

NESHAP Compliance and Enforcement Implementation Strategies and Challenges – Legal Perspective

Air Quality Regulation Conference

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Topics

- Life Cycle of NESHAP Regulations
- Impact on Regulated Entities
- What to Keep in Mind

Life Cycle of NESHAP Regulations

- Rule Development
- Proposed Rule
- Final Rule
 - Post-Issuance Regulatory Litigation
 - Federal, State and Local Guidance
 - Post-Issuance Enforcement Litigation
- Periodic Review and Revisions

Impact on Regulated Entities

- NESHAP standards are dynamic
- Enforcement “Initiative” is foreseeable for all NESHAP Standards
 - Usually Follows Shortly after Existing Source Compliance Dates
 - Self-Reporting is Required
 - Confusion about State or Local NESHAP Delegation Status
 - Confusion about Sending Duplicate Copies of Test Protocols/Reports, Periodic Compliance Reports and Notifications to U.S. EPA

Impact on Regulated Entities

- Periodic reviews of NESHAP changes must be built into a company's compliance plan
 - Need to review outside of permitting context
 - Could affect threshold applicability
 - Area Sources
 - Clarification or Withdrawal of Previous Applicability Determinations

Impact on Regulated Entities

- Periodic reviews of NESHAP changes must be built into a company's compliance plan (Cont.)
 - Could increase or decrease current obligations
 - Offer more regulatory flexibility
 - “Clarify” performance test requirements and methodologies
 - Change current policies (e.g., “Once In, Always In”)
 - Other Effects

What to Keep in Mind

- Get involved with NESHAP regulatory development and stay involved
 - Industry Group Participation May Not be Enough
 - Submitting Comments Helps Educate the U.S. EPA
 - Revisions to NESHAPs are only possible during a rulemaking process
 - Unreasonable and unworkable rules that are appealed are regularly resolved amicably

What to Keep in Mind

- When a NESHAP Standard Applies, Understand What You have to do to Comply
 - Review the NESHAP and applicable guidance closely
 - Complying vs. Demonstrating Compliance
 - Work directly with relevant company personnel to develop a company-specific compliance plan

What to Keep in Mind

- When a NESHAP Standard Applies, Understand What You have to do to Comply (Cont.)
 - Choose compliance options that make sense
 - If a particular provision applies, but isn't completely understood, seek assistance . . . It's not going away!
 - Develop and Implement Relevant Training

What to Keep in Mind

- Reliance on State or Local Interpretations
 - U.S. EPA may (and often does) disagree
 - Present a well-reasoned position when requesting assistance from a State or Local agency
 - Get interpretations in writing (e-mail?)
 - Seek Director level input
 - Confirm that the U.S. EPA Region agrees

What to Keep in Mind

- Policy Interpretations
 - Be prepared to challenge policy interpretations that do not have a clear regulatory basis
 - Compare to previous U.S. EPA positions that faced public scrutiny
 - Preamble
 - Response to Comments
 - EAB Decisions

What to Keep in Mind

- Policy Interpretations (Cont.)
 - Contact Appropriate Representatives from U.S. EPA Headquarters
 - Enforcement
 - Regulatory Development

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