

March 11, 2014

D.C. Circuit Upholds 2012 EGU NSPS

On March 11, 2014, the D.C. Circuit upheld or dismissed challenges to the 2012 New Source Performance Standards (NSPS) for criteria pollutant emissions from electric generation units (EGUs) issued under Section 111 of the Clean Air Act. These rules were part of EPA's Mercury and Air Toxics Standards (MATS) rule package, which also included the National Emission Standards for Hazardous Air Pollutants (NESHAPs) for air toxics emissions from new, reconstructed, and existing EGUs.

This brief summarizes the decision.

Background

On February 16, 2012, EPA finalized Standards of Performance for Fossil Fuel-Fired Electric Utility, Industrial-Commercial-Institutional Steam (ICI) Generating Units (Utility NSPS). The Utility NSPS revised the particulate matter (PM), sulfur dioxide (SO₂), and nitrogen oxides (NO_x) standards for new coal- and oil-fired power plants. The NSPS rule was released along with the National Emission Standard for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units (Utility NESHAP or Utility Air Toxics Rule).

Today's ruling only addressed the NSPS portion of the rule package finalized on February 16, 2012.

The Decision

In the March 11, 2014, ruling, the D.C. Circuit upheld several challenges to the particulate matter (PM) emissions standards and monitoring requirements and dismissed others as not properly before the court on procedural grounds. The opinion, written by Chief Judge Garland, explained that "[s]everal of the petitioners' challenges are not properly before us because they were first raised in petitions for reconsideration that remain pending before the agency. We reject the petitioners' remaining challenges and deny the petitions for review" (Page 2).

In terms of the substantive issues, the court addressed petitioners' challenges to EPA's PM monitoring and affirmative defense provisions. UARG challenged the requirement that Subparts D, Db, and Dc boilers emitting more than 0.03 pounds per million British thermal units (lb/MMBtu) of PM remain subject to the opacity standard and must install continuous opacity monitoring systems (COMS) or perform periodic visual opacity inspections, even if they use particulate matter continuous emissions monitoring system (CEMS). The court rejected the petitioners' challenge, finding EPA's reasoning reasonable. The court also rejected a related challenge brought by UARG, suggesting that the final rule should not have included units that would have been exempted under the proposed rule.

Separately, Texas challenged EPA's refusal to allow state-law affirmative defenses to take the place of federal affirmative defense provisions included in the rule. However, the court held that Texas did not bring

the issue to EPA's attention until its petition for reconsideration; thus, Texas could not raise this objection for judicial review until that petition is resolved.

The court found that several additional issues were not be properly before the court, including the rule's condensable particulate matter testing requirement for Subpart Da units; the rule's establishment of a different frequency for periodic visual opacity inspections under Subparts D, Db, and Dc than under Subpart Da; and the agency's suggestion that it would permit the use of state-law affirmative defenses in the context of the NESHAP issued pursuant to 42 U.S.C. § 7412, while not allowing such defenses in the context of new source performance standards under § 7411. The court notes that petitioners do not dispute that the objections were not raised during the public comment period, and those petitions remain pending before EPA. Thus, the court dismissed these challenges.

Next Steps

Petitioners may appeal this ruling to the full D.C. Circuit, the Supreme Court, or both. However, a number of challenges were determined to be unripe for review, but these could be addressed at a later date after EPA either completes reconsideration or declines to reconsider these issues.

With regard to the NESHAP portion that has received the majority of the public and legal scrutiny, we continue to await that separate decision from the D.C. Circuit. For a discussion of recent requests from EPA to remand portions of the NESHAP for new sources, please see our related Issue Brief, *EPA Seeks Remand to Defend Several Air Toxics Emissions Standards*, also dated March 11, 2014.

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