



Legal Updates

1/28/2009

Environmentalists Push EPA to Re-Open 34 NESHAP Categories

On January 14, 2009, the Natural Resources Defense Council (NRDC) and the Sierra Club petitioned U.S. EPA to “reopen” established Clean Air Act § 112 regulations (NESHAPs) for at least 34 industrial categories. The stated purpose of the Petition is to “ensure that such regulations include emission standards for each listed hazardous air pollutant [HAP] the category emits and that such standards fully comply with the Clean Air Act; eliminate unlawful exemptions and alternative standards promulgated under Clean Air Act § 112(d)(4); and, eliminate unlawful or invalid use of surrogates.” The NRDC and Sierra Club further request that the Agency “undertake a comprehensive assessment of all of its existing Part 61 and Part 63 regulations... to ensure that each standard complies with the Act and governing judicial rulings.”

Many NESHAP categories include emission units for which EPA set “no control” floors based upon a finding that no viable pollution control is available for such equipment. The Petition argues that *National Lime Ass’n v. EPA*, 233 F.3d 625, 629 (D.C. Cir. 2000) requires that EPA set emission standards for each listed HAP based upon the emission levels actually achieved by the best-performing sources in a given category regardless of whether such plants are using air pollution control technology to limit their emissions. The Petition cites *National Lime Ass’n* for the proposition that the CAA “includes minimum stringency requirements for emission standards that apply without regard to either costs or the other factors and methods listed in section 7412(d)(2).” NRDC claims that rather than setting “industry air pollution standards that reflect the emission levels currently being achieved by the least-polluting facilities in a given industry,” the Agency has “lowered the bar, tailoring weaker thresholds to the dirtiest factories.” The Petition seeks to ratchet down HAP emissions through a number of means, including deleting exemptions and eliminating the regulation of “surrogate” pollutants, such as particulate matter, in lieu of direct regulation of HAPs.

In the Petition, the NRDC and Sierra Club specifically allege that existing NESHAP regulations for the following NESHAP source categories include unlawfully adopted “no control” and “surrogate” HAP provisions which must be revisited:

- Aerospace Manufacturing and Rework Facilities
- Asphalt Processing and Asphalt Roofing Manufacturing
- Surface Coating of Automobiles and Light-Duty Trucks
- Cellulose Products Manufacturing
- Engine Test Cells/Stands
- Flexible Polyurethane Foam Fabrication Operations
- Flexible Polyurethane Foam Production
- Friction Materials Manufacturing Facilities
- Generic Maximum Achievable Control Technology I:
 - Acrylic and Modacrylic Fiber (AMF) Production
- Generic Maximum Achievable Control Technology II:
 - Carbon Black Production
 - Ethylene Production
 - Cyanide Chemicals Manufacturing

- Hazardous Organic NESHAP
- Hydrochloric Acid Production
- Surface Coating of Large Appliances
- Lime Manufacturing Plants
- Manufacturing of Nutritional Yeast
- Marine Tank Vessel Loading Operations
- Mercury Cell Chloro-Alkali Plants
- Mineral Wool Production
- Oil and Natural Gas Production
- Petroleum Refineries
- Phosphoric Acid Manufacturing and Phosphate Fertilizers Production
- Polyether Polyols Production
- Polymers and Resins, Groups I, III and IV
- Primary and Secondary Lead Smelting
- Publicly Owned Treatment Works (POTWs)
- Pulp and Paper Mills
- Stationary Combustion Turbines
- Taconite Iron Ore Processing
- Wet Formed Fiberglass Mat Production
- Wool Fiberglass Manufacturing

For example, with regard to petroleum refineries, the Petitioners claim that the current benzene standards do not reflect the actual benzene emission levels achieved by the relevant *best performing units* in the industry. Petitioners conclude that the Agency must revise these standards to satisfy § 112(d)(3)'s *minimum stringency* requirements. The current benzene NESHAP also exempts hydrogen plant vents at petroleum refineries from control requirements. The Petitioners conclude that because the Agency based the current exemption on the costliness of potential controls, the Agency must reopen the rule to set emission standards for hydrogen plant vents.

In many, if not all, of these categories, the Agency previously found that no further control was warranted in light of the minor level of unregulated emissions, the lack of demonstrated control technologies, and the statutory mandate that it consider "the cost of achieving such emission reductions, and any non-air quality health and environmental impacts and energy requirements" when establishing maximum achievable control (MACT) standards. (42 USC 7412(d)((2)) The NRDC and Sierra Club argue that these considerations do not obviate the requirement that EPA establish minimum emission limits for every HAP and HAP emitting process in a NESHAP category.

The organizations also request that the Agency "promptly delete all SSM [startup, shutdown, and malfunction] exemptions from any Part 63 regulation in which any such exemption appears" based on the D.C. Circuit Court's recent decision in *Sierra Club v. Environmental Protection Agency, et al.*, Case Nos. 02-1135, 03-1219, 06-1215, 07-1201, ___ F.3d ___, 2008 WL 5264663 (D.C. Cir. Dec.19, 2008). That decision vacated longstanding EPA regulations which exempt emissions during periods of "startup, shutdown, and malfunction" from permitted emission limits. The SSM exemption was based on the logic that such emissions, by definition, are not representative of normal operations, are unpredictable, and are difficult, if not impossible, to control. In lieu of discrete emissions standards, the General Provisions in Subpart A of Part 63 (40 C.F.R. 63.1 – 63.16) created a "general duty" to minimize emissions during SSM events, together with detailed SSM deviation reporting requirements. To date, EPA has not appealed the D.C. Circuit's SSM decision, and NRDC and the Sierra Club argue EPA must implement the Court's decision.

By filing this Petition at the outset of the new administration, these major environmental organizations are signaling that they intend to vigorously push the new Obama EPA to embrace their long-standing agenda for more stringent regulation of

hazardous air pollutants. Notably, on the same day that the Petition was filed, the Sierra Club also filed a lawsuit in the U.S. District Court for the Northern District of California seeking an order to compel the Agency to “review and revise as necessary” or “promulgate additional standards” for at least 26 categories of hazardous air pollutant sources according to a court imposed deadline.

From an affected industry perspective, this Petition presents the prospect that many reasonably derived exemptions, alternative control strategies and SSM programs will be abandoned and replaced with costly new requirements to reduce emissions from many small, temporary and difficult to control HAP emission sources and events.

The NRDC and Sierra Club have requested that EPA provide a “substantive response” to their Petition within 180 days.

McGuireWoods LLP Clean Air Act Team

McGuireWoods LLP is a full service law firm with a specialty practice in Clean Air Act matters. For further information on the implications of the NRDC and Sierra Club Petition for hazardous air pollutant regulation under the Clean Air Act, please contact the authors or any member of our Clear Air Act team.

If you would like to receive our legal news updates by e-mail, please use our online sign-up form.

McGuireWoods news is intended to provide information of general interest to the public and is not intended to offer legal advice about specific situations or problems. McGuireWoods does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention.

MORE INFORMATION

Patricia F. Sharkey
312.750.8601
psharkey@mcguirewoods.com

Gordon R. Alphonso
404.443.5716
galphonso@mcguirewoods.com

David L. Rieser
312.849.8249
drieser@mcguirewoods.com

Neal J. Cabral
202.857.1727
ncabral@mcguirewoods.com

Stacia A. Christman
412.667.7938
schristman@mcguirewoods.com

Elizabeth M. Rothenberg
904.798.2683

erothenberg@mcguirewoods.com

Amanda Kitchen Short
704.343.2359
ashort@mcguirewoods.com