

Hopping Green & Sams

Attorneys and Counselors

Environmental Update

• P.O. Box 6526 • Tallahassee, FL 32314 • (850) 222-7500 • <http://www.hgslaw.com/> •

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President Requests that EPA Withdraw Proposed Ozone NAAQS

Contact: Joseph Brown

On September 2, 2011, the President requested that EPA withdraw its 2010 proposed rule reconsidering EPA's 2008 ozone NAAQS. EPA's proposal would have reduced the 2008

Ozone NAAQS from 75 ppb to between 60 and 70 ppb. In addition, while the 2008 ozone NAAQS has remained in effect during EPA's reconsideration process and states submitted recommended area designations for the 2008 standards in March 2009, EPA has been delaying promulgating final area designations for the 2008 standards under the presumption that they would be replaced upon finalization of EPA's reconsideration process.

Now that EPA is withdrawing its proposed rule reconsidering the 2008 standards, EPA will have to address both the legal challenges to the standards (that have been held in abeyance pending reconsideration) and promulgation of area designations. With respect to the legal challenges, EPA filed a notice with the court indicating that EPA no longer expects to take final action to complete its reconsideration of the 2008 ozone NAAQS in the “near future,” as it stated just a few weeks ago, and intends to file a motion to govern future proceedings by September 12, 2011. See Mississippi v. EPA, Case No. 08-1200 (D.C. Cir. filed May 23, 2008). With respect to area designations, states submitted their recommended designations in March 2009, and EPA previously set a deadline of March 12, 2011, to finalize designations. To date, EPA has not finalized any designations, although on August 24, 2011, a lawsuit was filed to compel such action. See WildEarth Guardians v. Jackson, Case No. 2:2011-cv-01661 (D. Ariz. filed August 24, 2011).

For Florida, based on 2006-2008 data, the Florida Department of Environmental Protection recommended in March 2009 that the Pensacola and Tampa Bay areas be designated nonattainment. Based on 2008-2010 data, however, Florida should not have any ozone nonattainment areas in reference to the 2008 ozone NAAQS 75 ppb standard.

While there are issues with the 2008 standards that remain to be sorted out, the review process has already begun for reconsideration of the ozone NAAQS in 2013, which would be the normal five year schedule to review NAAQS under the Clean Air Act.

Florida Supreme Court Rules Against Governor’s Suspension of Agency Rulemaking

Contact: Joseph Brown

On January 4, 2011, Governor Scott issued Executive Order 11-01 which directed agencies controlled by the Governor to suspend rulemaking and submit all proposed rules to the Office of Fiscal Accountability and Regulatory Reform within the Executive Office of the Governor for review. In a 5-2 opinion, the Florida Supreme Court ruled that the Governor’s executive order exceeded his constitutional authority and violated the separation of powers to the extent it sought to suspend agency rulemaking. Whiley v. Scott, Case No. SC11-592, ---So.3d---, 2011 WL 3568864 (Fla. 2011).

The majority distinguished between the Governor’s constitutional authority to review and oversee rulemaking within agencies under his control and the portions of the executive order directing the suspension or termination of rulemaking. Ultimately, the Court held that the portions of the Governor’s executive order that suspended or terminated rulemaking encroached upon the Legislature’s delegation of rulemaking authority under the Florida Constitution and as set forth in Florida Statutes.

Justice Canady, in dissent, reasoned that the executive order did not prevent any legally required action and that the Governor may supervise and control the policy-making choices of the agency heads who serve at his pleasure. Justice Canady characterized the majority as unjustifiably concluding the Legislature divested the Governor of his supervisory power by assigning rulemaking power to agency heads. Similarly, Justice Polston stated in dissent that Governor

Scott was within his constitutional authority to issue the executive order as the chief administrative officer charged with faithfully executing the laws and managing the executive agencies under this control. Justice Polston characterized the majority's opinion as an improper advisory opinion, concluding that it is possible to comply with all provision of the executive order and comply with Florida Statutes and the Florida Constitution. On that basis, Justice Polston would have denied the challenge to Executive Order 11-01.

The ruling's impact may not be so great though. Governor Scott's attorney, Charles Trippe, reportedly views the ruling as only preventing the Governor from having a formal okay in the administrative rulemaking process. The Governor can still voice opinions and communicate with the many agency heads that serve at his pleasure. The biggest impact of the Court's ruling may come from the Legislature, with at least one state representative suggesting legislative action to give the Governor more rulemaking authority.

Scott Makes Appointment to Environmental Regulation Commission

Contact: Amelia Savage

On August 26, 2011, Herbert "Will" Montoya was appointed to the Environmental Regulation Commission. Montoya owns of Montoya & Associates LLC, and he succeeds John Micklos. His terms began on the date of appointment and ends July 1, 2015. Senate confirmation is required.

Boiler MACT Area Source Initial Notification Due September 17, 2011

Contact: Joseph Brown

Existing emission sources subject to the Boiler MACT Area Source Rule must submit an initial notification to EPA by September 17, 2011. EPA published its national emission standards for hazardous air pollutants for area source industrial, commercial and institutional boilers on March 21, 2011 ("Boiler MACT Area Source Rule"). See 76 Fed. Reg. 15554. An area source is one that emits less than 10 tons per year of any single hazardous air pollutant and less than 25 tons per year of total hazardous air pollutants. EPA issued a major source Boiler MACT rule – 76 Fed. Reg. 15608 – concurrently with the Boiler MACT Area Source Rule, but the former is currently under reconsideration while the latter is not.

Patrick Sheehan Appointed Director of FDACS Office of Energy

Contact: Joseph Brown

On August 26, 2011, Florida Department of Agriculture and Consumer Services ("FDACS") Commissioner Adam Putnam appointed Patrick Sheehan to the FDACS Office of Energy. The Office of Energy was transferred to FDACS during the 2011 legislative session. Mr. Sheehan was previously with Alutiiq International Solutions, LLC, where he served as the legislative and international affairs program manager for the U.S. National Guard Bureau. Mr. Sheehan also has

previous experience with several U.S. Congressional offices and subcommittees. His appointment was effective August 29, 2011.

EPA Increasing Information Collected on Commercial Chemicals from Chemical Manufacturers

**Contact: Carl Eldred
Jake Cremer**

The U.S. Environmental Protection Agency (EPA) is increasing the type and amount of information it collects on commercial chemicals from chemical manufacturers. The rule, known as the chemical data reporting rule (CDR), substantially updates the previous Inventory Update Reporting (IUR) Modifications Rule, promulgated under the Toxic Substances Control Act. Reporting will now be every 4 years, instead of 5. The rule also modifies certain reporting thresholds, updates various definitions, and revises industrial classifications. EPA claims the additional information will allow it to better identify and manage risks to the public and the environment.

In the next data submission period, February 1, 2012 to June 30, 2012, EPA will require electronic data submission. Claims of confidential business information must be substantiated at the time of submission. Information on reporting data about new and existing chemicals is available at www.epa.gov/iur.

EPA Maintains Current Carbon Monoxide (“CO”) NAAQS

Contact: Joseph Brown

On August 31, 2011, the U.S. Environmental Protection Agency (“EPA”) published its final rule on the review of national ambient air quality standards (“NAAQS”) for CO. *See* 76 Fed. Reg. 54294. Based on this review EPA is not changing the current primary CO NAAQS, which is 9 ppm on an 8-hour average and 35 ppm on a 1-hour average. Furthermore, EPA declined to set a secondary CO NAAQS. However, EPA did change several network design requirements for CO ambient air monitoring.

EPA Defers Deadline to Report Certain Data for GHG Reporting Rule

Contact: Joseph Brown

On August 25, 2011, EPA published final revisions to its Mandatory Greenhouse Gas Reporting Rule (“GHG Reporting Rule”) that delay certain data reporting deadlines. *See* 76 Fed. Reg. 53057. The original GHG Reporting Rule was published October 30, 2009. *See* 74 Fed. Reg. 56260. EPA subsequently proposed confidentiality determinations with respect to data submitted under the GHG Reporting Rule. In response to comments received regarding EPA’s proposed confidentiality determinations, EPA concluded that additional review was needed to evaluate impacts from public release of data submitted as inputs to emission equations. To afford additional time to complete this review, EPA’s August 25, 2011, final revisions defer the

reporting deadline for certain data inputs until March 31, 2013, and certain other data elements until March 31, 2015.

EPA Publishes Plan for Review of Existing Regulations

Contact: Joseph Brown

As of August 2011, EPA has published its plan for reviewing existing regulations: *Improving Our Regulations: Final Plan for Periodic Retrospective Reviews of Existing Regulations* (the “Plan”). EPA developed the Plan in response to Executive Order 13563, which directed executive agencies to develop a plan to review existing regulations to identify how to make regulatory programs more effective and less burdensome. The Plan identifies 35 regulatory programs to review during an initial review period (2011-2016). The Plan calls for subsequent review periods on a five-year cycle and provides for public nomination of regulations to review. A copy of the Plan is available at: www.epa.gov/lawsregs/rulemaking/retrospective/index.html.