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Improving the City's Air Quality

Mayor Michael Bloomberg's PlaNYC represents a strategic blueprint for meeting the challenges of a growing population, aging infrastructure, changing climate, and evolving economy as the city moves forward to the year 2030 and beyond. The Law Department's Environmental Law Division works closely with a variety of mayoral agencies to help further these goals. The division, together with the city's Department of Environmental Protection (DEP) and New York City Department of Health and Mental Hygiene (DOHMH), is pursuing efforts to meet the PlaNYC goal of achieving the cleanest air quality of any large city in the United States by 2030.

Air pollution is one of the leading environmental and public health problems faced by New York City residents. While there have been dramatic air quality improvements over the past two decades due to federal, state and local efforts to strengthen air quality standards, several pollutants in the city's air are still at levels that raise concern. Most important among these are ozone, which is a precursor to smog, and PM2.5, a fine particulate matter which is known to cause and exacerbate lung disease and respiratory problems, especially in sensitive populations.

While the city's initiatives under PlaNYC to improve air quality have yielded considerable results, including significant reductions in greenhouse gas emissions, additional steps remain to be taken. In this article, I will discuss the Environmental Law Division's continuing work with city agencies on issues relating to the health and environmental impacts of air pollution.

Air Pollution in New York City

Ozone and fine particulate matter, a significant portion of which come from sources located outside the city, both have negative impacts on the health of New York City residents, contributing significantly to lung and heart conditions and the exacerbation of asthma. Scientific evidence also shows that cumulative exposure to ozone during the growing season damages sensitive vegetation, and can result in increased tree mortality including reduced tree growth, injury to leaves, and increased susceptibility to disease and harsh weather.

The city has made significant progress in addressing harmful air emissions from buildings, including the enactment of local laws and the promulgation of rules to phase out the use of the most heavily polluting types of fuel oil, Number 6 and Number 4 fuel oils. Currently in New York City, there are roughly 10,000 residential and commercial buildings with furnaces that burn these grades of oil. While these buildings comprise only 1 percent of all buildings in the city, by burning No. 4 and No. 6 fuel oils, these buildings produce 90 percent of the city's overall particulate matter emissions, emitting more PM than all the cars and trucks in the city combined. The burning of "dirty" fuel oil also produces significantly higher levels of sulfur dioxide, nitrogen oxides, and carbon dioxide than alternative energy sources, such as No. 2 fuel oil or natural gas.

In August 2010, the City Council passed Local Law 43 which, among other things, lowered the permitted sulfur content of No. 4 fuel oil by half, and in April 2011, DEP promulgated chapter 2 of Title 15 of the Rules of the City of New York (RCNY), requiring the phasing-out of the use in heat and hot water boilers and burners in New York City of heavily polluting Number 6 fuel oil by 2015 and of Number 4 fuel oil by 2030. These rules are currently the subject of state court litigation on grounds that the environmental review was deficient and that the promulgation of the rules violated certain provisions of the City Administrative Procedure Act (CAPA). County Oil Company, Inc. v. New York City Department of Environmental Protection, Index No. 21750-2011 (Sup. Ct., Queens Co.). The Environmental Law Division is defending the case.

The Clean Air Act

The Clean Air Act (CAA) is a comprehensive federal statutory scheme that regulates air emissions from stationary and mobile sources. Among other things, it authorizes the Environmental Protection Agency to establish National Ambient Air Quality Standards (NAAQS) to protect the public health and the public welfare by regulating emissions of air pollutants, including PM2.5 and ozone. See 42 U.S.C. §7409(d)(1) and (2). For each regulated pollutant, the EPA must set a primary standard that is requisite to protect human health within an adequate margin of safety, and a secondary standard that is requisite to protect the public welfare (such as crops and trees) from any known or anticipated adverse effects of a regulated pollutant. 42 U.S.C. §7409(b)(1) and (2).

The EPA Administrator is required to complete a thorough review of these standards and their scientific basis every five years to determine whether revisions are appropriate. See 42 U.S.C. §7409(d)(1). However, in practice, such reviews take much longer. For example, EPA's review of the 1997 ozone NAAQS took over 10 years. In undertaking its NAAQS

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review, the Administrator is advised by the Clean Air Scientific Advisory Committee (CASAC), an independent panel of scientific experts established by Congress to provide advice on the technical bases for NAAQS. See 42 U.S.C. 7409(d)(2).

Under the Clean Air Act, each state is responsible for adopting a State Implementation Plan (SIP) that provides for implementation, maintenance and enforcement of each NAAQS. See 42 U.S.C. §7410. Section 110(a)(2)(D)(i)(I) of the CAA provides that each state must provide in its SIP "adequate provisions…prohibiting…any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will…contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any" primary or secondary NAAQS. 42 U.S.C. §7410(a)(2)(D)(i)(I) (2011). This requirement is often referred to as the CAA's "good neighbor" provision.

Clean Air Act Litigation

The Law Department is currently representing the city in two multi-party litigations, discussed below, pending in the U.S. Court of Appeals for the D.C. Circuit, challenging federal air pollution regulations issued by EPA in one case, and intervening primarily to support EPA in the other. In the first case, Mississippi v. EPA, Index No. 08-1200, the city has joined several states in challenging EPA's final NAAQS for ground level ozone, which the city contends are not adequate to protect the public health or environment. The second case, EME Homer City Generation LP v. EPA, Index No. 11-1302, involves challenges brought by several states and industry groups to EPA's Cross State Air Pollution Rule (CSAPR), which implements the "good neighbor" provision of the CAA and requires upwind states to decrease their emissions of the chemical precursors to ozone and PM2.5 so that downwind states can achieve compliance with the NAAQS for these pollutants. The city has moved to intervene in these actions.

'Mississippi v. EPA.'

In March 2008, the EPA Administrator issued final NAAQS for ground level ozone, setting both the primary and secondary standards at 0.075 ppm (parts per million). This final rule revised the then-existing primary and secondary standards set in 1997 at 0.08 parts per million (ppm). While the new rule was more stringent than the previous standard, it was not as protective as the 0.060 to 0.070 ppm range recommended by CASAC and EPA staff.

New York City, as part of a coalition of jurisdictions led by New York State, filed a petition in the U.S. Court of Appeals for the D.C. Circuit challenging the 2008 ozone standards. The petition contended that the EPA's revised NAAQS for ozone do not adequately protect the public health and welfare, as required under the federal Clean Air Act, and that the EPA arbitrarily ignored CASAC's recommendations. The petition was consolidated with a number of other challenges to the ozone standards (including a coalition of states claiming that the new standards are too stringent) under one lead case, Mississippi v. EPA, No. 08-1200.

In March 2009, after the 2008 election and the appointment of EPA Administrator Lisa Jackson, the court granted EPA's request to stay the litigation so the new administration could review the 2008 ozone standards and determine whether they should be modified based on the scientific evidence and, if so, undertake a rulemaking to set a revised ozone NAAQS.

After reviewing the 2008 record, and analyzing further data, on Jan. 19, 2010, the EPA, adopting CASAC's recommendations, proposed a revised primary standard set between 0.060 and 0.070 ppm. However, on Sept. 2, 2011, the revised proposed standards were unexpectedly withdrawn, and the case challenging the 2008 standards, which had been held in abeyance since 2009, was then reinstated. The parties are currently waiting for a scheduling order setting the briefing schedule.

'EME Homer City Generation LP v. EPA.'

In the city, the impacts of pollution from sources outside of New York, and beyond the reach of the city's and state's air permitting requirements, are a significant concern. Recent studies indicate that approximately 45 percent of the city's PM2.5 concentrations are the result of upwind transport from sources outside the city, including pollution from Midwestern power plants and factories.

To address these types of interstate air emissions, EPA issued the Cross State Air Pollution Rule, which was finalized in July 2011. The cross-state rule sets emissions allowances for two precursors to ozone and PM2.5 pollution (sulfur dioxide [SO2] and nitrous oxide [NOx]) for 27 upwind states, which must cap the amount of those pollutants that energy generators in each state can emit. Emission reductions will take effect shortly, beginning Jan. 1, 2012, for SO2 and annual NOX reductions, and May 1, 2012, for ozone season NOX reductions. Combined with other final state and EPA actions, the Cross State Air Pollution Rule is expected to reduce power plant SO2 emissions by 73 percent and NOX emissions by 54 percent from 2005 levels in the region by 2014.

The rule allows emissions allowance trading among covered sources, utilizing an allowance market infrastructure based on existing, successful allowance trading programs. In November, the city moved for leave to intervene in the litigation currently pending in the D.C. Circuit involving challenges to the Cross State Air Pollution Rule. The multiple petitions for review, which were brought mainly by upwind states and electric generators subject to the new emissions budgets, have been consolidated under the lead case, EME Homer City Generation LP v. EPA.

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Since the rule is expected to benefit air quality in the New York City metropolitan area, the city moved for leave to intervene as a respondent in support of EPA in most of the consolidated petitions. However, in two petitions filed by New York state generators, including one by Con Edison, the city moved for leave to intervene as a petitioner in order to ensure that EPA adequately address the concerns expressed by those generators that the emissions limits that apply to them may not permit them to satisfy the demands of their customers. Currently, the court is considering several motions to stay implementation of the rule pending the rulings on the petitions for review.

Greenhouse Gas Litigation

While the city has put great effort into addressing the problems of ozone, particulate matter and their predecessor compounds, it has also devoted much attention to limiting the output of greenhouse gases, primarily carbon dioxide. One step taken in this direction was the city's participation, along with six states and three land conservation trusts, in American Electric Power Company, Inc. v. Connecticut, 564 U.S. __ (2011), 131 S. Ct. 2527, 2011 U.S. LEXIS 4565, a lawsuit brought against the five power companies with the largest emissions of carbon dioxide in the United States. The complaint, filed in 2004, was grounded in the federal common law of interstate pollution, as well as in state common law.

The plaintiffs sought injunctive relief that would set an initial cap on the defendants' carbon dioxide emissions, which would be lowered on an annual basis for at least 10 years. The District Court originally dismissed the complaint on the ground that it posed a political question which must be resolved by the executive and legislative branches of government, but the Second Circuit reversed, finding both that the plaintiffs had established standing and that they had stated a valid cause of action under the federal common law of public nuisance. Connecticut v. American Electric Power Company, 582 F.3d 309 (2d Cir. 2009).

While American Electric Power Company was pending, the U.S. Supreme Court issued its ruling in Massachusetts v. EPA, 549 U.S. 497 (2007), another case in which the city participated as plaintiff. There, the Court concluded that the EPA has authority under the Clean Air Act to regulate greenhouse gas emissions from new motor vehicles if it determines that such emissions contribute to climate change.

Subsequently, the Court granted the defendants' petition for certiorari and, in a decision written by Justice Ruth Bader Ginsburg and issued on June 20, 2011, held, relying on Massachusetts v. EPA, that Congress, acting through the Clean Air Act, has entrusted to the EPA "the decision whether and how to regulate carbon-dioxide emissions from power plants," and that the plaintiffs' federal common law claim had therefore been displaced by the Clean Air Act.

The Court reversed the American Electric Power judgment of the Second Circuit and remanded the case for further proceedings consistent with its decision. On Dec. 2, 2011, the District Court entered an order dismissing the federal common law public nuisance claim for the reasons set forth in the Supreme Court's decision. Connecticut v. American Electric Power Company, Inc., Index No. 04-CV-5669, unpublished order dated Dec. 2, 2011. Further action on greenhouse gas emissions, as on the emission of ozone and particulate matter, is now in the province of the EPA.

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