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Contacts

Atlanta Office

[Robert E. Hogfoss](#)

Bank of America Plaza, Suite 4100
600 Peachtree Street, NE
Atlanta, GA 30308-2216
(404) 888-4042
rhogfoss@hunton.com

[Catherine D. Little](#)

Bank of America Plaza, Suite 4100
600 Peachtree Street, NE
Atlanta, GA 30308-2216
(404) 888-4047
clittle@hunton.com

Washington Office

[William L. Wehrum](#)

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1637
wwehrum@hunton.com

[Makram B. Jaber](#)

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1567
mjaber@hunton.com

[Deidre G. Duncan](#)

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1919
dduncan@hunton.com

Environmental Group Threatens To Sue EPA To Force More Stringent Clean Air Act Regulation of Oil & Gas Facilities

On July 2, 2008, the environmental group EarthJustice filed a notice of intent to sue EPA for the Agency's failure to promulgate more stringent Clean Air Act (CAA) regulations for oil & gas transmission and storage facilities. Submittal of the notice is a jurisdictional prerequisite to the filing of a suit (virtually all environmental statutes contain similar notice letter requirements). If EPA fails to respond to EarthJustice's requests, the environmental group is free to file its suit in sixty days after the date of the letter, or by September 1, 2008.

EarthJustice claims that EPA has failed to issue sufficient CAA regulations for the following oil & gas sources and standards:

New Source Performance Standards (NSPS) for (a) equipment leaks of volatile organic compounds (VOCs), and (b) sulfur dioxide (SO₂) emissions, from **onshore natural gas processing plants**; and

National Emission Standards for Hazardous Air Pollutants (NESHAPs) for (a) **oil & natural gas production facilities** that qualify as major sources, and (b) **natural gas transmission and storage facilities** that qualify as major sources.

Under the CAA, NSPS apply to categories of sources (such as oil & gas processing, transmission or storage operations); the standards are intended to reflect

the best technology that has actually been demonstrated to achieve emission reductions, and they are intended to establish the minimum level of control that must be achieved by new, modified and reconstructed sources. NESHAPs are regulated by Maximum Achievable Control Technology (MACT) standards; MACT is intended to represent the best performing sources in a category (either the top 12 percent or top 5 percent of companies in the category, depending on the number of sources in that category).

EPA has already promulgated NSPS and NESHAP regulations for the sources subject to the EarthJustice notice, at 40 C.F.R. Part 60 (Subparts KKK and LLL), and 40 C.F.R. Part 63 (Subparts HH and HHH). EarthJustice claims that EPA has failed to revise these standards, however, as required by the language of the statute. The Agency promulgated oil & gas NSPS in 1985, and oil & gas NESHAPs in 1999. The CAA requires EPA to 'review and revise as necessary' such standards 'at least every eight years.' EarthJustice claims that EPA has failed to conduct such a review, despite the fact that there are now more technologies available to control oil & gas air emissions from these sources.

The notice letter seeks further rulemaking to increase NSPS regulation for a number of source categories, including: (a) crude oil and natural gas well head operations;

(b) gas processing plants, and (c) intermediate locations such as tanks, pumps, compressors and separators. The letter also requests EPA NSPS regulation of other oil & gas pollutants beyond VOCs and SO₂, such as nitrogen oxides, methane and carbon dioxide. Significantly, the notice letter suggests that VOC limits should also be applied to currently unregulated activities, such as pigging operations, blowdowns and fugitive emissions from equipment not located at processing facilities.

Finally, the notice letter criticizes EPA for its failure to promulgate 'residual risk standards' for oil and natural gas production, and natural gas transmission and storage activities. Residual risk standards are required by Section 112(f)(2) of the CAA, to provide an 'ample margin of safety to protect public health', where other numeric standards are deemed insufficient (MACT standards are technology based, not health based). EarthJustice claims

that EPA has neither promulgated such risk standards nor made the requisite determination that such standards are unnecessary.

This threatened litigation is presented against a backdrop of increasing scrutiny on oil & gas processing, transmission and storage activities generally. The claims are national in scope, and openly linked to concerns about increased exploration and production activities in the Western U.S. The notice letter also raises concerns about global warming, and whether greenhouse gases (GHG) such as CO₂ should be regulated through NSPS. EPA is already expected to issue a notice of proposed rulemaking shortly on GHG issues. Thus, this latest challenge may be addressed in that notice.

EPA will likely respond to this NOI by proposing a schedule for review and revision of the existing standards for those source categories, whether by its

own initiative or through court directives. The issue will not likely be resolved until the next administration takes office, and regardless of how the election goes, these issues and the future regulation of the oil & gas industry will likely receive increased attention in the next few years. Operators are encouraged to follow this and all related developments closely, as there will be opportunities for comment or other involvement.

Hunton & Williams' attorneys have extensive knowledge and experience in all environmental matters affecting the oil and gas industry, and our practice is national in scope. H&W has one of the leading CAA and climate change practices in the U.S., and our lawyers include the most recent EPA Assistant Administrator for Air. We follow these issues closely and are available to answer your questions or otherwise assist you in assessing potential impacts to your oil and gas operations.

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