From: Logan Paul S
To: CAPP Carrie Ann
Subject: RE: Boiler Rulemaking Comment
Date: Tuesday, August 30, 2011 5:45:56 PM

Carrie,

Please see my responses to your questions below.

This is complicated. Give me a call if you have any questions. Note that I'm leaving at about 1 pm tomorrow for vacation, returning Tuesday.

Paul Logan
Oregon Department of Justice, 971.673.1943

> -----Original Message-----
> **From:** Logan Paul S
> **Sent:** Monday, August 29, 2011 3:11 PM
> **To:** 'CAPP Carrie Ann'
> **Subject:** RE: Boiler Rulemaking Comment
>
> Thanks Carrie. I'm working on a couple other projects today, and I'll respond to your email tomorrow.
>
> **Paul Logan**
> Oregon Department of Justice, 971.673.1943
> -----Original Message-----
> **From:** CAPP Carrie Ann [mailto:CAPP.Carrieann@deq.state.or.us]
> **Sent:** Monday, August 29, 2011 11:40 AM
> **To:** LOGAN Paul S
> **Subject:** Boiler Rulemaking Comment
>
> Hi Paul, I hope all is well.
>
> Below is the only comment we received for the Permanent rulemaking on solid fuel boilers, along with Andy's response.
>
> I have a question regarding Andy's response, highlighted below:
>
> "Subsequent changes would not be automatically incorporated. So, if Congress repealed the boiler NESHAP after EQC adopts the rules, those boilers would still be exempt from heat smart"
>
> As I interpret this statement, Andy is saying that if a boiler is subject to MACT, and the MACT is still in effect on Dec 16, 2011 as it was promulgated in February, that the requirements that were in effect and would apply to a boiler as of February would still be applied to boilers in Oregon after 12/16/11, even if the MACT changes or goes away.
>
> My questions to you are:
> 1) Is my interpretation correct? And,

It's complicated, I know. I'd put it slightly differently. First, the EQC rules will adopt the MACT/NESHAPs for applicability purposes (for determining exemptions from Heat Smart), and will not incorporate them by reference to enforce the substance of the MACT/NESHAPs. Second, for its applicability purposes, the EQC rules will use the MACT/NESHAPs as in effect on the day the EQC adopts its rules - 12/16/11. For the purposes of the applicability of Heat Smart exemptions under the EQC rules, the MACT/NESHAPs are set in stone as of 12/16/11. As Andy points out, that's because the Oregon constitution prohibits the EQC from incorporating future versions of the MACT/NESHAPs; the EQC may only incorporate the version that exists on the day that it adopts its rules (or earlier versions, but again, not future versions). As a result, even if the feds revise, suspend or even repeal the MACT/NESHAPs after 12/16/11, the MACT/NESHAPs that exist on 12/16/11 remain enshrined in the EQC rules for purposes of an applicability test for an exemption to the EQC's Heat Smart rules. For instance, if in January 2012 EPA repeals the MACT/NESHAPs, then a boiler that was previously subject to the substance of the MACT/NESHAPs would no longer be required to comply. However, for purposes of determining applicability of an exemption from the EQC's Heat Smart rules, the MACT/NESHAPs that existed on 12/16/11 would continue to apply.

2) If so, would you agree with that portion of Andy's response?

Yes.

3) If you are in agreement, can you please explain to me how that would work (e.g. how we could continue to hold a boiler to a federal standard that has changed from the version we reference in our rules as of 12/16/11)?

Please see my response to your first question. The EQC rules wouldn't adopt the substantive requirements of the MACT/NESHAPs, but rather would adopt them only for applicability purposes. So, the EQC rules wouldn't be holding the boiler to a federal standard that no longer exists.

As an aside, though, the EQC could do that. That is, the EQC could incorporate by reference the entire MACT/NESHAPs as they exist on 12/16/11, and require compliance with all the elements of those rules. After doing so, they become independently enforceable as state rules, even if EPA changes them in the future. Put another way, they're no longer federal rules. They're state rules. This is precisely what the EQC does with the federal air toxics program in division 244. See OAR 340-244-0220. The EQC updates and readopts the most current versions of those MACT/NESHAPs every year, to make sure it maintains consistency with the federal MACT/NESHAPs, but as a legal matter it wouldn't have to. It could adopt today's versions, and continue to enforce them regardless of how EPA changes them. That might cause EPA to revoke its delegation of the federal air toxics program to Oregon, but as a legal matter, the EQC could do that.

I'm trying to better understand both Andy's response and how that would play out.

Your insight is greatly appreciated.

Respectfully,
CarrieAnn

Carrie Capp
Natural Resource Specialist
Air Quality, Planning Section
Oregon Department of Environmental Quality, Headquarters

-----Original Message-----
From: Aubrey Baldwin [mailto:abaldwin@lclark.edu]
Sent: Friday, July 29, 2011 1:30 PM
To: GINSBURG Andy
Cc: CAPP Carrie Ann
Subject: Re: Will this go forward?

Yes, thanks, that helps a lot. And just asking a question. I'm sure we'll have some comments within the deadline, but wanted to get a sense of how this is intended to work! Thanks,

abs

_____
Aubrey Baldwin
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On Jul 29, 2011, at 1:24 PM, GINSBURG Andy wrote:

> Hi Aubrey. Were you commenting on the rule proposal, or just asking
> a question? At any rate, here is the answer. Oregon's constitution
> prohibits prospective rulemaking, so we can only refer to a federal
> rule as it exists on the date we adopt a state rule. Subsequent
> changes would not be automatically incorporated. So, if Congress
> repealed the boiler NESHAP after EQC adopts the rules, those boilers
> would still be exempt from heat smart. I'm not personally concerned
> about this for several reasons. First, the bill probably can't pass
> the Senate and probably would be vetoed if it did. Second, most of

> the opposition to the NESHAP is aimed at the major source MACT
> standard, and nearly all of the exempt boilers would be subject to
> the area source NESHAP. Third, the area source NESHAP mainly
> requires a biennial tune-up, and they would arguably still have to
> do that under the registration rule (which also points to the NESHAP
> as of 12/16/11). Alternately, we could amend the program to make
> that a requirement of exemption. Fourth, boilers would still be
> subject to grain loading and opacity.
>
> One other point of interest - we tied the exemption to those boilers
> subject to the NESHAP mainly to ensure that no residential boilers
> would be exempt (the NESHAP only applies to industrial, commercial
> and institutional boilers). Our main goal was to prohibit high
> polluting hydronic outside wood fired boilers in residential areas.
> That wouldn't change if anything happens to the NESHAP. Before Heat
> Smart, our woodstove rules only applied to woodstoves (not boilers),
> and the application of Heat Smart to industrial, commercial and
> institutional boilers wasn't the intended target of the bill. So,
> the current rulemaking is really just trying to restore the prior
> status quo, where our industrial, institutional and commercial rules
> (grain loading, opacity) apply to industrial sources and our
> residential rules (heat smart) apply to residential sources.
>
> Hope that helps.
>
> Andy
>
>
> Andy Ginsburg
> Air Quality Administrator
> Oregon Department of Environmental Quality
> (503) 229-5397 - Office
> (503) 572-7195 - Mobile
>
>
> -----Original Message-----
> From: Aubrey Baldwin [mailto:abaldwin@lclark.edu]
> Sent: Friday, July 29, 2011 12:57 PM
> To: GINSBURG Andy; Comment-SmBoilerPerm
> Subject: Will this go forward?
>
> Hello,
>
> There are bills in Congress currently that would postpone or avoid
> entirely the industrial boiler MACT regulations finalized in
> February. If that is true, will be DEQ rule still exempt small and
> mid sized boilers from compliance with Heat Smart, or will it only
> exempt those boilers that are IN FACT covered by the boiler MACT? I'm
> trying to clarify this statement in the rulemaking announcement:
>

>
> The proposed permanent rules would exempt small-scale commercial,
> industrial and institutional boilers from the Heat Smart regulations
> if they are subject to federal emissions standards for hazardous air
> pollutants and the user complies with existing construction approval
> requirements
>
>
> So, this new rule would ONLY apply if the boiler MACT is applied to a
> particular source? Would heat smart apply until then? Would heat smart
> re-apply if the MACT is overridden by congressional action?
>
> The language in the proposed rule: "The owner or operator of a boiler
> that is subject to [the MACT] as in effect on December 16, 2011,"
> seems confusing because a source could be "subject to [MACT] as in
> effect on December 16, 2011," but that MACT may go away soon after, or
> before, resulting in a need to amend the rule. For example, if the
> MACT is overridden by congressional action before December 16, 2011,
> but before EQC adopts the rule, DEQ will perhaps want to make changes
> to the rule - as no one will be "subject to" 40 CFR part 63, subpart
> JJJJJJ or DDDDD. Similarly, if the MACTs overridden after December
> 16, 2011, and after EQC approval, those that were subject will no
> longer be, thus the rule will not be applicable to them. If that's
> the case, it seems that small and mid-sized boilers will still be
> subject to heat smart.
>
> Just trying to clarify what might happen to this rule during the
> comment period.
>
> Thanks,
>
> Aubrey
>
> _____
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Carrie Capp

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