



State of Louisiana
DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF THE SECRETARY

February 8, 2016

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510-6175

RE: EPA's Current Regulatory Framework

Dear Senator Inhofe:

By letter dated January 12, 2016, the U.S. Senate Committee on Environment and Public Works ("Committee") requested Louisiana's perspective on the current EPA regulatory framework. More specifically, the Committee seeks "to better understand the scope of ongoing work and resources dedicated to EPA regulatory actions" and "whether the current regulatory framework between EPA and the states upholds the principle of cooperative federalism."

As you are aware, there are currently a number of EPA actions that demand significant resources of state permitting authorities, such as the Louisiana Department of Environmental Quality (LDEQ). Indeed, your letter recognizes nine regulatory deadlines imposed by eight federal air quality regulations in calendar year 2016 alone.

This correspondence will highlight the specific air quality-related obligations of LDEQ in 2016, the resource commitments or challenges associated with each, and describe a number of topics and issues beyond recently-promulgated federal regulations which significantly contribute to the workload of LDEQ's Air Permits Division.

2016 Obligations

*SO₂ Data Requirements Rule*¹

The SO₂ Data Requirements Rule requires LDEQ to demonstrate that "applicable sources" (i.e., those with actual SO₂ emissions of 2000 tons per year or more in calendar year 2014) are compliant with the 1-hour SO₂ NAAQS via ambient air monitoring or modeling. Nearby sources of SO₂ may also have to be addressed. Louisiana has 16 "applicable sources" located in 11 parishes.

For each area containing an applicable source, LDEQ must state by July 1, 2016, whether it will characterize air quality through monitoring or modeling. Where modeling is selected, technical protocols are also due to EPA on July 1, 2016, and the final analyses must be submitted by January 13, 2017. Note that if monitoring is selected, LDEQ will still have to conduct modeling to determine the appropriate placement of the ambient monitor(s).

¹ Data Requirements Rule for the 2010 1-Hour Sulfur Dioxide (SO₂) Primary National Ambient Air Quality Standard (NAAQS) (80 FR 51052; August 21, 2015)

The Committee should be aware that dispersion modeling is a resource-intensive exercise, often necessitating situation-specific decisions regarding the modeling domain, emissions inputs, source characterization, and background concentrations.² Even the selection of nearby sources is not a straightforward task. EPA notes that the “determination of whether to include nearby sources in a modeling exercise around a source that exceeds the emissions threshold is case specific, and a standardized methodology cannot be developed to fit all scenarios.”³ For frame of reference, the *initial* modeling for a single area – Calcasieu Parish – and the associated modeling report represent about 116 hours of work.

*Clean Power Plan*⁴

EPA’s Clean Power Plan requires states to develop and implement plans that ensure existing electric generating units (EGUs) achieve the carbon dioxide (CO₂) standards prescribed by EPA. State plans are due to EPA on September 6, 2016, though EPA has made two-year extensions “readily available.”⁵ LDEQ intends to request such an extension.

In the first half of 2016, LDEQ will be conducting listening sessions in the major metropolitan areas of the state in order to provide an opportunity for public comment and meaningful stakeholder engagement on the department’s initial submittal. Development of the plan itself will also require extensive coordination with the Louisiana Public Service Commission, regional transmission organizations, owners/operators of affected EGUs, and the public.

While EPA has appeared to streamline the process for requesting an extension, the Committee should recognize that many hundreds of hours of staff time have already been devoted to this regulation, and thousands more will likely be necessary in order to develop an approvable plan.

*2015 8-hour Ozone NAAQS*⁶

In 2016, LDEQ will recommend to EPA whether each parish in the state should be designated as attainment, nonattainment, or unclassifiable with respect to the 2015 8-hour ozone NAAQS based on data collected from LDEQ’s existing ambient monitoring network. While this obligation is not burdensome per se, the Committee should not overlook the resources that will be directed toward compliance with the new ozone standard before such designations are finalized in late 2017.

Currently, Baton Rouge has a design value of 71 parts per billion (ppb), just one ppb over the NAAQS. Assuming the design value remains above the standard following the upcoming ozone season, LDEQ anticipates that EPA will designate the area as a marginal nonattainment area. Attainment demonstrations are not required for marginal nonattainment areas.

² EPA has released an “SO₂ NAAQS Designations Modeling Technical Assistance Document” to assist state and local permitting authorities in this effort.

³ 80 FR 51079

⁴ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (80 FR 64662; October 23, 2015)

⁵ EPA Memorandum: Page, Stephen D., OAQPS, “Initial Clean Power Plan Submittals under Section 111(d) of the Clean Air Act,” October 22, 2015

⁶ National Ambient Air Quality Standards for Ozone (80 FR 65292; October 26, 2015)

However, the Clean Air Act provides marginal areas with only three years from the effective date of designation to attain the NAAQS. Because compliance with the NAAQS is based on three years of data, any control measures to be imposed by the state must be identified in short order such that they can be implemented expeditiously. If the ozone standard for a marginal area is not met by the attainment deadline, EPA will reclassify the area to “moderate” by operation of law. Based on the input the Committee received from TCEQ,⁷ the effort required to develop an attainment demonstration for a moderate ozone nonattainment area is indeed substantial. Therefore, LDEQ cannot afford to delay its efforts to comply with the new NAAQS.

*Startup, Shutdown, and Malfunction (SSM) State Implementation Plan (SIP) Call*⁸

The Committee should appreciate that increases in permitting authorities’ workload may be brought about by changes in federal *policy* and impact state regulations that, in some cases, were approved by EPA more than 20 years ago.

As case in point, consider EPA’s SSM SIP Call. On June 30, 2011, the Sierra Club filed a petition asking EPA to find inadequate and correct a number of SIPs that allegedly “threaten states’ abilities to achieve and maintain compliance with NAAQS.” EPA agreed, even though many of the provisions in question clearly did not preclude areas from meeting ambient standards.

With respect to Louisiana, EPA determined that seven SIP-approved state regulations are now “substantially inadequate to meet [Clean Air Act] requirements” because they provide exemptions for excess emissions from otherwise applicable limitations during periods of startup, shutdown, malfunction, and/or maintenance. In response, LDEQ will propose to delete six of the seven provisions addressed by the rule. For the seventh, LDEQ will propose work practice standards in lieu of a numerical limitation consistent with EPA’s “SSM Policy as of 2015.”⁹ SIP revisions are due to EPA by November 22, 2016.

Other 2016 and Prior Federal Actions

In addition to the federal regulations described above, several other prominent rulemakings have recently been signed by the Administrator. While these rules do not necessarily prompt action on the part of permitting authorities, significant time is required to review and understand their requirements and implications. Such actions include the:

- Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards;¹⁰ and
- National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters.¹¹

⁷ TCEQ reported that “to develop an attainment demonstration and reasonable further progress ... for a moderate [ozone] nonattainment area is 45,000 to 55,000 hours of staff time.”

⁸ State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction (80 FR 33840; June 12, 2015)

⁹ 80 FR 33976 - 33982

¹⁰ 80 FR 75178 (December 1, 2015)

¹¹ This “notice of final action on reconsideration” was signed on November 5, 2015, but has not yet been published in the *Federal Register*.

The Committee should also consider the obligations imposed by recent regulatory actions in conjunction with the ongoing requirements of prior federal regulations. For example, LDEQ is actively pursuing re-designation of the Baton Rouge area to attainment of the 2008 8-hour ozone NAAQS and working with EPA to develop an approvable SIP demonstrating compliance with the 1-hour SO₂ NAAQS in St. Bernard Parish.

Finally, the Committee must not lose sight of the fact that permitting authorities must continue to process permit applications and take final actions within federal and state deadlines.^{12,13}

Proposed Rules

In addition to the resources required to carry out duly promulgated federal regulations, the Committee should not discount the significant time and effort needed to provide meaningful input on *proposed* federal regulations. For example, in just the last four months of 2015, EPA proposed at least five rules which could significantly impact Louisiana's air permitting program, namely the:

- Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS;¹⁴
- Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations;¹⁵
- Oil and Natural Gas Sector: Emission Standards for New and Modified Sources;¹⁶
- Source Determination for Certain Emission Units in the Oil and Natural Gas Sector;¹⁷ and
- Revisions to the Public Notice Provisions in Clean Air Act Permitting Programs.¹⁸

Proposed rules are often voluminous,¹⁹ accompanied by numerous supporting documents and complex spreadsheets, and rely in part on predictions made by computer models. Permitting authorities must review not only the regulatory text itself, but also the underlying data and assumptions upon which the proposed rule is predicated.

To illustrate this point, the Integrated Planning Model (IPM) employed by EPA to develop the proposed updates to the Cross-State Air Pollution Rule erroneously predicts the retirement of a number of EGUs within the state. In order to address discrepancies such as this, LDEQ must devote sufficient resources to review and, if necessary, comment on proposed rules.

Litigation

The Committee should also be cognizant of the impact litigation has on permitting authorities. State and local officials have devoted countless hours to the implementation of federal programs that were ultimately vacated by the U.S. Supreme Court or the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). For this reason, significant resources must continue to be directed to EPA programs promulgated many years ago.

¹² See, for example, 40 CFR 70.7(a)(2) & (e)(2)(iv).

¹³ Louisiana has 496 Part 70 sources operating under 729 Title V permits.

¹⁴ 80 FR 75706 (December 3, 2015)

¹⁵ 80 FR 64966 (October 23, 2015)

¹⁶ 80 FR 56593 (September 18, 2015)

¹⁷ 80 FR 56579 (September 18, 2015)

¹⁸ 80 FR 81234 (December 29, 2015)

¹⁹ The pre-publication versions of just the five rules identified above exceed 1700 pages, excluding associated documents.

For example, consider the requirement of EPA's Regional Haze Rule to apply "best available retrofit technology" (BART) at certain stationary sources in order to improve visibility in national parks and wilderness areas. In 2006, EPA determined that its Clean Air Interstate Rule (CAIR) was "better-than-BART,"²⁰ so Louisiana relied on then-applicable CAIR SO₂ and NO_x cap-and-trade programs as an alternative to BART for EGUs in its regional haze SIP. Later, CAIR was remanded to EPA by the D.C. Circuit,²¹ but reinstated following the same Court's stay of the Transport Rule.²² Nevertheless, EPA disapproved this portion of Louisiana's SIP because "CAIR has been remanded and only remains in place temporarily."²³ Consequently, additional SO₂ modeling had to be performed many years after this Regional Haze requirement was thought to have been satisfied.

Another ruling that increased LDEQ's workload involved EPA's "Prevention of Significant Deterioration [PSD] and Title V Greenhouse Gas Tailoring Rule."²⁴ Subsequent to its promulgation, LDEQ issued 20 Title V permits and 14 PSD permits to so-called "Step 2 sources." However, the Supreme Court later found that "EPA exceeded its statutory authority when it interpreted the Clean Air Act to require PSD and Title V permitting for stationary sources based on their greenhouse-gas emissions."²⁵ As a result, LDEQ had to reissue minor source permits, modify Title V permits to remove requirements that were no longer applicable, and revise state regulations pertaining to greenhouse gases.

Litigation can also accelerate implementation schedules, thereby depriving permitting authorities of compliance options that would otherwise be available. On March 2, 2015, the U.S. District Court for the Northern District of California accepted, as an enforceable order, an agreement between the EPA and Sierra Club and NRDC to resolve litigation concerning the deadline for completing SO₂ designations. This agreement impacted 28 states and requires EPA to designate certain areas, including Calcasieu Parish and DeSoto Parish in Louisiana, by July 2, 2016. This schedule effectively precludes LDEQ from demonstrating compliance with the 1-hour SO₂ NAAQS via ambient air monitoring, despite the fact that this option is expressly available for other areas per EPA's SO₂ Data Requirements Rule.

LDEQ has not typically quantified the man-hours spent to implement and administer any given federal air quality program (other than the Part 70 Operating Permits Program), but I trust this correspondence contributes to the Committee's understanding of some of the challenges facing state permitting authorities.

The Louisiana legislature has declared that the "maintenance of a healthful and safe environment for the people of Louisiana is a matter of critical state concern."²⁶ In closing, let me assure you that LDEQ is committed to administering and enforcing the environmental laws of this state to ensure that this objective is achieved.

²⁰ 71 FR 60612 (October 13, 2006)

²¹ *North Carolina v. EPA*, 531 F.3d 896; modified by 550 F.3d 1176 (D.C. Cir. 2008)

²² *EME Homer City v. EPA*, No. 11-1302 (Order)

²³ 77 FR 33642 (June 7, 2012)

²⁴ 75 FR 31514 (June 3, 2010)

²⁵ *Utility Air Regulatory Group v. EPA*, 573 U. S. ____ (2014) (slip op., at 29)

²⁶ La. R.S. 30:2002

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If you would like to discuss these matters further, please do not hesitate to contact me at (225) 219-3950.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chuck Carr Brown', with a long horizontal flourish extending to the right.

Chuck Carr Brown, Ph.D.
Secretary

CCB:BDJ