendments (CAAA)² have been. Although the CAAA are five years old, as a practical matter, most of the key provisions, such as the Operating Permit Program, are still in their final stages of development and implementation. But, I think enough time has passed that we can get some sense of where things are headed and of which programs, at least conceptually, make sense, and in my case with the industry perspective, what are some of the good points and the bad points of the CAA.

Some of the common criticisms of the CAA made by industry are levied against environmental regulations generally. I would just like to highlight two or three of them.

One of the key industry concerns about the CAA are the extensive requirements for monitoring, reporting, and record

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1. Clean Air Act (CAA) §§ 101-618, 42 U.S.C. §§ 7401-7671q (1994).

2. Clean Air Act Amendments of 1990 (CAAA), Pub. L. No. 101-549, 104 Stat. 2399 (1990).

keeping. Everyone in industry understands that facilities must be able to track their emissions to prove that they are complying with applicable standards. Since there are so many different programs under the CAA, these requirements tend to multiply. For example, a boiler may be subject to two or three different regulatory programs each with separate monitoring, reporting, and recordkeeping requirements. These requirements are confusing and occasionally conflicting, making compliance difficult.

Industry recognizes that significant monitoring, reporting and recordkeeping is a tradeoff for development of more self-implementing regulations. To the extent that industry is responsible for demonstrating compliance, government must develop monitoring, reporting, and recordkeeping to fulfill that good purpose. Nevertheless, ask any environmental menace what they dislike most about CAA compliance and they will typically respond monitoring, reporting and recordkeeping.

Another common industry criticism of the CAA is the burden it imposes on new construction and modifications. Installing a single, modest-sized boiler typically triggers a variety of requirements. The facility must first look to see if the unit is subject to a new source performance standard. If the boiler is small to mid-sized, the answer is probably "yes." Next, the facility must determine the impact of that boiler under the non-attainment new source review and/or prevention of significant deterioration regulations. If the facility is located in downstate New York, the facility must, at minimum, conduct a net increase analysis. If the new boiler triggers new source review, the facility must meet stringent control requirements and obtain emission offsets. This is a very complex and time consuming process. If the boiler is a utility boiler there is the added burden of acid rain provisions. All of these changes must ultimately be incorporated into the facility's Title V Permit.

As this simple example illustrates, the multiple layers of requirements make new construction and modification very difficult and very time consuming. These complications and delays threaten industry's ability to respond to changing

markets and, thus, its ability to remain competitive both nationally and globally.

I am not sure industry would agree that the last problem I have identified is a problem: the failure of the United States Environmental Protection Agency (EPA) and the states to meet statutory deadlines. Initially, if the CAA requires the EPA to develop a standard, and the agency is three years late, your response may be, "good, that's three years I don't have comply." At some level, however, government's failure to meet statutory deadlines can make things difficult for industry. The best example of this phenomenon, particularly in New York State, has been the development of the Title V Operating Permit Regulations.

The EPA was late in developing its Title V Operating Permit Program largely because of political activities at the federal level. This delay made it difficult for New York State to get its own Title V process underway. Then, largely because of efforts by New York to make its regulations more responsive to industry concerns and simpler to implement, those regulations themselves were delayed, raising the possibility that the EPA would impose its own operating program in the state. As a result, facilities faced the unsettling prospect of developing Title V Permits without knowing which program would apply. This type of uncertainty makes industry very nervous.

An additional criticism unique to the CAA is the State Implementation Plan (SIP) process. While the federal hazardous waste regulations are extremely complex, it is not all that hard to determine what standards apply to a particular unit, such as a hazardous waste tank. In New York it is enough to look at the New York Code of Federal Rules and Regulations (NYCRR) to identify the requirements for hazardous waste tanks and update your research with whatever new federal standards have been adopted since the state regulations.

The delegation process under the hazardous waste program is relatively straightforward. The SIP process is much more complex. It is very goal oriented. The CAA, in effect, says to the states, "these are the goals we want you to meet;

and we want you to develop a plan that explains how you are going to do it. We will give you some general guidelines as to what that plan should contain, but it is up to you to come up with the details." This approach means two things. First, it means that the SIP process is constantly changing. Second, it means that even small changes to a facility may implicate the EPA. A facility seeking a variance from New York's reasonably available control technology requirements cannot simply get approval from the New York State Department of Environmental Conservation (DEC). The EPA must also approve the variance. This extra layer of review complicates the approval process and lends it an air of uncertainty.

We have discussed some of the problems with the CAA. What are its successes? Some of these have already been touched upon. From an industry perspective, there is enthusiasm, at least in theory, for the new emphasis on market-based solutions to air pollution control problems. The Acid Rain Program represents the first time industry has been told, "we are going to set some broad standards and you figure out how to implement them. If you want to have one facility that does not meet the standards, that's fine as long as it possesses the allowances equivalent to your actual emissions." There is similar enthusiasm for the EPA's proposed Open Market Trading Rule which also has the potential to offer industry the flexibility to respond to changing markets without compromising environmental compliance.

The number of such programs is multiplying so fast that it is sometimes hard to keep track. For example, there is the Acid Rain Program for utilities. There is also, potentially, the EPA's open-market trading rule. In New York State there is the emission reduction credits program under the state's new source review regulations. Then, if you are in the northeast, you have to worry about the upcoming Nitrogen Oxide (NOx) Budget Model Rule. Each of these programs has slightly different mechanisms associated with the trading process which can make the acquisition and trading of various reductions somewhat difficult.

Another big success, at both the federal and state level, is the greater attention paid to the practical implications of im-

plementing the CAA. Perhaps the best example of this phenomenon is in the Title V Program. In July 1995, the EPA issued what has come to be known as the EPA White Paper on Title V Permits. What the EPA White Paper essentially did was say to the states and industry that the EPA, "recognizes that people's perception of the CAA is complicating its implementation, and that states and businesses are concerned that they are going to be asked to provide a lot of information under the program that is not necessarily essential." The EPA White Paper clarified what sorts of information, in general terms, is required by Title V. It also specified that facilities do not need to quantify all of their emissions if they are regulated under Title V - it is enough to quantify those emissions that have applicable requirements attached to them. If there are minor sources at the facility, emissions from these sources do not have to be quantified or described in detail. It is enough to let the EPA know that they exist. This is the sort of advice that, from an industry prospective, makes implementing the Title V Program much easier.

Another promising development is the EPA's greater efforts to reach out to industry and environmental groups before regulations are proposed, in hope of ironing out problems before regulations are drafted. This effort is exemplified by the Maximum Achievable Control Technology (MACT) Partnership Program. With the MACT partnership, the EPA basically recognized that it lacked the resources to develop the standards on their own. It reached out to industry and to the states and said "we would like you to provide us with some help." This program gives industry a chance to shape the regulations while still providing the necessary opportunities for public notice and comment.

The most striking aspect of the CAA implementation program is the effort to involve industry and the public in the regulation development process. This is particularly true in the case of New York's air permitting regulations. The DEC made the draft regulations available from the outset and allowed two years for negotiations as an attempt to accommodate the interests of industry and environmentalists alike.

The result is a real success story. The DEC's Part 201 regulations are relatively easy to understand and flexible.

These and other developments at the federal and New York State level reflect a greater understanding of the practical implications of regulating air pollution. Perhaps the greatest example of this phenomenon is New York's Air Permitting Regulations. Approximately three years ago, New York set about to revise their Air Permit Regulations to incorporate the requirements of the Title V Program. The early drafts of the regulations were problematic. They were extremely confusing and imposed mandates on permittees beyond those required by the federal program. Over two years, however, the DEC met repeatedly with industry and environmental groups, revising the regulations to accommodate competing concerns. The result is an air permit regulation which has been widely applauded for its relative simplicity, clarity and flexibility. Even the most jaded in the business community concede that the DEC did an excellent job in developing its Air Permit Regulations. The final success or failure of the program cannot, however, be judged until the first permits have been issued.