

Morgan Lewis

C O U N S E L O R S A T L A W

Clean Air Regulatory Update

Audit Roundtable Conference

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Clean Air



Areas Covered

- Air Toxics & MACT Developments
- PM2.5 and 8-Hour Ozone Designations
- NSR Developments
- CAIR & Mercury Rulemaking
- Title V Developments

Air Toxics Enforcement

- Selected by EPA as national priority for FY 2005-2007
- Regions to select 2 MACTS/yr as regional priorities
- Sectors Identified
 - secondary aluminum, wood furniture, printing & publishing, oil & nat. gas production, nat. gas transmission, refining, pharmaceuticals

MACT Rule Amendments

- Mature program-app. 150 MACT standards, but rules continue to change, e.g.:
 - Pharmaceutical MACT (Subpart GGG)-5/6/05
 - Miscellaneous Coating (Subpart HHHHH)-5/6/05
 - Iron & Steel Foundries (Subpart EEEEE)-5/6/05
 - Asphalt Processing (Subpart LLLLL)-5/6/05
 - Refinery CCUs/CRUs/SRUs (Subpart UUU)- (2/1/05)
 - HON Equipment Leaks (Subpart I)-12/23/04

RICE MACT (Subpart ZZZZ); Reciprocating Internal Combustion Engines

- Covers RICE > 500 HP at major sources; thousands of units affected (eff. 8/16/04)
- Certain RICE have no requirements
 - e.g., existing 2SLB, 4SLB, CI, emergency, limited use; maintain non-applicability determination only (63.10(b)(3))
- Other RICE have only initial notice requirements

Boiler MACT (Subpart DDDDD)

- Industrial, Institutional, Commercial Boilers & Process Heaters at major sources (eff. 11/12/04) --app. 58,000 units affected
- Units may be subject to CO, PM, HCL, Hg limits, depending on size, fuel type, age
- Certain small existing/new units required to maintain non-applicability determination only; others subject to initial notice only (3/05)

First Residual Risk Rule/Coke Oven Batteries (4/15/05)

- Policy Decisions Relevant for all Future Residual Risk Rules
- In General: CAA §112(f)(2):
 - Deadline: Generally within 8 years of MACT promulgation for a source category
 - EPA to determine if additional standards required to provide ample margin of safety to protect public health

First Residual Risk Rule/Coke Oven Batteries (con't)

- Coke Oven Batteries Rule; 70 FR 19992
 - Applied 1989 Benzene NESHAP 2-step process
 - Determine if risk from MACT standard is acceptable; costs not considered/examines only risks from source category
 - Determine ample margin of safety; costs considered and may consider co-located emission sources that augment identified risk

Upcoming Residual Risk Rules

- 25 MACT risk evaluation projects ongoing
- HON-proposal due 7/05; final 12/06
- Halogenated Solvents-proposal due 8/05; final 12/06
- No Further Controls (final mid-06)
 - Industrial cooling towers/Magnetic tape
 - Ethylene oxide sterilizers/Gasoline distribution

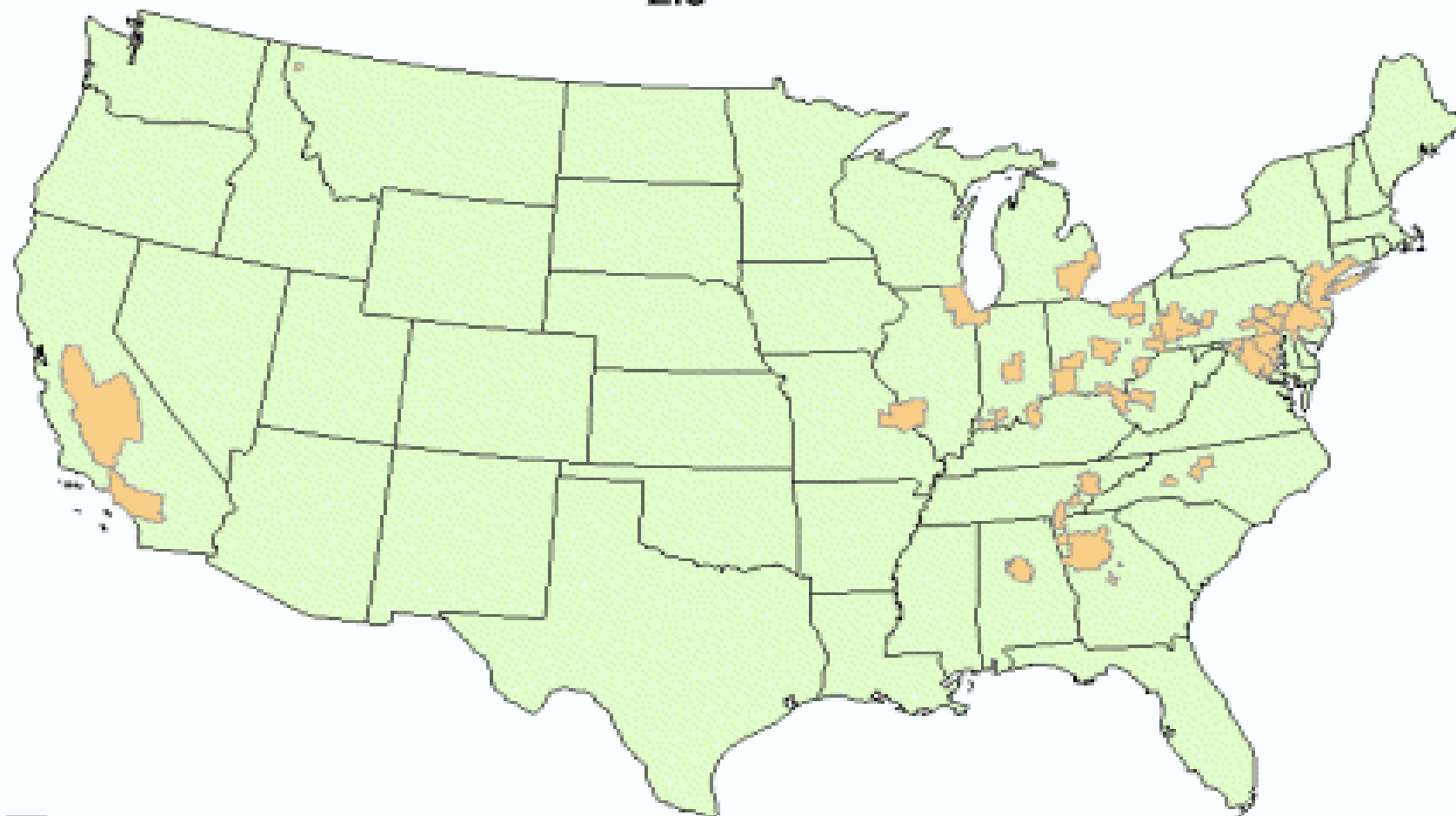
PM2.5 Designations

- PM2.5 NAAQS Designations Rule (1/5/05) over 200 counties designated NA (8 areas subsequently found to be attainment (4/12/05))
- Effective 4/5/05
- States -- 3 Years to submit SIPs meeting NA requirements, i.e., RACT and NSR permitting for PM2.5; however --
- No EPA implementation rule; due next year

NJ & NY PM2.5 NA Areas

- NJ Counties Affected:
 - Bergen, Essex, Hudson, Mercer, Middlesex, Monmouth, Morris, Passaic, Somerset, Union, Burlington, Camden, Gloucester
- NY Counties Affected:
 - Bronx, Kings, Nassau, New York, Orange, Queens, Richmond, Rockland, Suffolk, Westchester

Attainment and Nonattainment Areas in the U.S. PM_{2.5} Standards



- Attainment (or Unclassifiable) Areas (2933 counties)
- Nonattainment Areas (177 entire counties, 31 partial counties)

EPA PM2.5 Guidance Memo (4/5/05)

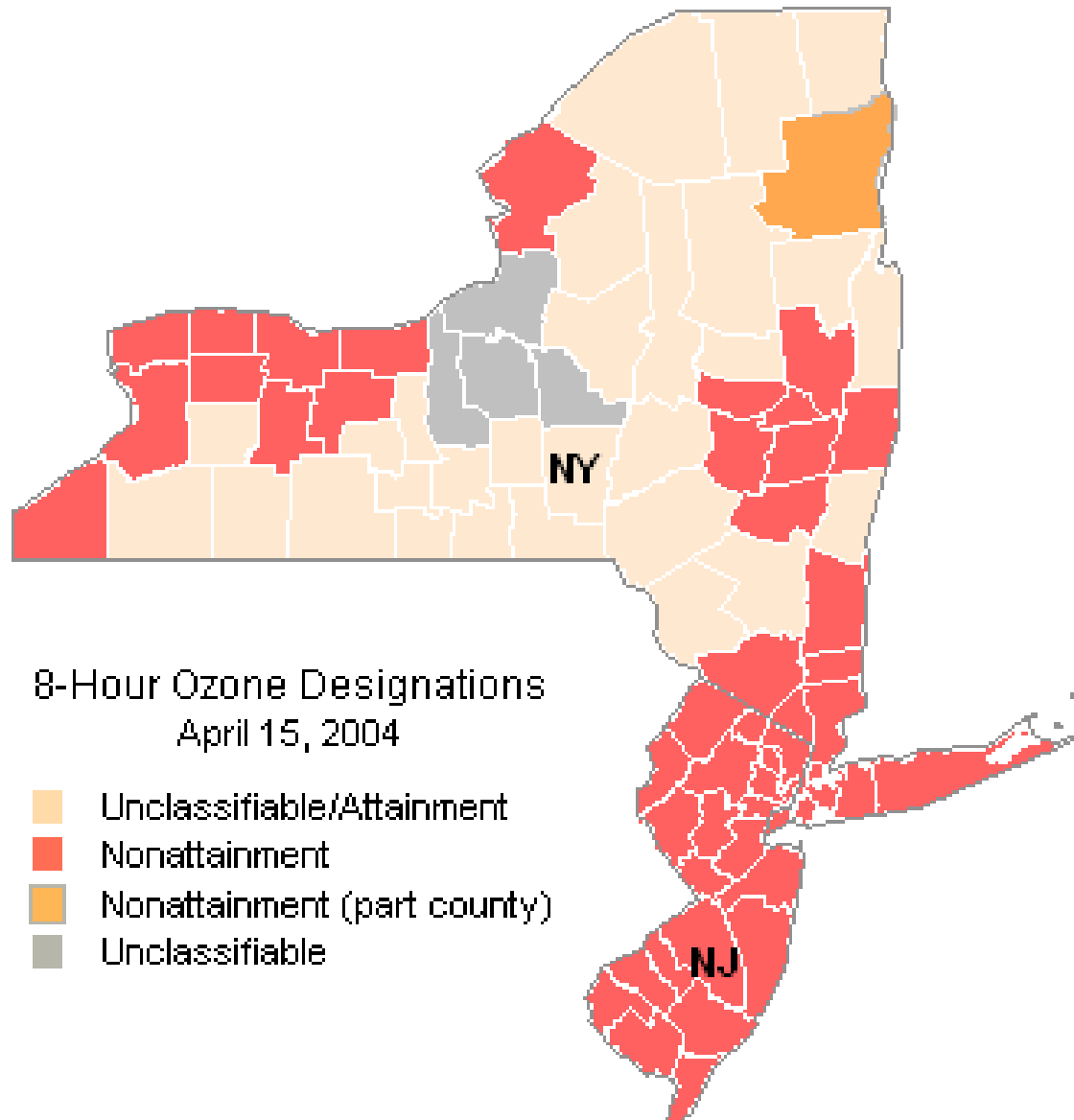
- States must issue major NSR permits that consider PM2.5 for projects triggering NSR
- States to use PM10 NA major NSR program or 40 CFR Part 51 Appendix S as a surrogate
- Source major for PM2.5 if actual/potential emissions = 100 tpy PM10; major modification threshold = 15 tpy
- Source may quantify PM2.5 fraction; if not major for PM2.5, NSR would not apply
- Not currently requiring regulation of precursors

8-hr Ozone NAAQS Developments

- 8-hr ozone NAAQS designations effective June 15, 2004
- 1-hr ozone NAAQS revoked June 15, 2005

NJ/NY 8-hr Ozone Designations

- All of New Jersey is a moderate NA area
- New York State is a mix
 - greater metropolitan NYC area is moderate
 - Jefferson County is moderate
 - other designated counties are generally “basic nonattainment” areas



8-hr Ozone NAAQS Developments

- What does it mean that 1-hr std is revoked?
 - Most of a State's 1-hr ozone SIP rules are required to be kept, i.e., RACT, enhanced I/M
 - However, not required to keep 1-hr NSR rules
 - Instead, States must establish an 8-hr NSR SIP based on 8-hr ozone designations
 - However, EPA indicates that 1-hr NSR SIPs (and permits) remain in effect until new 8-hr SIP is approved

Phase II Ozone Implementation Rule

- Due in Summer 2005 -- will include
 - major source thresholds
 - significant emission rate increases
 - offset ratios
 - NO_x as an ozone precursor in ozone NA areas

New Source Review Update

12/02 Reform Rules

- Actual-to-projected actual test; new baseline; PALs, clean unit test, pollution control projects
- Challenged in State of NY et al. v. EPA
- Court denied stay request (in effect in delegated PSD states, like NY, NJ)
- Briefing complete, oral argument 1/05
- Opinion expected Summer 2005

NSR Update

ERP Rule (Oct. 2003)

- Equipment Replacement Provision (ERP)
 - Specifies activities that will automatically qualify for RMRR from NSR definition of modification
 - Challenged in State of NY et al. v. EPA, and stayed by D.C. Circuit in late 2003
 - July 1, 2004: EPA granted requests for reconsideration and sought comment on certain issues raised by petitioners (69 FR 40278)

NSR Update

ERP Rule (con't)

- June 6, 2005 (70 FR 33838, 6/10/05): EPA takes final action on requests for reconsideration of ERP
- EPA finds that it will not make any changes to the ERP, including the controversial 20% cost replacement threshold
- D.C. Circuit litigation will now proceed, with briefs due in 90 days

NSR Update/Enforcement Coal Power Plants

- Enforcement continues: goal is 75% of generating capacity
- Settlements: 9 plants; 102 units
- Most recent settlement: Ohio Edison
 - \$1.1 billion in pollution controls
 - \$8.5 million penalty
 - 25 million in supplemental environmental projects

NSR Update/Enforcement Coal Power Plants (con't)

- Alabama Power Decision (June 3, 2005)
 - Whether project is RMRR to be determined on basis of whether an activity is routine for industrial category, not for a particular unit;
 - Emission increases, for NSR/PSD analysis, are to be determined based upon whether there is an increase in maximum hourly emissions, not annual emissions that consider increased utilization

NSR Update/Enforcement Petroleum Refineries

- EPA currently in NSR settlement discussions with 30% of industry
- EPA indicates it will sue nonsettlers
- Goal is to cover 80% of domestic refining
- In general, petroleum sector is a national enforcement priority for FY 2005-2007

NSR Update/Enforcement In General

- NSR/PSD selected as national priority for FY 2005-2007
- Shift to EPA regional enforcement
- Sectors identified by regions include:
 - glass, cement, polystyrene foam, landfills, industrial boilers, iron & steel, carbon black, PVC manufacturers, oil & gas producers, ethanol producers

Clean Air Interstate Rule (CAIR)

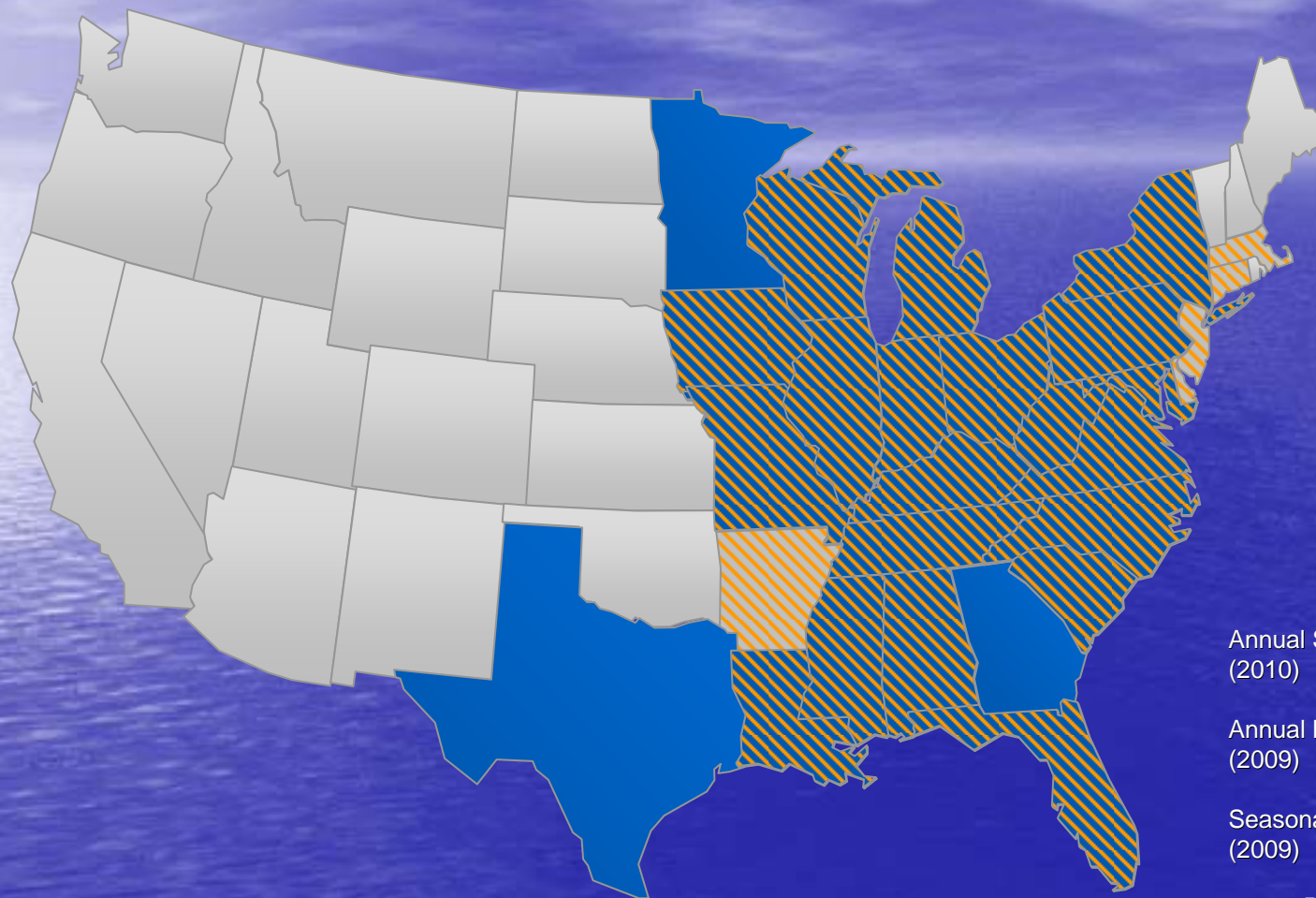
3/10/05; 70 FR 25162 (5/12/05)

- EPA finds 28 eastern States and D.C. contribute significantly to nonattainment of 8-hr ozone NAAQS and PM_{2.5} NAAQS in downwind States; CAA 110(a)(2)(D)
- Focus is on power plants (EGUs)
- Addresses SO₂ and NO_x as precursors to PM_{2.5}, and NO_x as precursor to ozone; States have 18 months to submit SIPs

CAIR--NY, NJ

- NY and NJ both affected
 - NY contributes significantly to ozone and PM_{2.5} NA in downwind States
 - NJ contributes significantly to only ozone NA in downwind States; therefore, only ozone-season NO_x budgets & not currently subject to CAIR SO₂ reductions
 - EPA proposes to make finding regarding NJ contributions to PM_{2.5} NA in downwind States

CAIR: Affected Region and Emission Caps



- States not covered by CAIR
- States controlled for fine particles (annual SO₂ and NO_x)
- States controlled for both fine particles (annual SO₂ and NO_x) and ozone (ozone season NO_x)
- States controlled for ozone (ozone season NO_x)

Emission Caps* (million tons)

	<u>2009/2010</u>	<u>2015</u>
Annual SO ₂ (2010)	3.6	2.5
Annual NO _x (2009)	1.5	1.3
Seasonal NO _x (2009)	.58	.48

*For the affected region.

CAIR Approach

- 2-Phase program with declining regional emission caps for NO_x (2009/2015), and SO₂ (2010/2015)
- Emissions budget for each State choosing to achieve reductions from EGUs/individual units receive allocations
 - Optional model cap-and-trade rules administered by EPA
 - complex integration issues with existing programs (NO_x SIP Call/Acid Rain)

Clean Air Mercury Rule-CAMR

3/15/05; 70 FR 28606 (5/18/05)

- Applies to coal-fired power plants
- Highly controversial; challenged by NJ, NY, PA and 8 other States
 - relies on standards developed under CAA 111 NSPS program, including cap-and trade approach for existing units (pre-1/30/04)
 - previous EPA position (12/00) that it would issue MACT standards under CAA 112

CAMR

- Highly controversial:
 - States/others believe not adequately protective of public health and environment, and cap & trade approach will lead to mercury (Hg) hot spots
 - 1st phase reductions rely on CAIR co-benefits
 - some assert that allocation methods and standards discriminate against “eastern” bituminous coal

CAMR

- CAMR caps nationwide Hg emissions
 - 2010: 38 tons (based on co-benefit reductions under CAIR)
 - 2018: 15 tons
- Mandatory emissions monitoring/reporting begins on 1/1/09; compliance 1/1/10
- States must submit rules in 18 months

Title V Developments

Enforcement

- EPA indicates will examine Title V compliance in enforcement cases brought under CAA
- St. Gobain (Region 9) NSR/PSD Settlement
 - allegations included Title V claim that improperly certified compliance
- Some States indicate will focus on compliance certifications to assess accuracy
- Regions slated to review 5% of new draft Title V permits to ensure ARs included and enforceable as practical matter

Title V Developments/General

- Permit Status as of 12/31/04; 95% of permits and 25% of renewals have issued
- Inspector General Report on Title V (3/9/05)
 - “Substantial Changes Needed in Implementation and Oversight of Title V Permits if Program Goals Are to be Fully Realized.” Issues include permit clarity, monitoring and annual compliance certifications
- Title V Implementation Task Force: consists of industry, States and environmental groups; report due in 2005

Title V Developments

GE Lighting v. Jones (OH) (3/1/05)

- Strikes operational restrictions not directly related to enforceability of the underlying emissions limit
 - An existing PM emissions limit on glass furnace
 - Title V permit included restriction requiring facility to maintain voltage/current within range of values recorded during PM emissions test, based on OH rule that Title V permits contain monitoring sufficient to assure compliance with permit terms
 - Facility demonstrated that these values were unrelated to compliance with PM limit; Commission struck this term

Title V Developments/ANPR

- Advanced notice of proposed rulemaking seeking comments to assist EPA in identifying monitoring in pre-1990 applicable requirements that are inadequate (70 FR 7905 (2/16/05))
- EPA may then develop rulemakings to improve/upgrade monitoring in some Federal rules