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Implementing the Clean Air Act Amendments of 1990: Major Rules 1995 - 2000

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Law school is an excellent forum in which to discuss the issues that are ahead of us rather than behind us. I welcome this opportunity to speak to you about the years 1995-2000. I am going to take a broad view, today, speaking about the major rules and implementation issues coming forward. There are three areas in the Clean Air Act (CAA)¹ I will be focusing on today. First, section 112, which includes air toxic standards, or hazardous air pollutants (HAPs) (these phrases are used interchangeably).² Second, Title V, which focuses on implementations.³ We are seeing a lot of good progress being made in this area. Third, the Enhanced or Compliance Assurance Monitoring Program, which is what I see as the major battleground for the next five to ten years for CAA issues.⁴

Making hard choices is one of the things that both the Environmental Protection Agency (EPA) and industry representatives continuously struggle with when people ask us about how we are progressing. In reality, when Congress passes a law, they cannot look at all the implications and de-

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1. Clean Air Act (CAA) §§ 101-618, 42 U.S.C. §§ 7401-7671q (1994).
2. *See id.* § 112, 42 U.S.C. § 7412.
3. *See id.* § 501-507, 42 U.S.C. § 7661(a)-(f).
4. *See* Enhanced Monitoring Program, 59 Fed. Reg. 66844 (1994) (to be codified at 40 C.F.R. pt. 51, 52, 60, 61 and 64).

tails concerning the regulations of the programs. We heard from prior speakers today that after a law is passed, there are all these regulations, specifically dealing with resource allocation and control. Bill Rosenberg said that utilities, cars and gasoline are the big issues, and the EPA is obviously focusing its resources there. But, that is for air quality. A big issue for the economy is what Bill Rosenberg referred to as the "noise." The "noise" is what the rest of us out there in the manufacturing sector, trying to comply with these laws, are dealing with, and the resource allocation issues impact there as well.

The second thing is implementability, and I know that is not a word, but it's a word that I use all the time because regulations need to be understandable and implementable for the person at the plant. I used to be that person at the plant, and we cannot have lawyers running around the plant telling us how the regulations apply. We need to have technical people understand these regulations, and we also need to have operators, who are not environmental health and safety experts, be able to understand and comply with what their job is under that regulation. The third issue is cost and the fourth is fairness.

For resource allocation issues, we need to make tough decisions about companies versus government setting standards. I think that the EPA is in a tough situation regarding their budget. I also think that the EPA has not used their budget as wisely as they could, since there are always reasons as to why these things happen, and it is not without basis. With the CAA, what you find is that, in many cases when the EPA does not issue a rule, the affected facilities have to set their own standards under the law's case by case provision. Then these case by case standards are reviewed and approved individually by state agencies. That is a tremendous resource burden. When allocating the country's resources, it should be the EPA and not the individual companies setting the standards.

Second, there is a conflict between state agencies and federal agencies over who should set standards. In this area, there are a host of issues that are very controversial. The

first is the issue over so called "potential to emit." There were two cases decided in 1995 that invalidated EPA's rule on the potential to emit.⁵ Now, potential to emit is the measure of how big the source is. Dan asked if these "mom and pop" operations are major sources. Well, they might be major sources if you look at how much they could emit under EPA's rules. However, in reality, many of them are very small sources which do not emit much at all.

The problem with EPA's rules is that the Agency required individual facilities to have federally enforceable limits on their emissions which allows them to be able to say "hey, I do not emit that much." The court informed the EPA that it is not justified in setting federal limits. There is no valid reason for this, and it presents a real problem for states because a lot of states do not have the authority to issue these federally enforceable permits. As it now stands, the EPA's requirements are sweeping the states into the programs unnecessarily, calling them big when they are little. What industry wanted was for the EPA to recognize that states have been issuing permits for years, and they know how to do it. These are landmark cases. Unfortunately, the EPA has responded to the cases by saying, "we will conduct rule-making. Now, that will take several years, and in the meantime, you are still stuck with federal enforceability. Actually, EPA's rule-making is going to propose retaining federal enforceability because no matter what the court says, they intend to find a way to justify it." And, if you think about it, there are ten years of records of the EPA trying to justify this provision, and the court rejected it in its opinion. Therefore, I question whether they will be able to do it.

On the air toxics side, we also have a case that deals with whether the protection to emit can be done. Then, on the local side, we have the MVMA⁶ case, which was in New York, and the EMA⁷ case which is currently in the District of Co-

5. See *Chemical Mfrs. Ass'n v. EPA*, 70 F.3d 637 (D.C. Cir. 1995); see also *National Mining Ass'n v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995).

6. See *Motor Vehicle Mfrs. Ass'n v. Jorling*, 557 N.Y.S.2d 346 (1st Dep't 1991).

7. See *Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075 (D.C. Cir. 1996).

lumbia Circuit. This case is a very complex case which consists of the argument over whether national standards should be established for off-road engines and the authority of the states issuing those standards.

The third thing is uniformity versus flexibility. It is funny because you hear "flexibility, flexibility, flexibility" in complying with standards. That is what we need, and you see that in the Acid Rain Program. At the same time, as a company, I want to be sure that the standard by which I am being judged is the same standard by which my competitor is being judged. Therefore, you need uniformity in terms of how you judge emitters, because as a competitive matter, you do not want to be put at a disadvantage. Then again, you want flexibility to comply with the regulations in the most cost-efficient way.

The EPA has to deal with these tensions as well, because they want to have an enforcement program that is fair. I think that is pretty clear. Then, you have government versus citizen enforcement, and also what evidence can be used, which I will discuss later. Finally, you have traditional mobile versus stationary source issues, with the burden on the general public with inspection and maintenance (I&M) programs for cars.

On implementability, we have three examples of proposals gone awry in EPA's recent history, and we are seeing a lot of changes to try to correct them. I think that the battleground and the challenge for the EPA over the next five years is to make these things implementable, so normal people can understand and apply them to their facilities on a day-to-day basis.

The first is the enhanced monitoring proposal. The proposed rule was a nightmare in terms of implementability. It established requirements that were so ambiguous that no one could figure out exactly what was required. When the EPA sent an independent contractor to verify General Electric's (GE) cost estimates for this program at one of our facilities in New York, they came up with a dollar figure and had to make several difficult interpretations. Their dollar figure was \$10 million over ten years for a medium-sized plant. That is why

this proposal was withdrawn. There was no real benefit for a plant that was in compliance with the law.

From the Title V proposal in August 1994, we saw improvements in a new proposal in August 1995. So, we are seeing improvements there. CAA § 112(g), an April 1994 proposal,⁸ was so confusing that no one understood what it meant, except that it was really bad. Now, EPA has come out with a new proposal. We are seeing a lot of improvement and recognition of reality by the Agency making this a "doable" thing for people.

Beth also talked about implementation detail. That is a real issue. We need to be sure that we do not have people watching people that are watching people do something. That is something we find in the regulations constantly and that is a challenge for the future. We need to recognize the real cost of the rules and that administrative burdens are costly. Hiring a person to travel around and continuously write down that the temperature is five degrees costs money. The systems that you have to establish - the data management systems - all cost money, and that is something that we do not see being recognized. It is something that we are going to have to push to achieve.

Finally, I will focus on fairness principles. This is something that we are finally seeing the courts recognize, the reality of the implementation issue. The *GE* case,⁹ is a case that we won. The principle of that case is that when there is a regulation that is ambiguous, and you, unaware of any other interpretation, believe that you have the right interpretation, the EPA can come in and tell you which interpretation you must meet. However, they cannot make you pay fines and go to jail for not complying with the regulation under their interpretation. The court recognized that due process applies to the EPA and that is what we are seeing cited time and time again. So, from a legal standpoint, it is a very significant case.

8. See CAA § 112(g), 42 U.S.C. § 7412(g).

9. See *General Electric v. EPA*, 53 F.3d. 1324 (D.C. Cir. 1995).

Ogden Projects v. New Morgan Landfill Company,¹⁰ is also a case where the court found the defendant in violation. It was a citizens suit case brought by a competitor against a landfill. The court essentially said they could not figure the regulation out. Since it took the court days to comprehend the regulation, they did not penalize the company for not figuring it out. Rather, the court required the defendant to get the necessary permit. Thus, we are seeing progress in the courts.

In addition, you have *United States v. Telluride*,¹¹ which is a case that recognized, in the wetlands context, that the statute of limitations of five years can bar both financial remedies for the EPA and equitable remedies meaning they cannot force a facility to obtain a permit. So, we are looking at real changes in the way that the CAA is being enforced.

Section 112, Air Toxics, The Maximum Achievable Control Technology (MACT) Program,¹² is the primary EPA and source activity in this program and is going to be in effect from 1990 into 2000. The EPA has about 100 standards to issue from now until the year 2000, and we are in a dire situation because the EPA has not even begun to look at the year 2000 categories. The EPA recognizes this too. So, they started something called "presumptive MACTs," which are basically rulemaking by guidance. They are trying to create a practical method for rule-making based on the inadequate information they usually gather or fail to gather. They call in some industry folks and some state folks and they try to figure something out. While this interactive process is a good thing to have, the fear of many industry people is that these presumptive MACTs will just sit out there and be used by the states even though they are not being issued with notice and comment. They are also not being developed with the depth of investigation that is needed to make standards technically supportable.

10. See *Ogden Projects v. New Morgan Landfill Company*, 911 F. Supp. 863 (E.D. Pa. 1996).

11. See *United States v. Telluride*, 884 F. Supp. 404 (D. Colo. 1995).

12. See CAA §412, 42 U.S.C. § 7412.

I think it is important that the EPA is trying to get the job done and to get the controls on, and that we support it. At the same time, you have to realize that the Congress set out procedures in the Administrative Procedures Act (APA) requiring notice and comment on rulemaking.¹³ Again, with resources, we are going to have to figure out how to allocate our resources in order to achieve our goals, if these goals are worth achieving. If they are, we should be focusing on them.

Case by case MACT determinations under section 112(j)¹⁴ is what happens if the EPA misses its deadlines. This could impose substantial burdens on sources and states which is why it is important to get those standards out. With 112(g),¹⁵ as I have mentioned, the big debate has been the implementation of this provision or its deletion from the CAA. I know that there is a legislative panel that will discuss that, and the EPA has issued a new proposed rule that addresses only, as they call it, "big new stuff" (where you would apply case by case MACT standards to big new emissions units during the transition period before these new source categories standards are set or before the section 112(j) requirement comes in). We support this approach.

Regarding Title V, we are seeing that the biggest challenges in the next five years are going to be on companies and on states. Managing the papers in the program will be very difficult - the computer disks, maintaining "transparency," and the like. By "transparency" I mean that this is not a substantive program, and the challenge for the states is not to lump a bunch of new requirements into the permits even though they have no substantive authority to do so. For us, it will be to manage the papers so we can document our compliance. That is going to be an interesting project in terms of keeping everything together so that the responsible official for the plant can certify compliance.

Flexible permitting is very resource intensive. The EPA is trying to move toward that, but right now, I think, it is

13. See CAA § 112(j), 42 U.S.C. § 7412(j).

14. See CAA § 112(j), 42 U.S.C. § 7412(j).

15. See CAA § 112(g), 42 U.S.C. § 7412(g).

more myth than reality. It will be a few years before we really see progress on flexible permitting. The basic goal right now is just to get the permits issued.

Finally, on compliance assurance monitoring, I just want to say that the EPA has moved to create a more implementable program by looking at assurances of compliance rather than at absolute knowledge. The challenge with Title V monitoring is going to be to make sure that requirements are technologically and economically feasible. The substance of this is extremely boring, but it is probably the biggest EPA action that we are going to see in the next five years. It will amount to a "holy war" in terms of how the lawyers in the EPA's General Counsel's office feel about it, how the enforcers in the enforcement offices feel about it, how the Justice Department feels about it, and how the industry feels about it. The industry feels that standards are now being changed because they were set on the basis of "reference methods." That is how the numbers in the standards were derived. So, to say that all of a sudden you have to now change how you are supposed to meet them, without changing the numerical standard to reflect the various operating conditions, could require people to install entirely new control systems even though they have been complying with the same standards for years. The issue is what these standards mean.

The last thing we have to do is continue to challenge ourselves over the next five years to look factually at these situations. Industry cannot assume that everything the EPA is trying to do is bad. Likewise, the EPA cannot assume that industry is trying to get away with something, when, in reality, they are not; industry is just trying to figure out how to comply. We have to assess the benefits and the real costs of the various courses of action. We also have to make some rational choices about our resources, since we do not have enough of them to do every program to its fullest extent.