

Environmental Regulatory Update – Climate Change & Air

National Shipbuilding Research Program

Joint Panel Meeting – Johnstown, Pa

September 30, 2008

Seth A. Rice, Esq.

412-394-5490

srice@bccz.com



BCCZ

BABST | CALLAND | CLEMENTS | ZOMNIR

A PROFESSIONAL CORPORATION

Background on BCCZ

- About me
- BCCZ formed in 1986 (Pittsburgh, Pa)
- Now 66 attorneys practicing in 3 offices
- Core practice – environmental regulatory law
 - ✓ National full-service environmental practice
 - ✓ 16 dedicated regulatory lawyers – many have technical background and/or industry experience
 - ✓ Significant sector experience:
 - Metals
 - Chemicals
 - Energy generation and mining

BCCZ

BABST | CALLAND | CLEMENTS | ZOMNIR
A PROFESSIONAL CORPORATION

Agenda

- Greenhouse Gas Regulatory Update
- Clean Air Act Update
- Renewable Energy Update



Summary of GHG Updates

- Status of *Massachusetts v. EPA* – endangerment finding
- Legislative Developments
- GHG Advanced Notice of Proposed Rulemaking
- Water Issues – UIC rule and National Water Strategy

Massachusetts v. EPA

- April 2007 Supreme Court decision - EPA claimed it lacked authority to regulate GHGs under the CAA – case applied to new motor vehicles
- Court held
 - ✓ GHG's are an “air pollutant” under the CAA
 - ✓ EPA cannot rely on policy decisions in conducting its “endangerment analysis” under section 202(a) of the CAA
- June 2008 DC Cir. petition by group to mandate endangerment finding was denied
- No endangerment finding from EPA, yet

Legislative Update

- National Legislation Developments
 - ✓ Cap and trade program (mandatory GHG reductions)
 - Lieberman-Warner bill debated for 1 week in June 2008 without passage
 - No current action; watch for Jan. 2009 push
 - ✓ Upcoming GHG Inventory Rule
 - Mandated by Congress in 2008 spending bill
 - Requires – “mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy” (emphasis added)
 - EPA’s inventory protocol unclear at this time
 - Proposed rule by Sept. 2008; final rule June 2009
 - No mandatory GHG limits; forerunner to cap and trade(?)

Legislative Update cont.

- State and regional approaches have proceeded in the absence of national legislation
 - ✓ RGGI program in the Northeast – credit auctions occurring
 - ✓ Western Climate Initiative (includes parts of Canada)
 - ✓ California program
 - ✓ PA Climate Change Act (passed summer 2008)
 - GHG inventory
 - No mandatory limits
- International Developments
 - ✓ Post-Kyoto (2012) framework being negotiated / off-set issues
 - ✓ Role of developing countries uncertain (China, Brazil, India)
 - ✓ Unclear if US will participate fully or pursue own program

Advanced Notice of Proposed Rulemaking on the Regulation of Greenhouse Gases

- ANPR Background

- ✓ Published at 73 Fed Reg. 44354 (July 30, 2008)
- ✓ Comment deadline Nov. 28, 2008
- ✓ Analysis under existing CAA
- ✓ EPA's 'response' to *Mass v. EPA* decision
- ✓ Acknowledges human role in climate change

- Key ANPR Issues

- ✓ OMB review process
- ✓ Endangerment discussion
- ✓ Regulatory ramifications of an endangerment finding

ANPR Update

- No OMB approval
 - ✓ Administrator believes CAA is ill-suited
 - ✓ Significant interagency comment letters
 - ✓ OMB review process will need to be redone
- Section 202(a) Endangerment Language
 - ✓ Standards must be prescribed for any air pollutant from new vehicles “which in his judgment cause, or contribute to, air pollution which may be reasonably anticipated to endanger public health or welfare.”
 - ✓ Ripple affect – similar language throughout CAA (e.g. marine vessels, non-road vehicles, and shore-based stationary facilities)



ANPR – Potential GHG Regulatory Pathways

- ANPR focuses on ramifications of a section 202(a) finding of endangerment under the existing CAA
- Positive endangerment finding under section 202(a) may trigger one or more of the following:
 - ✓ NAAQS for GHGs
 - ✓ NSPS standards for GHGs (new & existing categories)
 - ✓ NESHAP/MACT for GHGs
 - ✓ Permitting requirements (PSD/NSR/Title V)

NAAQS Regulatory Pathway

- Endangerment finding issues
 - ✓ GHG NAAQS listing (i.e. CO₂)
 - ✓ NAAQS criteria development
 - ✓ Area designations (attainment v. non-attainment – potentially significant implications)
 - ✓ Regulatory deadlines triggered (e.g. 5 yrs to reach attainment)
- Primary v. Secondary NAAQS Standard – one, both, neither ? (nature of health/environmental affects to be protected is unclear)
- State's ability to address cross-border GHG emissions very limited ; attainment issue

NSPS Regulatory Pathway

- Categorical-based standards
- Potential ramifications of endangerment finding
 - ✓ Listing of new source categories not currently subject to an NSPS (e.g. commercial buildings)
 - ✓ Existing source categories – issuance of standards for GHG emissions
 - Advocacy groups petitioning for limits
 - Magnitude of GHG emissions from category potentially relevant
 - Cost and availability of controls
 - ✓ Trigger PSD permitting (“otherwise regulated”)

NESHAP Regulatory Pathway

- Major source
 - ✓ Very low threshold (10 TPY / 25 TPY)
 - ✓ Many small sources potentially subject
 - ✓ HAP listing of GHGs (*cannot list CFCs or ODSs as HAPs; separately regulated)
- MACT Standards:
 - ✓ “Maximum degree of reduction in HAP emissions”
 - ✓ GHG control technology uncertain
 - ✓ Control cost is irrelevant

Potential Permitting Implications

- Common Issue – low major source threshold for GHGs (100 TPY/250 TPY)
- PSD
 - ✓ Attainment areas
 - ✓ BACT controls – cost considered
 - ✓ Vast increase in PSD applicability (up to 3,000 permits a year from about 300 today)
- NSR
 - ✓ Non-attainment areas
 - ✓ LAER controls – cost irrelevant
- Title V Operating Permits

Potential Permitting Alternatives

- Raise Major Source Threshold
 - ✓ Limit number of subject sources – raise to 10,000 TPY / use a CO₂ equivalency approach.
 - ✓ Legal problem – CAA statutory provision
- Develop general PSD/Title V permits
- Legislative Fix
 - ✓ Exempt GHGs from PSD/NSR/Title V programs
 - ✓ Establish a cap and trade program or carbon tax
 - ✓ Presently, little consensus on the legislative fix



GHG Regulation of Marine Vessels/Marine Engines

- Oct. 3, 2007 petition to regulate GHG emissions from marine vessels (Oceana, Friends of the Earth, and Earth Justice)
 - ✓ Seeks endangerment finding for marine vessel GHG emissions (recall section 202(a) language)
 - ✓ Establish strict sulfur content regulation of marine vessel fuels
- EPA has not responded to the petition
- On July 31, 2008 petitioners filed Notice of Intent to Sue under section 304 for EPA's failure to respond to petition within 180 days

Climate Change - Water Issues Update

- Proposed UIC Rule

- ✓ Published July 25, 2008
- ✓ Comment period ends Nov. 24, 2008
- ✓ Regulation of the geologic sequestration of CO₂ using underground injection wells (Safe Drinking Water Act)
- ✓ Create new Class VI UIC well category
- ✓ Does not cover
 - Capture and transport of CO₂
 - Property rights
 - Transfers of liability between entities
 - Surface release of CO₂ risks
 - Air regulation under the CAA

Water Issues Update cont.

- Other water issues - March 1, 2007 National Water Strategy Memo
 - ✓ Recognizes climate change impacts on water resources
 - ✓ Focuses on
 - Mitigation of GHGs
 - Adaption – physical response to rising sea levels and coast line changes
 - Research
 - ✓ Petitions have been filed regarding alleged coastal water impairment from pH changes due to CO₂



Other Climate Change Issues

- Adaption issue – infrastructure considerations for shore-based operations from rising sea levels and the associated costs.
- Investment disclosures
 - ✓ Petitions to SEC and state agencies for greater disclosure of GHG emissions and ‘risk’
 - ✓ New environmental accounting rules coming down the line (although, may be deferred with current financial crisis)
- Shareholder Advocacy
 - ✓ Pressing company Board’s for GHG information
 - ✓ Driving GHG reduction announcements, despite absence of current regulation
- Climate change litigation on the rise

Clean Air Act Update

- Shipbuilding and Ship Repair (Surface Coatings) NESHAP Update
 - ✓ Residual risk review
 - ✓ MACT amendments
- Quick PM_{2.5} implementation update



Shipbuilding and Ship Repair (Surface Coatings) NESHAP Update

- Background

- ✓ 1992 – EPA listed surface coating operations as HAP emission source
- ✓ Original MACT issued 12/15/1995 – required control of VOC emissions from marine coating operations
- ✓ 1995 MACT excluded certain pleasure crafts from the definition of “ship”
- ✓ EPA – original MACT *inadvertently* excluded large pleasure craft > 20 meters from definition of “ship”; significant HAP source



Shipbuilding and Ship Repair (Surface Coatings) NESHAP Update

- Subpart II MACT Amendment (issued 12/29/2006)
- 2006 revision issued to ‘clarify’ issue regarding applicability of MACT to pleasure craft
- EPA withdrew 2006 revisions in February 2007, citing “adverse comments”
 - ✓ Re-opened comment period
 - ✓ Unclear how/if EPA will proceed

Shipbuilding and Ship Repair (Surface Coatings) NESHAP Update cont.

- On-going Residual Risk Review

- ✓ Periodic review (every 8 years) required of all MACT standards (i.e. technology-based standards)
- ✓ Issue is whether more stringent standards are required to maintain an “ample margin of safety”
- ✓ General Note: June 2008 D.C. Cir. case (NRDC v. EPA) upheld EPA’s use of a cancer risk threshold of 100-in-1 million; NRDC had argued 1-in-1 million risk applied
- ✓ EPA undertaking review ‘backlog’ for various MACT standards by groupings.



Shipbuilding and Ship Repair (Surface Coatings) NESHAP Update

- Shipbuilding coatings residual risk review—
Group 2C
 - ✓ Slated for residual risk determination proposal in Summer 2009
 - ✓ EPA particularly examining welding, abrasive blasting, and solvent cleaning emissions pursuant to the residual risk review
 - ✓ On-going discussions regarding appropriate emissions factors for abrasive blasting and welding operations; question as to whether EPA's factors are appropriate for the industry sector



Quick PM2.5 Implementation Update

- Fine particulate NAAQS revised in 2006
 - ✓ 24-hour standard went from 65 $\mu\text{g}/\text{m}^3$ to 35 $\mu\text{g}/\text{m}^3$
 - ✓ Annual standard remains 15 $\mu\text{g}/\text{m}^3$
 - ✓ PM10 24-hour standard retained
- Final area designations due Dec. 2008
- SIPs due 3 years after effective date of designations
- Attainment required within 5 years (~ 2013) after effective date of designations (10 years with an extension)

Renewable Energy Update

- Background

- ✓ Connection between renewable energy and climate change issue
 - Fuel economy issue
 - Use of non-fossil fuel based fuels
- ✓ National security dimension
- ✓ Continued implementation by DOD of the Jan. 2007 E.O. 13423 measures

Renewable Energy Update cont.

- Summary: 20-in-10 fuels program
 - ✓ Announced May 2007 – Administration response to Mass. v. EPA decision
 - ✓ Enacted by Congress Dec. 2007 – Energy Independence and Security Act (“EISA”)
- Goal – cut U.S. fuel consumption by 20% in 10 years
 - ✓ 35 billion gallons of alternative fuel by 2017
 - ✓ Reduce foreign fuel imports
 - ✓ Decrease GHG emissions (> 80% less GHGs than current reformulated fuels)

Renewable Energy Update cont.

- Transition from corn-based ethanol feedstock to cellulosic ethanol
 - ✓ Reduce reliance on food crop feedstock
 - ✓ Make cellulosic fuel competitive
- EISA “Savings Clause” issue
 - ✓ Expressly preserved GHG emission regulation option under the existing CAA
 - ✓ Heavily debated issue; Administration sought to ‘cut GHG regulation off at the pass.’

Renewable Energy Update cont.

- Shipbuilding industry
 - ✓ Equipment replacement may significantly reduce energy usage, but cost is a major consideration
 - ✓ Energy efficiency improvements through process improvements also present good opportunities
- Other energy issues
 - ✓ Extension of Production Tax Credit (i.e. wind development)
 - ✓ Emerging state/federal renewable energy incentive programs for demand management and energy efficiency
 - ✓ Comprehensive national energy policy appears to still be a political 'football', although off-shore drilling ban was allowed to expire



General Conclusions

- GHG regulation is very likely, although the final form and regulatory ‘vehicle’ is unclear
- Advocacy groups are pressing governments, industry, and the investment community hard on climate change and air emission regulatory issues
- Shipbuilding coatings NESHAP developments should be followed closely
- Energy policy is likely to continue to be a dominant issue, particularly as national GHG legislative discussions re-start post-Jan. 2009

Contact Information

If you would like more information about BCCZ's legal capabilities or about environmental regulatory issues generally, please contact:

Seth A. Rice, Esq.

412-394-5490

srice@bccz.com

www.bccz.com

