Testimony of Robert J. Meyers

Subcommittee on Energy and Power

House Energy and Commerce Committee

May 13, 2011

I would like to thank the Chairman of the Subcommittee, Mr. Whitfield, for the opportunity to offer additional testimony on The Jobs and Energy Permitting Act of 2011. Since my testimony for the Subcommittee hearing of April 13, 2011 contained a lengthy analysis of the original discussion draft, I will not repeat all the assessments rendered in that testimony. Instead, my testimony today will center on arguments that have been raised concerning whether to amend Section 328 of the Clean Air Act ("CAA") to clarify how permitting agencies should consider emissions from Outer Continental Shelf ("OCS") sources, how OCS sources should be defined and regulated and what time limits should apply to taking final agency action on a complete permit application.

As Members may know, my law firm, Crowell & Moring LLP represents affiliates of Shell Oil Company that are seeking CAA permits for exploration drilling projects to be conducted offshore Alaska in the Beaufort and Chukchi Seas where Shell holds offshore oil and gas leases. I have also provided legal services and representation to Shell Oil Company. I understand, however, that the committee has requested me to testify on the basis of my experience with regard to CAA legislation and regulatory interpretation and implementation of the Act since approval of the 1990 Clean Air Act Amendments ("1990 CAAA").

I. Measurement of Onshore Impact

My April 13th testimony outlined the development of CAA section 328 in the House and the Senate and its final approval by the conference committee for the 1990 CAAA. As I indicated previously, given the historical context in which Section 328 of the CAA was developed, it seems clear that the overall intent of Congress in enacting this provision was to protect onshore air quality and to ensure that offshore sources were regulated in a similar manner to source located in the "corresponding onshore area."[1]

Outside of any legislative intent, however, the statutory structure of CAA section 328 also centers on onshore air quality. In CAA section 328, Congress did not authorize EPA (or states or localities acting pursuant to a delegation of EPA authority) to regulate OCS sources for

[1] The conference report for the 1990 CAAA mentions only that "A new program is established providing for control of air pollution from Outer Continental Shelf drilling *facilities*." (Emphasis added) H.Rept. 101-952 at 348. Additional contemporaneous statements, however, do lend support to the interpretation that CAA section 328 was focused on onshore air quality. For example, during consideration of the 1990 CAAA conference report, Representative Largomarsino inserted a statement from the Assistant Director of the Santa Barbara Air Pollution Control District into the Congressional Record. This statement indicated in part that "The construction and operation of Outer Continental Shelf (OCS) facilities emit a significant amount of air pollution which can adversely impact *coastal air quality* in the United States. . . . Of primary concern is the fact that OCS air pollution is *causing or contributing to the violation of federal and state ambient air quality standards in some coastal regions*, with the potential that unmitigated OCS pollution will prevent certain coastal regions from attaining federal and state clean air standards." (Emphasis added) 136 Cong. Rec. 35031 (October 26, 1990)." As an additional example, Clean Air Facts (April 12, 1990), a publication circulated to members following the House Energy and Commerce Committee's mark up of H.R. 3030, indicated that a floor amendment would be offered to regulate OCS facilities. After citing the potentially large emissions from a "single uncontrolled facility" this publication stated that "[o]il and gas activities on the outer continental shelf can cause tremendous *onshore air pollution problems*." (Emphasis added) *A Legislative History of the Clean Air Act Amendments of 1990*, Library of Congress at 2564.

any purpose, but for certain defined purposes. Congress did not provide permitting authorities with the authority to regulate all OCS sources generally, but only with reference to certain provisions contained in the CAA. In specific, CAA section 328 provides that EPA establish requirements to "attain and maintain Federal and State ambient air quality standards and to comply with the provisions [of the Clean Air Act pertaining to preconstruction permitting of major emitting facilities]." Thus, EPA is authorized to control OCS sources with respect to attaining and maintaining national ambient air quality standards ("NAAQS"). Attainment and nonattainment designations for NAAQS are promulgated on the basis of land-based, geographic areas.[2] Congress also directed EPA to utilize the CAA provisions for the permitting of stationary sources (e.g., to determine such issues as whether a PSD permit is required and, if required, how air pollution control requirements are to be determined). Sources subject to PSD are required to demonstrate that their emissions combined with other emissions, in addition to not exceeding the NAAQS, will not consume more than the available air quality "increment." The focus of such requirements again is with respect to designated attainment and nonattainment areas onshore and land areas classified for their air quality, i.e., Class I or II.

[2] EPA has used Metropolitan Statistical Areas (MSAs) and Consolidated Statistical Metropolitan Areas (CSMAs) as a basis for the designation of nonattainment areas for NAAQS (although the Agency has also issued additional guidance documents which include other factors to be utilized in the designation process). CAA section 107(d)(4) additionally provides that if an ozone or carbon monoxide nonattainment area is located within a MSA or CMSA and is above a certain classification, then entire MSA or CMSA is included within the area by operation of law unless a Governor and EPA agree on a different course of action. State efforts to designate attainment and nonattainment areas through the process in CAA section 107(d) are also based on areas, specifically "areas (or portions thereof) *in the State*." (Emphasis added). Predictably then, most nonattainment areas follow political boundaries and jurisdictions. *See for example* Attachment 1, which includes a map of the nonattainment area for the South Coast of California.

EPA has recognized the overarching purpose of CAA section 328 within the regulations the Agency promulgated in 1992. EPA's OCS regulations provide that, "In implementing, enforcing and revising [the OCS rule] and in delegating authority hereunder, the Administrator will ensure that there is a *rational relationship to the attainment and maintenance of Federal and State ambient air quality standards* and the requirements of [the PSD program], and *that the rule is not used for the purpose of preventing exploration and development of the OCS.*"[3] (Emphasis added). In addition, EPA has explicitly stated that "The intent of Congress in adding section 328 was *to protect ambient air quality standards onshore* and ensure compliance with PSD standards. EPA is to accomplish this by controlling emissions of pollutants for which ambient standards have been set and their precursors (criteria pollutants) from the OCS that can be *transported onshore* and affect ambient air quality."[4] (Emphasis added) Measuring the air quality impact of an OCS source at the shoreline of a state, at the geographic points where NAAQS attainment and nonattainment areas exist and where the general public overwhelmingly resides, is obviously such a rational relationship. It is a relationship that EPA has repeatedly recognized in both promulgating the original OCS regulations and in updating OCS requirements to ensure consistency with state standards. The language within the discussion draft would serve to clarify this historic nexus and provide clear direction to EPA and other permitting agencies on

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[3] 40 CFR 55.1. In making further determinations with regard to the consistency of state and local regulations with federal regulations on OCS, EPA has indicated that the Agency "review[s] the rules submitted for inclusion in part 55 to ensure that they are rationally related to the attainment of maintenance of Federal or State ambient air quality standards or part C of title I of the Act , that they are not designed expressly to prevent exploration and development of the OCS and that they are applicable to OCS sources. 40 CFR 55.1 EPA has also evaluated the rules to ensure they are not arbitrary and capricious. 40 CFR 55.12(e). EPA has excluded rules that regulate toxics, which are not related to the attainment and maintenance of Federal and State ambient air quality standards." 75 Fed. Reg. 15,898, 15,899 (March 22, 2011

[4] 56 Fed. Reg. 63,774, 63,775 (December 5, 1991).

assessing impacted air quality in the course of their consideration of OCS permitting applications.

II. Definition of OCS Source

Concerns have been raised regarding the definition of an "OCS source" within the discussion draft. These concerns appear to be centered on whether during certain periods of time (e.g., when a drill ship is getting in position for drilling activities) a source which is otherwise a mobile source under the CAA should be, but would *not* be, considered to be a "stationary source." The committee has also received comments that set-up and breakdown activities for drilling should also be considered as activities of a "stationary source."[5]

As my previous testimony indicated, the discussion draft would not exempt all such activities from any regulation, or even from regulation under the Clean Air Act (e.g., as Title II mobile sources). Instead, the discussion draft would provide that such activities would not be defined as the activities of a stationary source and thereby potentially subject to standards applicable to "major emitting facilities" under the PSD program. Marine vessels are, in fact, regulated by EPA both as to engines and with regard to fuel.[6] Furthermore, states such as California have acted to regulate both vessels and the fuel used in such vessels within a certain distance from shore. The California Code of Regulations contains provisions to reduce particulate matter ("PM"), oxides of sulfur ("SO_x") and oxides of nitrogen ("NO_x") from harbor

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[5] Letter to the Honorable Bobby Rush from Thomas P. Walters, Washington Representative, County of Santa Barbara, April 12, 2011.

[6] *See* 68 Fed. Reg. 9,745 (February 28, 2003), 73 Fed. Reg. 25,098 (May 6, 2008), and 75 Fed. Reg. 22,896 (April 30, 2010).

craft by prescribing engine standards.[7] These regulations specifically include the regulation of "any . . commercial . . . vessel"[8] and include requirements for the use of California Air Resource Board diesel fuel or alternative fuel.[9] In addition, California has promulgated "Vessel Fuel Rules" that require ocean-going vessels to use lower sulfur fuels.[10]

Although the PSD program can be immensely complicated, the concept addressed in the legislation is straightforward. When a source is engaged in drilling activity – the actual function that that a drill ship or other mobile offshore drilling unit is designed to serve– it is considered to be a OCS source and thereby subject to stationary source regulation under the CAA. When a source is not engaged in drilling activity, it is not considered a stationary source. "Drilling activity" is a standard that can be applied among anchored drill ships, jack-up drilling units, and dynamically positioned units – all of which involve different procedures for preparing to drill. This would provide direction to permitting agencies as to the point at which the vessel becomes an OCS source. But again, this does not mean that air emissions from the vessel are "unregulated" or incapable of being subject to regulation, instead emissions from vessels may be subject to other federal and state regulation that is focused on mobile sources.[11]

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[7] *See* 17 CA ADC § 93118.5

[8] 17 CA ADC § 93118.5(d)(36).

[9] *Id*. at § 93118.5(e)(1).

[10] 17 CCR 98118.2. The fuel rules cover vessels greater than 400 feet in length, non-tanker vessels equal or greater than 10,000 gross tons, non-tanker vessels will engines with per-cylinder displacements larger than 30 liters and certain tankers.

[11] In *Pacific Merchant Shipping Association v. Goldstene,* a case in which vessel operators challenged California's fuel standards for certain vessels operating within 24 miles of its coastline, the United States Court of Appeals for the Ninth Circuit recently affirmed a district

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EPA has also recognized that the authority to regulate OCS sources is not unbounded. It has clearly stated that "Only the vessel's stationary source activities may be regulated, since when vessels are in transit, they are specifically excluded from the definition of OCS source by statute . . .Section 328 does not provide authority to EPA to regulate the emissions from engines being used for propulsion of vessels. Any state or local regulations that go beyond these limits will not be incorporated into the OCS rule."[12] The legislation therefore provides a "bright line" test to determine when a vessel or other OCS source ceases to be mobile and becomes subject to the narrow authorization of regulation contained in CAA section 328.

III. State Permitting Actions/Administrative Review

CAA section 116 generally provides that states or political subdivisions are not precluded from adopting or enforcing CAA standards and requirements provided that they are not less stringent than federal requirements. Most PSD permits are issued by state or local air pollution control agencies, either under delegation of authority from EPA to implement applicable federal regulations or through approval of an individual state's program under its State Implementation Plan ("SIP").

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court denial of a motion for summary judgment on several grounds including that California fuel rules were not preempted by the Submerged Lands Act. Case No. 09-17765 (March 28, 2011).

[12] 57 Fed. Reg. 40792, 40,794-5 (September 4, 1992). Parenthetically, EPA also indicated that "If mobile source emissions from vessels are regulated under future regulations developed pursuant to title II of the Act, the OCS rule will be revised accordingly." *Id*. at 40,795. As related in my April 13, 2011 testimony this regulation of marine vessels has occurred in the years following enactment of the 1990 CAAA and the promulgation of OCS regulations. However, I am currently unaware of EPA regulatory activity in this area.

EPA has delegated OCS air permitting authority in some states and in other states it has retained authority to implement the program. Pursuant to CAA section 328(a)(1), EPA regulations also provide that state and local requirements are applicable to OCS sources within 25 miles of the state's seaward boundaries, and EPA regulations incorporate such requirements by reference.[13] EPA periodically updates the requirements in its regulations to reflect changes to state and local requirements.

In the case of California, EPA delegated its OCS air permitting authority to each of California's coastal air quality control districts in 1994. Some districts (South Coast, Ventura, Santa Barbara and San Luis Obispo) have adopted the federal regulations as their own by cross-referencing the federal regulations within their regulations. An issue has been raised as to the extent to which the discussion draft would interfere with state administrative process on OCS permits.

To the extent a state is implementing the federal PSD program through delegation, changing federal laws and regulations could affect the previous process used in a state to consider and act on OCS permits. For example, I would interpret that the shorter 6 month deadline for granting or denying OCS permits would apply to state and local permitting agencies who are currently delegated authority by EPA. It is a separate question, however, as to the authority of a state to regulate OCS sources under its own authority within state territorial waters, within 25 miles of the shoreline or potentially further from shore, or whether federal preemption would exist that might constrain state action on the OCS.

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[13] 40 CFR § 55.14

The presumption that the discussion draft might interfere with state administrative process appears to be based on the view that the state authority in this area originally derived from CAA section 328 and/or that amending this authority would necessarily affect state administrative practices or procedures. Without discussing the relative limits of state and federal authority in this area, however, Congress clearly retains the right to adjust requirements contained in the CAA as it sees fit to promote desired outcomes, and consequently to alter the scope of the authority that EPA can delegate to the states. And EPA has unilaterally interpreted its CAA authority to require changes in SIPs and requirements applicable to sources in a state even in cases where a state may object to the changes.[14] Therefore, to the extent that state administrative processes might be changed through enactment of the discussion draft, there would be nothing unusual about such a legislative outcome. Instead, it would fall into the category of Congress' prerogative to amend and revise the laws it has enacted. To the extent that EPA is authorized to delegate its authority, the delegation necessarily follows the contours of the authority that Congress has given the Agency.

Currently, it appears that EPA considers that the administrative process on a PSD permit is not constrained by statutory deadlines contained in the CAA. EPA has taken the position in litigation that the one-year deadline in the CAA for granting or denying a PSD permit based on a

[14] Examples in this area would include "SIP Calls" under the authority of CAA section 110(a)(2)(D) to impose state emission budgets for certain pollutants to address downwind nonattainment and maintenance issues. In addition, in implementing newly established thresholds for the regulation of greenhouse gas emissions ("GHGs") under authority of the CAA, EPA issued Federal Implementation Plans ("FIPs") to impose the higher permitting thresholds on certain states. See 75 Fed. Reg. 82,246 (December 30, 2010) where EPA acted to apply FIPs in seven states that did not file a "corrective" SIP to apply their PSD program to sources of GHGs (although such states did not object to the FIP) and 75 Fed. Reg. 82,430 (December 30, 2010) where EPA promulgated a FIP to establish a PSD permitting program in a state for GHG-emitting sources in a state which objected to this action.

completed application applies only with respect to the actions of the Administrator's "delegate" to make a final permit decision (e.g. the decision of a Regional Administrator with respect to a completed permit application). While I am unaware of similar EPA statements specifically with regard to state administrative process, or any state administrative appeal process, EPA has stated that a permit decision "becomes final agency action for purposes of appeal to a federal court of appeals only after the administrative appeal process is exhausted."[15] Thus, by providing clear direction with regard to consideration of OCS source permits, Congress could achieve the beneficial result of creating certainty in this area. It could ensure that completed permit applications for OCS sources would not linger indefinitely in the administrative review process at either the federal or state level.

IV. Conclusion

Once again, I appreciate the opportunity to testify before the Subcommittee on this important issue. On the whole, my assessment of the Discussion Draft has not changed since my initial testimony. That is, it will serve to apply CAA requirements to OCS sources in a clear fashion, resolving lingering uncertainties that have surrounded the program. I also think that the legislation could help to fulfill the purposes that EPA originally outlined for its OCS regulations 20 years ago, i.e., to achieve "a more orderly, less burdensome system of air quality permitting for OCS sources."[16]

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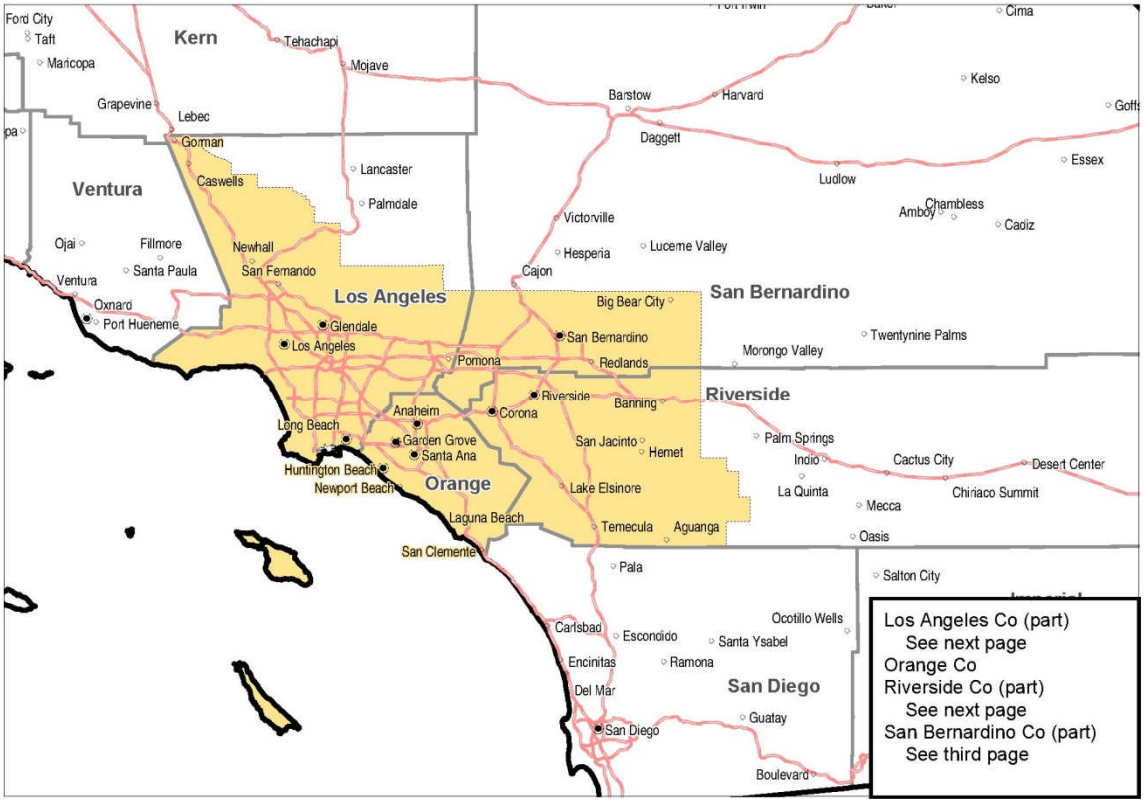
[15] Defendant's Response to Plaintiff's Supplemental Brief Regarding Remedy, *Avenal Power Center, LLC v. EPA*, United States District Court for the District of Columbia (filed 3/1/2011) at 14.

[16] 56 Fed. Reg. at 63,775.

Los Angeles-South Coast Air Basin, CA 8-hour Ozone Nonattainment Area



Boundaries and locations are for illustrative purposes only. This is not a regulatory document.

Los Angeles-South Coast Air Basin, CA 8-hour Ozone Nonattainment Area

Los Angeles Co (part)

That portion of Los Angeles County which lies south and west of a line described as follows: Beginning at the Los Angeles - San Bernardino County boundary and running west along the Township line common to Township 3 North and Township 2 North, San Bernardino Base and Meridian; then north along the range line common to Range 8 West and Range 9 West; then west along the Township line common to Township 4 North and Township 3 North; then north along the range line common to Range 12 West and Range 13 West to the southeast corner of Section 12, Township 5 North and Range 13 West; then west along the south boundaries of Sections 12, 11, 10, 9, 8, and 7, Township 5 North and Range 13 West to the boundary of the Angeles National Forest which is collinear with the range line common to Range 13 West and Range 14 West; then north and west along the Angeles National Forest boundary to the point of intersection with the Township line common to Township 7 North and Township 6 North (point is at the northwest corner of Section 4 in Township 6 North and Range 14 West); then west along the Township line common to Township 7 North and Township 6 North; then north along the range line common to Range 15 West and Range 16 West to the southeast corner of Section 13, Township 7 North and Range 16 West; then along the south boundaries of Sections 13, 14, 15, 16, 17, and 18, Township 7 North and Range 16 West; then north along the range line common to Range 16 West and Range 17 West to the north boundary of the Angeles National Forest (collinear with the Township line common to Township 8 North and Township 7 North); then west and north along the Angeles National Forest boundary to the point of intersection with the south boundary of the Rancho La Liebre Land Grant; then west and north along this land grant boundary to the Los Angeles-Kern County boundary.

Riverside Co (part)

That portion of Riverside County which lies to the west of a line described as follows: Beginning at the Riverside - San Diego County boundary and running north along the range line common to Range 4 East and Range 3 East, San Bernardino Base and Meridian; then east along the Township line common to Township 8 South and Township 7 South; then north along the range line common to Range 5 East and Range 4 East; then west along the Township line common to Township 6 South and Township 7 South to the southwest corner of Section 34, Township 6 South, Range 4 East; then north along the west boundaries of Sections 34, 27, 22, 15, 10, and 3, Township 6 South, Range 4 East; then west along the Township line common to Township 5 South and Township 6 South; then north along the range line common to Range 4 East and Range 3 East; then west along the south boundaries of Sections 13, 14, 15, 16, 17, and 18, Township 5 South, Range 3 East; then north along the range line common to Range 2 East and Range 3 East; to the Riverside - San Bernardino County line.

San Bernardino Co (part)

That portion of San Bernardino County which lies south and west of a line described as follows: Beginning at the San Bernardino - Riverside County boundary and running north along the range line common to Range 3 East and Range 2 East, San Bernardino Base and Meridian; then west along the Township line common to Township 3 North and Township 2 North to the San Bernardino - Los Angeles County boundary.