

Administrative Law News



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Message From The Chairman

The year ended June 30, 1991, was a very successful one for the Administrative Law Section. The Section sponsored two educational programs, the National Regulatory Conference (co-sponsored by the State Corporation Commission and the Marshall-Wythe School of Law) and a program at the annual meeting of the Virginia State Bar. The Section continued its publishing efforts through the *Administrative Law News* and the dedicated, January 1991 issue of *The Virginia Lawyer*. The Board also reviewed and provided recommendations related to proposed changes to the Virginia Supreme Court Rules governing appeals pursuant to the Administrative Process Act.

For fiscal year 1991-92, the Board's goals are to build upon our successful past by developing new programs focused on the needs of administrative lawyers in the Commonwealth, continuing sponsorship of those programs that have proven to be of value to the Bar and the Commonwealth,

seeking sustained growth in Section membership, and expanding the core of active members to include a more significant portion of our total membership.

To implement these goals, the Section will:

- continue to co-sponsor the National Regulatory Conference,
- present a program at the annual meeting of the State Bar,
- assume responsibility for the May 1992 issue of *The Virginia Lawyer*, dedicated exclusively to administrative law, and
- continue to publish the *Administrative Law News* on a quarterly basis.

The Board of Governors anticipates a busy year for the Section. The Board solicits and would welcome any comments or suggestions that any member of the Section may have about any of its projects. If you have any thoughts, especially about new activities that the Board should pursue on behalf of the Section, please contact any member of the Board of Governors with your suggestions.

Finally, I would like to warmly welcome, and to note that I am looking forward to working with, the newly elected members of the Board: Briggs W. Andrews, Mary Lynne Bailey, Deborah V. Ellenberg, Charles H. Koch, Jr., Donald G. Owens, and Stephen H. Watts, II.

— Kenworth E. Lion, Jr.

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An overview

The Clean Air Act

✪ *Editor's Note: This article was written by Lisa A. Davis, an associate at Christian, Barton, Epps, Brent & Chappell in Richmond.*

While the Environmental Protection Agency struggles to draft the hundreds of regulations needed to implement the new Clean Air Act,¹ businesses whose survival may depend on knowledgeable, farsighted planning must endure a period of uncertainty. The extensive amendments² passed by Congress last year after intense debate and negotiation sketch only the broad outline of a regulatory picture which will affect us profoundly — both as businessmen and as individuals. This article describes the general contours of that picture and offers a framework for understanding the myriad regulations EPA will draft throughout this decade.

The Clean Air Act ("the Act") prior to the 1990 amendments had many vehicles for protecting air quality. The Act established air quality criteria which were to be implemented through pollutant specific National Ambient Air Quality Standards ("NAAQS") for six pollutants, called "criteria pollutants." The NAAQS (pronounced Naks) were to be enforced through State Implementation Plans ("SIPs"), EPA-approved state programs which have been and will continue to be the primary mechanisms for enforcement of the

Act. The SIPs categorize areas in a state as "attainment" or "nonattainment" for each criteria pollutant, depending on whether the ambient concentrations of that pollutant meet or exceed the applicable NAAQS. The permitting requirements for a given plant vary according to the classification of the area in which the plant is located. "Existing" sources under this scheme have not been required to have permits, but merely to register their emissions.

Using this framework, states administer "new source review" programs to issue permits to proposed new sources. In attainment areas new sources must use the "best available control technology" ("BACT") to reduce their emissions, and "major" new sources must insure that they do not increase ambient concentrations above specified "increments." In nonattainment areas, sources must generally use the technology which provides the "lowest achievable emission rate" ("LAER") and obtain "offsets" of their emissions from other sources in the area, to prevent the new source from causing any net increase in emissions.

While this basic structure has remained intact, the 1990 amendments expand and tighten the permitting program, add new programs to curtail the manufacture of ozone depleting chemicals and the emission of sulfur dioxide, tighten controls on vehicle emissions, require the development of cleaner fuels, expand enforcement resources and enhance penalties for violations.

The permit, described in Title V of the amendments, will become the primary tool for controlling pollution by stationary sources. In contrast to prior law, the amendments require all sources, not just new or modified sources, to obtain permits. The permits, issued for a term of up to 5 years, will require the sources to file periodic discharge monitoring reports describing their compliance or violation of the permit standards.³ These reports will provide interested environmental groups

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James C. Dimitri, Editor
Administrative Law News
Christian, Barton, Epps, Brent & Chappell
1200 Mutual Building
Richmond, Virginia 23219

James A. Schmidt, Managing Editor
Administrative Law News
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

¹ The Clean Air Act, 42 U.S.C. §7401 et seq.

² The Clean Air Act Amendments of 1990, Pub. L. 101-549, Nov. 15, 1990, 104 Stat 2399.

³ 42 U.S.C. §§7661a, 7661c.

or others with inexpensive, virtually unassailable proof of violations and are expected to produce a wave of citizen litigation similar to that which followed filing of such reports under the Clean Water Act in the 1980s.⁴

Permits should be drafted as broadly and comprehensively as possible to take advantage of the so-called "permit shield." Under the "shielding" principle, a source will be deemed in compliance with all laws and regulations spelled out in its permit.⁵ In addition to listing the applicable laws and regulations, permits should expressly state that the permit shield applies.

EPA is required to issue regulations outlining minimum requirements for the new state permit programs by November 15, 1991.⁶ Within two years of that date, states must submit plans for a permit program to EPA, which must then approve or disapprove the program within one year of receipt.⁷

Title I of the amendments attacks the nonattainment problems for certain pollutants for which NAAQS were established under the old Air Act: ozone, carbon monoxide, particulate matter and sulfur dioxide. The amendments require "major sources" to install "reasonably available control technology" ("RACT") to control emission of these pollutants. The definition of "major source," and therefore the sources which will be subject to the RACT requirements, varies depending on the severity of the pollution in a given area. In "marginal" and "moderate" areas, a major source is defined as having the potential to emit at least 100 tons of a pollutant per year. In "extreme" areas, sources that can emit 10 tons per year are major sources. In addition, the construction of new sources, or any modification which will significantly increase emissions, will continue to require installation of pollution control technology obtaining the "lowest achievable emission

rate," and the purchase of "offsets" representing emissions reductions from other sources. The new requirements will be phased in during 1993 and 1994 if EPA and the states meet the deadlines established in the amendments.⁸

In an effort to control release of hundreds of pollutants not addressed by previous versions of the Act, Title III of the amendments lists 189 toxic air pollutants, which are those pollutants hazardous to human health but not specifically covered by other portions of the Act. The EPA is required to publish a list of source categories for those pollutants by November 1991, and must then issue "maximum achievable control technology" ("MACT") standards for each source category. The MACT standards will be based on the best demonstrated control technology or practices now used within the regulated industry. Standards for the first category of sources must be established by November 15, 1992, and standards for all affected sources must be issued by the year 2000. Sources are required to meet the MACT standards within 3 years after they are established.

Under a "voluntary reduction" option, companies that voluntarily reduce emissions of these toxic pollutants by 90 percent from a baseline year (generally 1987) will receive a 6 year extension on imposition of the MACT standard. To qualify for this extension, the reduction must be achieved before MACT standards applicable to the source are proposed, or the source must make an "enforceable commitment" to achieve the reduction before the standard is proposed and the reduction must be achieved before January 1, 1994. The voluntary reduction option is intended to allow companies to design cost-effective emission reduction approaches and reduce the cost of compliance over the long-term.⁹

The various schedules under which the above described RACT and MACT requirements will

⁴ The amendments also provide for "whistle-blower awards" to citizens of up to \$10,000 for information leading to penalties or convictions under the Act. 42 U.S.C. §7413(f).

⁵ 42 U.S.C. §7661c(f).

⁶ 42 U.S.C. §7661a(b).

⁷ 42 U.S.C. §7661a(d).

⁸ Based on past performance, it is unlikely either states or EPA will meet all of these deadlines. In all probability, implementation of many of these standards will occur toward the end of the 1990s.

⁹ Proposed Rules on Early Reductions of Toxic Releases Under Clean Air Act, 56 Fed. Reg. 27338 (1991) (to be codified at 40 CFR pt. 63).

The Clean Air Act

continued

be phased in will make planning complex. Because many of the hazardous air pollutants (subject to MACT standards) are also VOCs (subject to RACT standards), coordinated, farsighted planning may save companies costly mistakes and redundancy of effort.

Title IV of the amendments addresses the acid rain problem through an innovative sulfur dioxide "allowance" system. The system uses market forces to encourage electric utility power plants to find cost-effective ways to reduce sulfur dioxide emissions. The EPA will issue allowances to sources for an amount of sulfur dioxide based on a percentage of the plant's prior fuel consumption, and a source's emissions must equal its allowances by year-end, whether this is achieved by controlling emissions, or buying and selling allowances.¹⁰ The reductions will be required in two phases — the first in 1995 and the second in 2000. The government will auction up to 200,000 allowances per year beginning in 1993, and new sources built after 1995 will not be allocated allowances, but will be required to buy them on the market. Sources must continuously monitor emissions to assure compliance, and those without sufficient allowances to cover annual emissions by year-end will be fined \$2,000 per ton of excess emission.

Proposed regulations issued by the EPA on July 14 would exclude from Title I "new source review" emission reducing pollution control projects undertaken by electric utilities under Title IV.¹¹ Under certain conditions described in the regulations, a physical or operational (e.g. switching to a cleaner fuel) change will not be considered a "modification," and so the source will not

¹⁰ The EPA is currently considering whether the allowance trading system will be controlled nationally or individually by the states. Decision on National Allowance Trading System Up to EPA, Acid Rain Advisory Committee Says, 22 *Env't Rep.* 8 (BNA) 5/3/91.

¹¹ 56 *Fed. Reg.* 27, 630 (1991) (to be codified at 40 C.F.R. Parts 51, 52 and 60) (proposed June 14, 1991).

have to comply with "new source" technology requirements.¹²

The regulations are in part a response to the WEPCo decision¹³ which last year upheld EPA's determination that refurbishing a utility boiler was a modification subject to new source review. The proposed regulations have been widely attacked as illegal and potentially damaging to the environment.¹⁴

Vehicles now account for almost half of the emissions of VOCs and nitrogen oxides, and up to 90 percent of the carbon monoxide emissions in urban areas. Under Title II of the amendments, automobile manufacturers will be required to reduce tail pipe emissions of certain pollutants beginning in model year 1994. Manufacturers will also be required to reduce vehicle emissions resulting from the evaporation of gasoline.¹⁵ In addition, the petroleum refining industry will be forced to develop oxygenated and reformulated fuels to meet clean fuel standards which will be phased in starting in 1992.

The business community has an interest in seeing these restrictions on automobiles work, because reductions in air pollution not achieved through automobiles will be required from stationary sources. One of the sanctions on states not meeting the Act's goals will be requiring greater offsets of pollutants before new sources can be built.

Both the scope of EPA authority and the ability of states and the EPA to penalize infractions are

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¹² The regulations also established an EPA presumption that "low NOx burners" satisfy "best achievable control technology" requirements for new sources.

¹³ *Wisconsin Electric Power Co. v. EPA*, 893 F.2d. 901 (7th Cir. 1990).

¹⁴ See NRDC Calls "WEPCo Fix Unlawful, Urges Companies to Follow Old Rules," 22 *Env't Rep.* 779 (BNA) 7/26/91; WEPCo Proposal Creates Illegal Loopholes for Utilities to Escape Air Rules, Waxman Says, 22 *Env't Rep.* 779 (BNA) 7/26/91; NRDC Faults EPA Rule on Source Modification, Says "One-Sided" Approach Allows More Emissions, 22 *Env't Rep.* 780 (BNA) 7/26/91.

¹⁵ The Executive Engineer for Chrysler Motors estimates that these changes will add about \$600.00 to the sticker price of a car.

Standing Room Only

The National Regulatory Conference

On May 30, 1991, the Administrative Law Section of the Virginia State Bar, the Virginia State Corporation Commission, and the Marshall-Wythe School of Law of the College of William and Mary presented the eleventh annual National Regulatory Conference. This year's program, entitled "Non-Utility Generation In The 90s," was the most successful ever. Not only was the conference "sold out" for the first time, but there was also a waiting list.

Opening remarks were presented by the Honorable Theodore V. Morrison, Jr., Chairman of the State Corporation Commission; Robert T. Adams, Chairman of the State Bar's Administrative Law Section; and Professor Charles H. Koch, Jr., of the Marshall-Wythe School of Law. Kevin Kelley, Acting Director of the Office of Electricity, Coal, Nuclear, and Renewal Energy Policy in the U.S. Department of Energy, presented the keynote address. Mr. Kelly discussed the role of competition in electricity generation in the achievement of the National Energy Strategy goal of enhancing the performance of the electric industry.

"Capacity Acquisition: The New Direction" was the topic of the first panel discussion. As moderator, Hullahen W. Moore, Esquire, a partner of Christian, Barton, Epps, Brent & Chappell, focused the discussion on the issues encountered as a result of utility acquisition of non-utility generation (NUG). The panelists were Larry W. Ellis, Senior Vice President of Virginia Power; Robert D. Fagan, Regional Vice President of Mission Energy Company; Mark J. LaFratta, Esquire, Mays & Valentine; and William F. Stephens, Director of Energy Regulation, Virginia State Corporation Commission.

The second morning panel addressed many of the business, regulatory, and operating aspects of the trend toward the use of natural gas for electric generation. The participants on this panel were the moderator, Stephen H. Watts, II, Esquire, a partner of McGuire, Woods, Battle & Boothe; Michael W. Casdorff, Senior Vice President of Columbia Gas Transmission Corporation; Richard R. Hoffman, Chief, Environmental Policy and Project Analysis Branch, Office of Producer and Pipeline Regulation, Federal Energy Regulatory

Commission; Jeremiah K. Hughitt, Vice Chairman, Washington Gas Light Company; and Henry H. Barbour, Manager of Fuel Procurement for Virginia Power.

After a very enjoyable luncheon at The Cascades in Colonial Williamsburg, the first afternoon session undertook an examination of the problems encountered when a NUG project fails. Participants in this session included the moderator, Evans B. Brasfield, Esquire, a partner of Hunton & Williams; T. Randolph Perkins, Esquire, Vice President and General Counsel, Cogentrix, Inc.; Phillip D. Fletcher, Esquire, Milbank, Tweed, Hadley & McCloy; G. Thomas West, Jr., Esquire, a partner of Hunton & Williams; and James M. Nolan, Esquire, a partner of Mays & Valentine.

The final session addressed the unprecedented regulatory permitting challenges experienced by NUGs in Virginia and the implications for the rest of the country. James E. Ryan, Jr., Esquire, a partner of Mays & Valentine, moderated the session. The panelists were William P. Utt, Senior Vice President of Marketing and Business Development, CRSS Capital, Inc.; Charles S. Carter, Esquire, a partner of McGuire, Woods, Battle & Boothe; Robert E. Yuhnke, Esquire, Environmental Defense Fund; Thomas J. Maslany, Director, Air, Toxics, and Radiation Management Division, U.S. Environmental Protection Agency, Region 3; and Pamela F. Faggert, Assistant Executive Director of Operations, Virginia Department of Air Pollution Control. ■

Editor's Note:

Administrative Law News is pleased to publish, upon request, all Letters to the Editor in our FORUM section. All letters, however, must be signed. Please send your letters to:

James C. Dimitri, Editor
Administrative Law News
Christian, Barton, Epps, Brent & Chappell
1200 Mutual Building, Richmond, Virginia 23219

James A. Schmidt, Managing Editor
Administrative Law News
Hunton & Williams
Riverfront Plaza, East Tower, 951 East Byrd Street
Richmond, Virginia 23219-4074

The Clean Air Act

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enhanced by the amendments. Virtually any knowing violation of any provision of the Act will be punishable by a fine of up to \$250,000 and a prison term of 5 years for an individual, or a \$500,000 fine for an organization.¹⁶ The Act creates a new crime of reckless endangerment which consists of knowingly placing a person in imminent danger of death or serious bodily injury.¹⁷ An individual convicted of this can be imprisoned for up to 15 years, and an organization can be fined up to \$1 million. Another new crime — negligent endangerment — carries a fine of up to \$100,000 and a prison term of up to one year.¹⁸ This provision is remarkable because it imposes

criminal liability for negligent (as opposed to "knowing") actions or omissions.

Thousands of pages have already been written analyzing and explaining the amendments to the Clean Air Act. Any summary of the amended Act can only attempt to touch on some major points and hint at areas of future concern for this "monster of complexity." Although all the repercussions cannot be foreseen at this time, it is clear that the effects will be far-reaching and profound. ■

¹⁶ 42 U.S.C. §7413(c)(1).

¹⁷ 42 U.S.C. §7413(c)(5).

¹⁸ 42 U.S.C. §7413(c)(4).

1991-1992 Board of Governors

Kenworth E. Lion Jr., '93
Chair
Miller & Hern
4201 Dominion Blvd.
Suite 200
Glen Allen, VA 23060
804/270-0070

James C. Dimitri, 1994
Vice Chair
Christian, Barton, Epps,
Brent & Chappell
1200 Mutual Building
Richmond, VA 23219-3095
804/697-4126

Guy T. Tripp, III, 1994
Secretary
Hunton & Williams
Riverfront Plaza, E. Tower
951 East Byrd Street
Richmond, VA 23219-4074
804/788-8328

Briggs W. Andrews, 1992
Carilion Health System
P.O. Box 13727
Roanoke, VA 24036-3727
703/981-8053

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Mezzullo & McCandlish
700 East Main Street
Eighth Floor
Richmond, VA 23219
804/782-9250

George J. A. Clemo, 1993
Woods, Rogers &
Hazlegrove
P.O. Box 720
Roanoke, VA 24004-0720
703/982-4200

Deborah V. Ellenberg, '95
State Corporation Comm.
P.O. Box 1197
Richmond, VA 23209
804/786-86571

Charles H. Koch, Jr., '92
Marshall Wythe-School
of Law
College of William & Mary
Williamsburg, VA 23185
804/221-3835

Donald G. Owens, 1995
Mays & Valentine
P.O. Box 1122
Richmond, VA 23208
804/697-1200

Stephen H. Watts, II, 1995
McGuire, Woods,
Battle & Boothe
One James Center
Richmond, VA 23219
804/775-4353

Robert T. Adams
Ex Officio
McGuire, Woods,
Battle & Boothe
One James Center
Richmond, VA 23219
804/775-4365

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