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Air Quality Letter

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Permitting

Pennsylvania Federal Court Decision Opens Door for Use of "Functional Interrelatedness" Analysis to Aggregate Emissions for Permitting Purposes

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A recent decision by a Pennsylvania federal court has left open the door outside the Sixth Circuit for Clean Air Act citizen suits and permit challenges claiming that facilities must obtain strict major source air permits by aggregating emissions from similar emissions units. In the case, styled *Citizens for Pennsylvania's Future v. Ultra Resources, Inc.,* Case No. 4:11-cv-1360 (M.D. Pa. Feb. 23, 2015), the court ultimately ruled that Pennsylvania air permitting authorities properly declined to "aggregate" emissions from a series of natural gas wells and compressor stations for permitting purposes. However, the court's analysis left open an argument that agencies should engage in a case-by-case analysis of whether such facilities are functionally interrelated, not just adjacent to one another, in determining whether they should be considered a single source for air permitting purposes.

INSIDE THIS ISSUE

The issue of "aggregating" emissions to trigger major source thresholds has been a contentious one, particularly in the oil and gas industry. Whether emissions from multiple emission units can be aggregated has a major effect on permitting. In 2009, EPA issued a guidance memorandum instructing the agency to consider not only whether emission units were physically contiguous or adjacent but also whether they were "functionally interrelated" in determining whether their emissions should be aggregated for purposes of determining whether major source permits were required. In a 2012 case, *Summit Petroleum Corp. v. EPA,* 690 F.3d 733, the U.S. Court of Appeals for the Sixth Circuit held that considering physical or functional interrelatedness was contrary to the plain meaning of the word "adjacent" as used in the definition of "facility." As such, the court ruled that EPA could not rely on the

interrelatedness of facilities to aggregate their emissions for permitting purposes where the facilities are not adjacent. Although, EPA has announced that it intends to publish new, national, guidelines on aggregation, such guidelines have not yet been published.

In the meantime, environmental interest groups pledged to file lawsuits challenging minor source permits issued to the oil and gas industry that did not aggregate emissions from interrelated facilities, such as wells and compressor or processing stations. The *Ultra Resources* case was the first of these cases to be decided by a federal court outside of the Sixth Circuit. In *Ultra Resources,* the Pennsylvania Department of Environmental Protection (PADEP) issued separate general permits to each of eight compressor stations as individual NO_X emitting units. The court noted that according to Pennsylvania law a "major emitting facility" is one that emits or had the potential to emit 100 tpy to any air pollutant, that Pennsylvania is designated non-attainment and thus a facility that emits or has the potential to emit 100 tpy of NO_X must undergo non-attainment new source review (NNSR) permitting. Aggregation of the Ultra units' NO_X emissions would have exceeded 100 tpy of NO_X thus subjecting Ultra to NNSR. Plaintiffs argued that the compressor and production systems were functionally interrelated and therefore their emissions should be aggregated and a major source permit should be required. The Pennsylvania court refused to apply the rule from the Sixth Circuit that only geographic adjacency should be considered in determining whether aggregation was appropriate, and left open the possibility that functional interrelatedness could be considered. However, after examining the facts of the case, the court ruled that the various emissions units could operate independently of one another and were therefore not functionally interrelated such that aggregation would not be required even under a functional interrelatedness analysis.

As a result of the *Ultra Resources* decision, project opponents, at least in states outside the Sixth Circuit, will retain the ability to argue that emissions from functionally interrelated facilities should be aggregated for permitting purposes. The oil and gas industry, and other industries where aggregation has been an issue, will therefore continue to face uncertainty in the permitting process until EPA releases additional guidance or amends its regulations. Moreover, because the *Ultra Resources* case arose in a citizen suit challenge to a series of issued permits, even those facilities holding final minor source permits remain at risk of litigation until the aggregation issue is resolved.

EPA Issues Revised Emission Factors for Flares and Other Refinery Process Units

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On April 20, 2015, EPA issued new and revised emission factors for flares and certain other refinery process units. The final action addressed: (1) VOC and CO emission factors for flares; (2) emission factors for NO_X, total hydrocarbons (THC) and CO for sulfur recovery units; (3) a THC emission factor for catalytic reforming units; (4) a NO_X emission factor for hydrogen plants; and (5) a hydrogen cyanide emission factor for fluid catalytic cracking units. Although EPA had proposed a revised NO_X emission factor for flares, the agency declined to adopt the revised factor due to concerns about the quality of the supporting data. EPA updated Sections 5.1, 8.13, and 13.5 of AP-42, which is EPA's primary compilation of emission factors. The agency also updated the Refinery Emissions Estimation Protocol that was used for the 2011 Refinery Information Collection Request.

EPA was acting in part to meet deadlines set by the consent decree in *Air Alliance Houston, et al. v. McCarthy,* No. 1:13-cv-00621-KBJ (D.D.C.). The lawsuit was filed in 2013 by Air Alliance Houston, Community In-Power and Development Association, Inc., Louisiana Bucket Brigade and Texas Environmental Justice Advocacy Services. The plaintiffs asserted that EPA had failed to perform nondiscretionary duties under Section 130 of the Clean Air Act. Section 130 of the Act requires the Administrator to review, and if necessary revise, emission factors used to estimate emissions of CO, VOC and NO_X from sources of those pollutants and to establish emission factors for sources for which factors have not been established. Initial action under Section 130 was required within nine months after enactment of the 1990 amendments to the Clean Air Act and then every three years thereafter. The plaintiffs asked the court to set a date certain by which EPA had to complete a review of VOC emission factors for flares, liquid storage tanks and wastewater collection, treatment and storage systems at petroleum refineries and petrochemical plants and either revise the factors or make a final determination that revisions were not needed. EPA entered into a consent decree that established a schedule to complete the review and take final action.

A number of comments were received on the proposal. In response to criticism of the emission factors for flares, EPA pointed out that it relied on data from four flares at test facilities burning propylene, propane and natural gas. The data set included eight flares from refineries and one flare from a chemical plant, all burning typical flare vent gas. EPA believes the data set adequately captured the emission profile of both the refinery and chemical plant flares. EPA also pointed out that the original emissions factors were based on testing of only two flares, one steam-assisted and one air-assisted burning a single fuel (crude propylene).

Although EPA recognized that use of source-specific data is preferred when it is available, if a source needs to use an emission factor, the agency concluded that these emissions factors are representative of flares that fall into assigned source classification code categories of Industrial Processes, Petroleum Industry, Flares, and Process Gas. For industries with flares that do not fall into these categories, the user must determine whether the emission factor is representative of its flare or whether a more appropriate data source, such as data from a manufacturer, is available. For example, the oil and gas production sector may use the flare factors at their own discretion although EPA noted that many of the flares in the oil and gas sector vary from the types of flares from which data was collected to develop the factors. Oil and gas sector flares may not have to achieve the same level of control as the refining and chemical manufacturing sectors, so the emission profiles would not be equivalent.

EPA specifically noted that use of AP-42 emission factors (or the Refinery Protocol) is not required. However, AP-42 emission factors in particular are routinely used by sources in all sectors to estimate emissions. Although EPA stated that it does not recommend using emission factors for site-specific permit limits, permit applicants and permitting agencies often use AP-42 emission factors in the permitting process where unit-specific emission data is unavailable. Thus, adjustments to emission factors can indirectly affect source permitting, particularly future renewals or revisions.

State Updates

Kentucky Regulatory Update

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No new regulations or amendments to existing regulations are currently proposed by the Kentucky Division for Air Quality (DAQ) or the Louisville Metro Air Pollution Control District (LMAPCD) as of the date of publication of this *Air Letter.*

Ohio EPA Proposes Changes to Open Burning Regulations for Prairie Fires

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Controlled burning is an integral, if sometimes controversial, method of maintaining prairie lands in Ohio. While the Ohio EPA has approved controlled burns of prairie land since the 1970s, a 2013 ruling by the Environmental Review Appeals Commission (ERAC) cast doubt on the future of controlled prairie burns.

In the spring of 2013, the Portsmouth Local Air Agency issued burning permits for 709 acres of land in the Shawnee State Forest. Environmentalist Barbara Lund then sued the State to stop the burns. ERAC sided with Lund in the case *Lund v. Portsmouth Local Air Agency,* Case No. ERAC 13-016720 (Dec. 19, 2013), holding that the State failed to establish that the controlled burning of a prairie fell into the "silvacultural" or "wildlife management" exceptions to Ohio's general prohibition on open burning. The court reasoned, on a textual basis, that since "silvaculture" is a word only intended to cover forestry activities, not prairies, and any impact on wildlife would be purely incidental, a controlled burn of a prairie did not fall within the existing open burning exceptions.

To remedy this situation, the Ohio EPA has proposed an amendment to OAC 3745-19-04 that specifies that "prairie and grassland management" as well as "invasive species management" are acceptable justifications for it to allow open burning. If adopted, the proposed changes will provide clarity for those seeking to employ open burns to manage prairie lands.

Ohio EPA Intends to Modify NOx Regulations for Lime Kilns and Stationary Internal Combustion Engines

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On May 7, 2015, the Ohio EPA announced that it intends to modify OAC 3745-110 regarding Reasonably Available Control Technology (RACT) Regulations for Nitrogen Oxides ("NOx"). Chapter 3745-110 of the Ohio Code establishes the requirements for emission of NOx from "very large, large, mid-size, and small boilers, stationary combustion turbines, or stationary internal combustion engines as defined in OAC rule 3745-110-01, and boilers located at facilities that emit or have the potential to emit a total of more than one hundred tons per year of NOx emissions from all sources at that facility."

Although Ohio EPA has not yet drafted its proposed changes, it has indicated that the changes will involve the addition of "site specific requirements for three facilities in northeast Ohio" and adding exemptions to OAC 3725-110-03(K) for lime kilns and stationary combustion engines. OAC 3725-110-03(K) currently contains exemptions from the RACT requirements for certain sources such as any "emergency standby boiler, stationary internal combustion engine, or stationary combustion turbine which operates less than 500 hours during any consecutive 12 month period."

NAAQS

EPA Proposes Revised Ozone Standard

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On November 25, 2014, EPA proposed revising the National Ambient Air Quality Standard (NAAQS) for ozone, recommending a standard between 65 to 70 parts per billion (ppb) for both the 8-hour primary and secondary standards. The current ozone standard is set at 75 ppb. The Clean Air Scientific Advisory Committee (CASAC) concluded that scientific evidence supported a standard between 60 to 70 ppb. Ultimately, EPA decided to propose a new standard between 65 and 70 ppb, but is taking comment on whether a 60 ppb standard should be established for the primary standard or whether the existing 75 ppb standard should be retained. EPA is also proposing to extend the length of the ozone monitoring season in 33 states.

Currently, the northern Kentucky counties of Boone, Kenton, and Campbell are designated as partial nonattainment with the existing 75 ppb ozone standard. But other counties could ultimately be designated as nonattainment depending on which value EPA chooses for the final standard.

In anticipation of the EPA's proposal to revise the ozone NAAQS, Kentucky Governor Steve Beshear sent a letter to President Barack Obama on November 21, 2014 outlining the Governor's concerns relating to the economic impact of the proposed standards and recommending that the standard remain unchanged. The letter indicates that if a 60 ppb standard is ultimately chosen all 29 of Kentucky's air monitors would exceed the standard.

Previously, in 2008, EPA revised the 8-hour primary ozone standard from 80 ppb to the current 75 ppb standard. EPA had allowed states to show compliance with the NAAQS more than three years after an area is designated "nonattainment" by extending the deadline to the end of the calendar year rather than three years from the designation date. However, the D.C. Circuit Court of Appeals recently held that this was contrary to the Clean Air Act's mandated deadlines in *National Resources Defense Council (NRDS) v. EPA,* (Case No. 12-1321, Dec. 23, 2014). This ruling could potentially pose restrictions on how EPA plans to implement the new standard.

The proposed rule includes grandfather provisions that would allow facilities with pending PSD applications, that have gone to public notice or have been determined complete before dates tied to the issuance of the final rule, to be reviewed based upon the current ozone standard. To meet the deadlines for the grandfather provisions in the proposed rule, facilities may need to submit PSD applications by as early as August, 2015.

EPA SO_2 NAAQS Designation Update

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On March 20, 2015, EPA issued updated guidance for area designations for the 2010 one-hour primary SO_2 NAAQS. The guidance was issued following EPA's settlement of claims by environmental groups and certain states that EPA failed to timely designate all areas of the country. The consent decree resolving the litigation established a three stage process to complete the designations. Kentucky has joined North Dakota, Arizona, Nevada, Louisiana and Texas in appealing the settlement to the U.S. Court of Appeals for the Ninth Circuit. The Notice of Appeal was filed on April 30, 2015.

As explained in the guidance, EPA must complete designations in accordance with the following schedule. By July 2, 2016, EPA must designate: (1) areas with newly monitored violations of the NAAQS; and (2) areas that contain any stationary source that according to EPA's Air Markets Database emitted more than 16,000 tons of SO_2 in 2012 or emitted more than 2,600 tons of SO_2 and had an annual average emission rate of at least 0.45 pounds/mmBtu in 2012 and for which retirement was not announced as of March 2, 2015. By December 31, 2017, EPA must complete designations for remaining undesignated areas for which states have not installed and begun operating SO_2 monitoring networks by January 1, 2017. All remaining areas must be designated by December 31, 2020.

On the same date the guidance was issued, EPA sent letters to 28 states advising them of areas which EPA believed fell within categories requiring action by July 2, 2016. In the March 20, 2015 letter to Commissioner Bruce Scott of the Kentucky Department of Environmental Protection, EPA identified two power plants in Kentucky that it believed met the SO_2 emission criteria in the guidance for action by July 2016: the D.B. Wilson Generating Station and the John S. Cooper Power Station. EPA also notified Kentucky of the following sources in nearby states that met the criteria and might be impacting Kentucky: Joppa Steam Coal Power Plant in Illinois, AB Brown Generating Station and Clifty Creek Power Plant in Indiana, and W H Zimmer Generating Station in Ohio.

States may submit updated recommendations on designations with supporting information to EPA for consideration. Those submittals are due by September 18, 2015. EPA expects to notify states of any intended modifications to the states' recommendation on or about January 22, 2016 but not later than March 2, 2016. In the schedule provided to Kentucky, EPA intends to publish the state recommendations and any EPA modifications for a 30-day public comment period on or about February 3, 2016. States will have until April 8 to provide additional information as to why an EPA modification of the state's recommendation is inappropriate. Final designations will be issued by July 2, 2016.

Standards of Performance

OSM Will Propose New Regulations to Address Air Emissions from Surface Mines

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The United States Office of Surface Mining Reclamation and Enforcement (OSM) is moving forward with a rulemaking to address emissions from blasting operations at surface coal mines. On February 20, 2015, OSM announced it was granting a petition for rulemaking filed by WildEarth Guardians. *See 80 Fed. Reg.* 9,256 (Feb. 20, 2015). WildEarth Guardians' petition, filed on April 14, 2014, requested OSM adopt new regulations under the Surface Mining Control and Reclamation Act (SMCRA) that would prohibit the production of visible NO_X emissions during blasting at surface coal mining operations. On July 25, 2014, OSM requested public comment on the petition. OSM received numerous comments on the petition, including some from state permitting agencies and industry asserting OSM's authority to regulate emissions under SMCRA was limited to emissions related to erosion of the surface, existing standards are adequate, and the standard proposed by WildEarth Guardians was infeasible and unnecessary. In its February 20 notice, OSM stated that existing state-level regulation of air emissions from blasting was often inconsistent and, therefore national regulation was appropriate. The notice also stated that OSM's proposed rule would not adopt the regulatory language proposed by WildEarth Guardians that would have set specific limits on NO_X emissions. The rulemaking is also expected to adopt a definition of "blasting area" under the federal regulations that implement SMCRA.

Once published, OSM's proposed regulation will again be subject to public notice and comment. If adopted, the regulation would initially only be part of OSM's federal regulatory program. Under SMCRA, most states with significant coal mining activity have "primacy" to administer their own state regulatory programs. However, those state programs must generally be consistent with minimum federal standards. As such, any proposed federal changes concerning blasting emissions would ultimately have some impact in primacy states and could impose a significant additional burden on the mining industry. Mine operators should continue to closely follow the development of OSM's proposed standards.

Reporting

EPA Proposes Electronic Reporting and Recordkeeping Requirements for New Source Performance Standards

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On March 20, 2015, EPA proposed to revise the 40 CFR Part 60, Subpart A General Provisions and various individual new source performance standards (NSPS) subparts to require the electronic submittal of specific air emissions reports to EPA and to allow these reports to be maintained electronically. The proposed rule would require specific air emission reports such as summary reports, excess emission

reports, compliance test reports, and performance evaluation reports be submitted to EPA's Central Data Exchange (CDX) rather than submitted in paper format. Most sources subject to an NSPS will be affected including paper mills, phosphoric acid plants, glass manufacturing plants, stationary gas turbines, grain elevators, coating operations, landfills, engines, waste combustors, refineries, steel mills, and rubber tire manufacturers. (A complete list of subparts affected and excluded by the proposed rule begins on page 15112 of EPA's proposal as it appears in the March 20, 2015, 80 *Fed. Reg.* 15100.)

The proposed rule will not change the way the reports are submitted to a facility's state or local air agency. However, state and local air agencies may "opt in" to receive reports electronically using EPA's system. The reports will be archived in the CDX and will be sent to the WebFIRE database within 60 days of submittal where they will be available to the public. Currently, these reports are not typically available online and the public would need to obtain copies through a Freedom of Information Act (FOIA) request or through a file review at state or local regulatory agencies.

EPA clarified that this proposal does not address the reporting and recordkeeping requirements for sources subject to existing source standards under NSPS emission guidelines. Rather, electronic reporting and recordkeeping under existing source standards will be addressed in the future when emission guidelines are opened for other revisions or when new emission guidelines are proposed.

EPA also proposes to delay the effective date of the final rule until 90 days after it is published in the Federal Register, in order to provide additional time for affected facilities to transition to electronic reporting. Comments on the proposal were due May 19, 2015.

DAQ now accepts submittal of certain documents through its eForms website. The eForms website removes DAQ's file size limitation for email attachments and allows documents to be securely transferred to DAQ's TEMPO database. The eForm website eliminates the need for sending a hard copy of the submittal to DAQ and allows a user to view documents previously submitted through the eForm website.

DAQ's Field Operations Branch (DAQ FOB) accepts permit-required reports such as annual compliance certifications and semi-annual monitoring reports through the eForm website. Note that asbestos notifications are not accepted through the eForm website and must be submitted to the appropriate regional office. Permit application correspondence is also not accepted through the website and must be submitted to the Permit Review Branch. To submit a document to the DAQ FOB, navigate to https://dep.gateway.ky.gov/eForms/Default.aspx?FormID=34.

DAQ's Source Sampling Section also accepts files such as sampling protocols and compliance test reports through the eForm website. To submit a document to the Division for Air Quality's Source Sampling Section. navigate to https://dep.gateway.ky.gov/eForms/Default.aspx?FormID=32.

Although not required, DAQ is encouraging facilities to submit documents through the eForm website rather than in hard copy. Following submittal of a document, the eForm website will display a receipt indicating proof of submission. The website will also send an email to the facility once the document is placed into the Division's TEMPO database. Detailed instructions for accessing and using the eForm website can be found https://dep.gateway.ky.gov/eForms/Controls/Instructions_for_Submitting_an_eForm_to_DAQ.mht.

Greenhouse Gas Emissions

EPA Takes Action to Provide for Rescission of Prevention of Significant Deterioration Permits Issued Solely Due to Increases in Greenhouse Gas Emissions

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On May 7, 2015, EPA issued a direct final rule to amend the permit rescission provisions in the federal Prevention of Significant Deterioration (PSD) regulations at 40 CFR 52.21. The direct final rule will allow states and local permitting authorities to rescind PSD permits that were issued under Step 2 of the Greenhouse Gas (GHG) Tailoring Rule.

Under Step 2 of the GHG Tailoring Rule, PSD permits were required for facilities that triggered PSD due solely to increases in GHG emissions of 100,000 tons per year or more. However, the U.S. Supreme Court issued a decision on June 23, 2014 in *UARG v. EPA,* 134 S.Ct. 2427 (2014) holding that EPA may not treat GHGs as an air pollutant for the specific purpose of determining whether a source is required to obtain a PSD or Title V permit solely on the basis of the significance of the GHG emissions. Accordingly, as a result of this Supreme Court decision, Step 2 sources that triggered PSD permitting requirements based solely on their GHG emissions are no longer required to hold a PSD permit. While EPA's direct final rule does not rescind any previously issued Step 2 permits, the rule provides a regulatory mechanism for the permit issuing authority to rescind PSD Step 2 permits that were issued under the now invalidated regulations upon the request of the source.

Note that the Supreme Court also held EPA could continue to require that PSD permitting address GHGs where a PSD permit is otherwise required based on emissions of conventional pollutants. These are PSD permitting requirements for GHGs under Step 1 of the Tailoring Rule for "anyway sources". The GHG threshold for such sources is 75,000 tons per year under the Tailoring Rule. However, EPA is proceeding to develop a proposed rule to modify that regulatory significance level for "anyway sources". It is not known whether EPA will set a significance threshold that is higher or lower than 75,000 tons per year of GHGs. Where GHGs along with other conventional pollutants are subject to PSD review for new major sources or major modifications, GHGs will be subject to BACT determinations.

Air Toxics

United States Supreme Court Reverses Utility MACT Rule

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On June 29, the United States Supreme Court ruled that EPA unreasonably interpreted the Clean Air Act (CAA) when the agency failed to consider cost in determining whether regulation of air toxics from power plants was appropriate and necessary. The U.S. Court of Appeals for the District of Columbia (D.C. Circuit) upheld the EPA regulations in 2014, but the high court has reversed and remanded the lower court's ruling.*Michigan v. EPA, U.S.,* No. 146 (June 29, 2015). Justice Scalia delivered the majority opinion in which Justices Roberts, Kennedy, Thomas and Alito joined. Justice Thomas also filed a concurring opinion. Justices Kagan, Ginsburg, Breyer, and Sotomayor dissented.

The rule, commonly referred to as the Mercury and Air Toxics Standards (MATS), was finalized in 2012 to require coal- and oil-fired power plants to reduce emissions of mercury and other air toxics. The rule established technology-based emission limitations and work practice standards that became applicable on April 16 of this year, unless a source was granted a one-year compliance extension. Writing for the majority, Justice Scalia explained that the CAA treats power plants differently from other sources for regulation of hazardous air pollutants by requiring EPA to first determine that regulation was "appropriate and necessary." EPA determined that regulation of hazardous air pollutants was appropriate and necessary but specifically did not consider costs in the determination. However, EPA performed a regulatory impact analysis, which estimated that the cost of compliance for the power plants was $9.6 billion and the benefits of reducing hazardous air pollutant emissions were estimate at $4 to $6 billion per year. EPA further estimated that ancillary benefits of the rule — benefits that were not attributable to the hazardous air program — would increase the benefits of the rule to $37 -$90 billion per year. EPA, however, did not use the regulatory impact analysis in determining that the regulation was appropriate and necessary.

The Supreme Court found that EPA is required to consider cost as a relevant factor in the appropriate and necessary determination. First, the Court found that the term "appropriate and necessary" is broad and all-encompassing and should include consideration of cost, noting that administrative agencies have long treated cost as relevant when deciding to regulate. Second, the Court found that the statutory context, which required a study considering the cost of control technology, showed the relevance of cost in the appropriate and necessary finding. The Court further rejected EPA's claim that the CAA makes cost irrelevant to the initial decision to regulate other sources under Section 112, pointing out that Congress crafted a separate provision in Section 112 specifically to address power plants.

The Court specifically stated that EPA "must consider cost - including, most importantly, cost of compliance - before deciding whether regulation is appropriate and necessary". The Court, however, left to EPA the discretion "within the limits of reasonable interpretation" to decide how to account for cost.

D. C. Circuit Vacates RICE MACT and NSPS 100-Hour Provision for Emergency Engines Participating in Emergency Demand Response Programs

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On May 1, 2015, the United States Court of Appeals for the District of Columbia issued an opinion remanding to EPA the 2013 federal regulatory provisions allowing emergency engines participating in an emergency demand response (EDR) program to operate for 100 hours without meeting more stringent MACT requirements for non-emergency engines pursuant to 40 CFR 63 Subpart ZZZZ. *Delaware Department of Natural Resources and Environmental Control v. EPA,* No. 13-1093 (D.C. Cir. May 1, 2015). See 78 *Fed. Reg.* 6674 January 20, 2013). As with other vacatur actions, the court will issue a mandate after the time has passed for post judgment filings. In its opinion, the court provided EPA, or any party, the ability to file a motion to "delay issuance of the mandate or to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards" if the vacatur causes administrative or other difficulties. EPA has been granted an extension until July 15, 2015 to file a petition for rehearing or a motion to stay the mandate.

The court found that in adopting the 100 hour provision EPA acted in an arbitrary and capricious manner in failing to adequately address comments and justify the exemption.

First, the court found concerns raised during the regulatory comment period regarding the impact of the exemption on grid reliability were not adequately addressed by EPA. Industry and environmental petitioners had raised concerns with EPA that demand response programs based on backup generators had a negative, rather than positive, impact on grid reliability because: (1) backup generators are not subject to the same controls as traditional power plants, cost less and thus underbid conventional power suppliers in capacity markets; (2) increased use of backup generators decreases demand for traditional power in capacity markets, traditional power generators rely on backup generators to recoup costs and under-invest in power plants thus undermining the reliability of the power grid; (3) decreasing power supply from traditional sources creates a less stable grid and power emergencies will increase; and (4) as power emergencies increase, the use of "dirty" backup generators will cause greater pollution. The court found the comments legitimate and further found that EPA passed off the arguments to other agencies responsible for grid reliability. The court found EPA's response inadequate when the final rule had based the exemption on grid reliability and EPA's failure to respond to these serious objections was arbitrary and capricious.

Second, the court found EPA had failed to adequately respond to comments that the 100-hour limit was based on faulty evidence. EPA had relied on comments from a prior rulemaking that the EDR program of regional transmission organization PJM Interconnection, LLC (PJM) required engines to be available for a minimum of 60 hours per year. The court found EPA failed to consider later comments from PJM that the 60-hour rule does not apply to individual engines but engines may be aggregated to meet the 60 hour availability requirement. The court found EPA failed to give an adequate reason for relying on the PJM availability requirement.

Third, the court found EPA did not explain why it did not limit the 100-hour exemption to areas of the country not served by capacity markets as had been proposed in comments to the rule. The court found SSM policy to interpret the Clean Air Act to preclude affirmative defense provisions in SIPs.

EPA provided only a “vague desire for uniformity” and EPA should have considered alternatives and provided reasons for not using them. “Because EPA too cavalierly sidestepped its responsibility to address reasonable alternatives, its action was not rational and must, therefore, be set aside.”

Also, the court noted EPA had justified the final rule adopting the 100 hour exemption on the basis of supporting grid reliability but did not involve the federal agencies responsible for grid reliability. “EPA cannot have it both ways it cannot simultaneously rely on reliability concerns and then brush off comments about those concerns as beyond its purview.”

According to the EPA website, the agency is reviewing the decision and will post any updates regarding the regulation.

Enforcement

EPA Grants Petition to Eliminate Affirmative Defense for Startups, Shutdowns, and Malfunction in State Implementation Plans

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In February 2013, EPA proposed to issue a State Implementation Plan (SIP) Call in 26 states, including Kentucky, regarding affirmative defenses in state regulations for excess emissions during startup, shutdown, and malfunction (SSM) events. At that time, EPA found provisions in the DAQ and LMAPCD SIPs would allow certain sources to be excused from compliance with emission standards where unplanned events, such as malfunctions, were deemed beyond the control of the permittee. Jefferson County, Kentucky revised its SSM provisions to eliminate the affirmative defense, and that SIP revision has been approved by EPA. DAQ had submitted correspondence to EPA on May 13, 2013 to indicate the state regulation provided for use of enforcement discretion and did not limit or exclude the authority of EPA and citizens from taking enforcement action under the Clean Air Act. However, EPA determined that clarification was necessary and proposed to find 401 KAR 50:055 § 1(1) substantially inadequate. See February 22, 2013 proposal at 12506, 12507.

On September 17, 2014, EPA issued a supplemental notice of proposed rulemaking relating to its February 2013 proposal for a SIP Call with respect to state SSM affirmative defenses. In the supplemental notice, EPA notes that the April 2014 decision of the U.S. Court of Appeals for the D.C. Circuit that invalidated an affirmative defense for malfunctions in the NESHAP for Portland Cement Manufacturing, indicates the states, like EPA, have no authority through SIP provisions to alter the jurisdiction of federal courts to assess civil penalties for violations of Clean Air Act requirements through affirmative defense provisions. EPA found the criteria for the affirmative defense under the Portland Cement NESHAP are functionally the same as the criteria that EPA previously recommended to the states for SIP provisions relating to affirmative defenses for excess emissions during malfunctions. Accordingly, EPA is proposing to revise its SSM policy to interpret the Clean Air Act to preclude affirmative defense provisions in SIPs.

In its September 17, 2014 supplemental notice, EPA notes that it has reevaluated each of the specific affirmative defense provisions previously identified in state SIPs in its February 2013 proposal. As a result of its reevaluation, EPA listed 17 states with SIP affirmative defense provisions that would be subject to a SIP Call. EPA noted that for Jefferson County, the SIP provisions for which it proposed a SIP Call in February 2013 have already been substantially removed from the SIP and the SIP revision has been approved by EPA as of June 2014. The supplemental notice stated EPA's position on DAQ's SSM regulation was unchanged from its February 2013 proposal to issue a SIP Call.

By letter dated November 19, 2014, EPA responded to a petition by Earthjustice requesting that EPA amend its NSPS and NESHAP regulations to delete affirmative defenses against civil penalties during SSM events. EPA noted that it had already commenced the process to remove the affirmative defenses from NSPS and NESHAP regulations consistent with the April 18, 2014 decision by the United States Court of Appeals for the D.C. Circuit that invalidated the affirmative defense for emission exceedances due to malfunctions in the Portland Cement Manufacturing NESHAP. EPA noted in the petition response it would continue the ongoing process of removing affirmative defenses from the remaining rules that were the subject of the petition as expeditiously as practicable.

On May 22, 2015, EPA signed its final rule on the SIP Call and the rule was published in the June 12, 2015 Federal Register. The final SIP Call requires 36 states to revise their affirmative defense regulations for excess emissions during startups and shutdown. In this region, affected states include Kentucky, Ohio, West Virginia, Indiana and Illinois.

With respect to Kentucky, EPA explained that 401 KAR 50:055 authorizes the Director of DAQ to excuse excess emissions from a finding of non-compliance where various factors are demonstrated without additional public review. EPA believes that could be viewed as precluding enforcement action by EPA or in citizen suits. In its response to DAQ's argument in comments to EPA, EPA stated the regulation was sufficiently ambiguous, despite DAQ's position that it only provides for enforcement discretion, that revision of 401 KAR 50:055 pursuant to a SIP Call is necessary. Accordingly, DAQ will need to revise 401 KAR 50:055 in response to the SIP call.

EPA's SIP call poses special concerns for emissions during startups where the permit does not address startup emission conditions or limits. It also raises questions as to whether Title V permits will need to be re-opened to remove language/conditions based upon 401 KAR 50:055 in its current form.

Other Significant Notes

NGOs Push EPA on Residual Risk Rules

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After serving a notice of intent to sue EPA related to updated emission control requirements associated with "residual risk" air toxics regulations, environmental groups brought suit against the agency on April 8. The plaintiffs in the suit, filed in the U.S. District Court for the District of Columbia, seek to force EPA to reassess requirements imposed on twenty-one industry sectors pertaining to residual health threats and upgrades in pollution control technology. Targeted in the litigation are industry sectors that have not been the subject of previous efforts by advocacy groups. Suits such as this often result in a settlement between the parties whereby EPA agrees to undertake the reassessment by a date certain. Further updates will be provided in subsequent issues of the *Air Letter*

Air Quality Letter

Readers are invited to provide comments, suggestions or newsworthy materials to the editors of the newsletter listed below. All input is welcome.

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