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EPA Seeks Remand to Defend Several Air Toxics Emissions Standards

In recent weeks, EPA has sought to suspend litigation challenging recent air quality rulemakings that seek to limit emissions of hazardous air pollutants (HAPs): (1) the Mercury and Air Toxics Standards (MATS) for new and reconstructed electric generating units (EGUs) and (2) standards for industrial, commercial, and Institutional (ICI) boilers for sources of HAPs. The D.C. Circuit's decision in *National Association of Clean Water Agencies (NACWA) v. EPA*, which remanded a sewage sludge incinerator rule, called into question EPA's statistical methodology for setting emissions standards for subcategories with limited emissions data.

This brief summarizes the ruling in *NACWA* and discusses its implications for the EGU NESHAP and ICI boiler rules.

Background

Section 112 of the Clean Air Act is fairly prescriptive in terms of its approach to standard setting for both new and existing sources. Emissions standards for HAPs are required to result in "the maximum degree of reduction in emissions" taking into account cost and other non-air-quality factors. The standards for existing sources may be less stringent than those for new sources, but must be no less stringent than the emissions achieved by the best-performing 12 percent of existing sources (the "MACT floor"). Standards for new sources must represent the best-controlled similar source. In both rulemakings discussed here, the final emission limit is the MACT floor adjusted for variability as well as any beyond-the-floor controls. In general, accounting for variability results in a less stringent standard, while considering beyond-the-floor controls results in a more stringent standard. The issue in *NACWA* is the statistical methodology that EPA used in adjusting for variability and calculating the resultant emissions standards.

NACWA Highlights Concerns with EPA's Methodology

In *NACWA*, the D.C. Circuit heard challenges to EPA's emissions standards for sewage sludge incinerators (SSI Rule).¹ On August 20, 2013, the court remanded the SSI Rule to EPA for further explanation of the Agency's methodology for accounting for variability, including the use of a statistical methodology referred to as the "Upper Prediction Limit" (UPL), in setting numeric emission standards for SSIs. While EPA subsequently used the UPL methodology in the air toxic emissions standards for ICI and EGU boilers, the court notes in *NACWA* that "EPA took a different approach than it has in other MACT standard regulations that have come before [the D.C. Circuit] on petitions for review" (Page 27).

¹ While the SSI rule was issued under Clean Air Act Section 129 rather than 112, the Act uses the same wording for both calculation requirements.

Specifically, the court raised the concern that “[i]t is not clear to us, however, that the ‘average emissions limitation achieved by the best performing 12 percent’ would refer to the future average of a 3-run test that EPA predicts a source in the best-performing 12 percent will fall below with 99 percent confidence. Instead, the word ‘average’ as referred to in the standard for existing unit MACT floors seems to mean the average emissions limitation that the existing population of the best-performing 12 percent of incinerators has achieved, not the average of a future 3-run test conducted for compliance purposes. This is not to say that the upper prediction limit, which EPA applied to the average of the emission levels recorded while testing the best-performing 12 percent, would violate the statutory standard established in § 129. ... The need for further explanation is especially acute when EPA’s approach of using the upper prediction limit and its interpretation of ‘average emissions limitation achieved’ are both departures from the approaches EPA has taken in setting MACT floors in earlier cases” (Pages 51-52). The court concluded that, “[a]lthough EPA may be able to justify its novel interpretation that ‘average’ means the average of a future 3-run compliance test, one sentence in the Federal Register is not enough of a basis to uphold EPA’s new approach to incorporating variability against arbitrary and capricious review” (Page 53).

Thus, the court instructed EPA to “explain on remand why the upper prediction limit is a reasonable estimate of what an incinerator would achieve under the worst foreseeable conditions for incinerators with smaller data sets.” The court noted that, in at least one case in the SSI Rule, application of the UPL methodology would have resulted in establishing a standard for new sources that was less stringent than that for existing sources. While EPA addressed that issue in the final rule by setting the new source standard equal to the existing source standard, the court suggested that such a result indicated a potential problem with the methodology.

MATS

On March 5, 2014, EPA asked the D.C. Circuit for a voluntary remand without vacatur of the numeric standards for new and reconstructed EGUs set forth in the 2013 New Source MATS Reconsideration Rule (the 2012 standards for existing sources are unaffected by this action). EPA wishes to review the variability analysis used in establishing those standards in light of the court’s decision in *NA CWA*. EPA is also filing a motion to suspend briefing in this case pending resolution of the motion for partial remand. One issue in this litigation is environmental petitioners’ argument that EPA’s use of the UPL resulted in standards that were insufficiently stringent.

EPA notes in the request that the variability analysis used in establishing the numeric standards for new and reconstructed EGUs used the UPL methodology at issue in *NA CWA* and that the numeric standards were set using data sets consisting of six data points or fewer, and in one instance the UPL methodology similarly resulted in the calculation of a new source MACT standard less stringent than the MACT standard for existing sources. EPA states that it could adequately explain why the use of the UPL in general is consistent with Clean Air Act requirements through a temporary remand of the record (as the Agency requested in the ICI boiler litigation discussed below). However, EPA believes the question of whether the UPL is an appropriate statistical method for small data sets requires further analysis. Thus, EPA requested a voluntary remand without vacatur of all numeric standards for new and reconstructed EGUs finalized in 2013.

During the remand period, EPA will review its methodology for calculating the remanded standards and expects to conduct notice and comment rulemaking.

ICI Boilers

In litigation challenging EPA's regulations for ICI boilers, EPA has similarly asked the court to suspend briefing and remand the record to EPA for 60 days for evaluation of its calculation methodology. EPA is also requesting a voluntary remand without vacatur of the affected standards.

EPA also relied upon the UPL methodology to set emissions standards for ICI boilers. EPA notes that the Agency is particularly concerned about instances where standards are based on fewer than nine sources because "this statistical anomaly (i.e., where the UPL methodology resulted in the calculation of a new source MACT standard less stringent than the MACT standard for existing sources) did not occur in data sets with more than 9 data points. Accordingly, EPA is seeking a voluntary remand without vacatur of the numeric MACT limits that were established on the basis of 9 or fewer data points." This includes:

New Major Source ICI Boilers

- Hydrogen Chloride ("HCl") standard for units in all subcategories designed to burn solid fuel;
- Filterable Particulate Matter ("PM") and alternative Total Selected Metals ("TSM") standard for units designed to burn coal/solid fossil fuel;
- Carbon Monoxide ("CO") standard (but not the alternative CO Continuous Emission Monitoring System ("CEMS") standard) for fluidized bed units with an integrated heat exchanger designed to burn coal/solid fossil fuel;
- TSM (but not the filterable PM standard) for stokers/sloped grate/others designed to burn wet biomass fuel;
- CO standard for stokers/sloped grate/others designed to burn kiln-dried biomass fuel;
- Filterable PM and alternative TSM standard for stokers/sloped grate/others designed to burn kiln-dried biomass fuel;
- CO standard (but not the alternative CEMS standard) for fluidized bed units designed to burn biomass/bio-based solids;
- Filterable PM and alternative TSM standard for fluidized bed units designed to burn biomass/bio-based solids;
- Filterable PM and alternative TSM standard for suspension burners designed to burn biomass/bio-based solids;
- CO standard (but not the alternative CEMS standard) for Dutch Ovens/Pile burners designed to burn biomass/bio-based solids;
- Filterable PM and alternative TSM standard for Dutch Ovens/Pile burners designed to burn biomass/bio-based solids;
- Filterable PM and alternative TSM standard for fuel cell units designed to burn biomass/bio-based solids;
- HCl standard for units designed to burn liquid fuel;
- Mercury standard for units designed to burn liquid fuel;
- Filterable PM and alternative TSM standard for units designed to burn heavy liquid fuel;
- Filterable PM and alternative TSM standard for units designed to burn light liquid fuel;
- Filterable PM and alternative TSM standard for units designed to burn liquid fuel that are non-continental units;
- CO standard for units designed to burn gas 2 (other) gases;
- HCl standard for units designed to burn gas 2 (other) gases;
- Mercury standard for units designed to burn gas 2 (other) gases;
- Filterable PM and alternative TSM standard for units designed to burn gas 2 (other) gases.

Existing Major Source ICI Boilers

- CO standard (but not the alternative CEMS standard) for fluidized bed units with an integrated heat exchanger designed to burn coal/solid fossil fuel;
- CO standard for stokers/sloped grate/others designed to burn kiln-dried biomass fuel;
- Filterable PM and alternative TSM standard for stokers/sloped grate/others designed to burn kiln-dried biomass fuel;
- Filterable PM and alternative TSM standard for suspension burners designed to burn biomass/bio-based solids;
- TSM standard (but not the Filterable PM standard) for units designed to burn liquid fuel that are non-continental units;
- CO standard for units designed to burn gas 2 (other) gases;
- HCl standard for units designed to burn gas 2 (other) gases;
- Mercury standard for units designed to burn gas 2 (other) gases;
- Filterable PM and alternative TSM standard for units designed to burn gas 2 (other) gases.

Area Source ICI Boilers

While the area source rule had fewer numeric standards (many subcategories were subject to work practices only), all numeric standards were set with small data sets. Therefore, EPA is seeking a voluntary remand without vacatur of all numeric standards for area sources: mercury and CO standards for some new and existing coal-fired boilers.

Next Steps

EPA anticipates a decision on these requests shortly, as briefing is otherwise set to continue. In the case of the EGU NESHAP for new sources, because the standards only apply to new or reconstructed EGUs, EPA does not expect any plants to be affected as the Agency anticipates no new coal plants in the near term.

However, the use of the UPL was raised in litigation challenging the existing source standards, on which the D.C. Circuit recently heard oral arguments. The main coal and liquid oil subcategories were based on well over nine data points and, therefore, may not raise these concerns for the court. However, some of the smaller subcategories existing source subcategories relied on fewer than nine data points and may raise similar concerns as in the new source rules. In addition, the court may have to separately decide if EPA is correct that the UPL is not arbitrary and capricious with more than nine data points. Either way, the court could vacate the affected numeric standards or, as in *NACWA*, remand them with or without vacatur to EPA for further explanation. A decision in the existing source case is expected before the compliance deadlines go into effect in 2015.

With regard to ICI boilers, the impact of this request on the compliance timeline is less clear, particularly for area source boilers facing a March 21, 2014, compliance deadline. However, most area source subcategories were subject to work practice standards only; EPA estimates numeric standards cover approximately one percent of area source boilers. Work practice standards, such as the initial tune-up and energy assessment, are unaffected by EPA's request. Briefing in the ICI litigation is currently set to begin later in March 2014.

Any subsequent revisions to emissions standards would be subject to notice-and-comment. EPA has not requested that any standards be stayed during the evaluation. Concurrently, EPA is considering several reconsideration requests and expects to propose revisions by September 2014.

Contacts

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