The Long and Winding Road to a Boiler MACT Rule

When the U.S. Court of Appeals for the D.C. Circuit vacated EPA's Boiler MACT regulations in *NRDC v. EPA*, 489 F.3d 1250 (June 8, 2007), effective July 31, 2007, it threw another curve in a long and torturous regulatory process. As a result of the Court's decision, EPA has advised state regulators that, the "MACT Hammer" has fallen, triggering the Section 112(j) case-by-case MACT process for both new and existing Boiler MACT sources.

How did we get here?

On September 13, 2004, after much delay, EPA finalized the Boiler MACT, formally known as the National Emission Standard for Hazardous Air Pollutants Rule for Industrial, Commercial, and Institutional Boilers and Process Heaters or Subpart DDDDD of 40 CFR Part 63. The Final Rule addressed different types of boilers differently — based on the size of the unit and the type of fuel used. For certain types of boilers, including existing gas and oil fired units, EPA found that the "MACT floor" was "no control," and thus the Boiler MACT established no emission limits or technology requirements for those boilers. The Natural Resources Defense Council (NRDC) and other environmental citizen groups opposed the "no control" categories and other aspects of the rule and appealed to the D.C. Circuit Court of Appeals. To address some of NRDC's concerns, EPA amended the rule in late 2006, but the appeal continued on certain points. While the appeal proceeded, the rule remained in effect and the compliance deadline for existing sources remained September 13, 2007. As the deadline approached, many states and permittees watched the lawsuit closely. To be prepared, some states began inserting the Subpart DDDDD requirements in permits and incorporating the federal rules in state regulations.

Why did the Court vacate the EPA rule?

The Court's opinion failed to reach the controversial questions of whether EPA's risk-based "health thresholds" and "No Control" Boiler MACT options are lawful, and instead vacated based on the scope of the boilers considered and covered under the rule. What troubled the D.C. Circuit was the fact that in another rule appealed in the same case, the Commercial and Industrial Solid Waste Incineration ("CISWI") Rule, EPA narrowed the definition of "incinerator" to exclude units that burn any solid waste for energy recovery. The effect of this definition is to make fewer units subject to the CISWI, which applies to both area and major sources of Hazardous Air Pollutants" ("HAP"). This results in the regulation of those units under the Boiler MACT, which applies only to major HAP sources. The Court held this was inconsistent with Section 129 of the Clean Air Act, which only exempts co-generation facilities from the definition of "incinerator." Because thousands of units that were excluded from the CISWI rule were included in the database for the Boiler MACT rule, the Court vacated not only the CISWI rule, but the Boiler MACT rule as well.

The Court vacated the rule, rather than simply remand it back to EPA with instructions for further action because the Court apparently believed vacating the rule would allow the Court to retain greater control over the schedule for revising the rule. This appears to have been based on the assumption that one or more of the parties – EPA or NRDC — would move for a stay of the vacatur order allowing the court to impose conditions addressing the schedule for revisions and the standards that would apply in the interim. But, to many observers surprise, neither EPA nor NRDC moved for a stay. Thus, the Court's assumption backfired. On July 31, 2007, the Court issued a mandate formally vacating the rule. The effect of the vacatur was to essentially wipe the rule off the books.

The MACT "Hammer:" Did you hear it fall?

Shortly after the Court's mandate issued, EPA held a conference call with state air pollution control regulators across the country to discuss the implications of the Boiler MACT vacatur. In that call, EPA stated its view that the "MACT Hammer" in Section 112(j) of the Clean Air Act should be deemed to have "fallen" by virtue of the vacatur – thus triggering the requirement for the states to make case-by-case determinations of "maximum achievable

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control technology" in thousands of individual boiler permits. EPA advised that "one option" is for the states to notify affected permittees, pursuant to 40 CFR 63.52(a)(ii), that they are now required to submit applications for Title V permit revisions reflecting case-by-case Boiler MACT requirements.

Section 112(j) is a "stop gap" provision in the Clean Air Act, designed to ensure against EPA's failure to promulgate MACT regulations. Under Section 112 (j), if EPA fails to promulgate a MACT standard by the specified date for the source category, those sources in the affected industrial category must apply to their state permitting authorities for "case-by-case" MACT determinations. This is known as the "Hammer." Its effect is to "hammer" not only EPA, but also the state regulators that must make thousands of case-by-case determinations and the regulated entities that find themselves in a vague realm, with varying procedural and substantive requirements.

Is there a road map for compliance?

In the face of EPA's conclusion that Section 112(j) has been triggered, the states and industry have urged EPA to provide guidance to state agencies and regulated entities on their implementation and compliance obligations. But, to date, no written guidance or even a timetable for compliance has been forthcoming. In fact, EPA isn't sure right now what that guidance will contain or when it will be issued. EPA recently determined that its authority (and the authority of state permitting authorities) to issue an information collection request for Section 112(j) applications expired in 2005 under the Paperwork Reduction Act. EPA admits it didn't renew that authority back in 2005 because it never imagined this situation occurring. While EPA waits for the Office of Management and Budget to act on its request for a temporary emergency renewal of its information collection request authority, it is reluctant to issue guidance to the states.

As a result of all this, the regulated community is left with many questions:

First, there is a fundamental question as to whether EPA is correct that a judicial vacatur of a rule triggers the Section 112(j) case-by-case MACT requirement. Section 112(j) doesn't address judicial vacatur. Rather, Section 112(j) by its own terms only applies when the EPA Administrator fails to promulgate a NESHAP standard for a listed category by the specified deadlines. In the case of the Boiler MACT, EPA did promulgate a rule.

Second, if the vacatur does trigger the Section 112(j) "hammer," it's not clear what duties arise (for EPA, the States and the permittees) and what time lines apply. As the duties and time lines specified in the Clean Air Act and EPA's Section 112(j) procedural rules are geared to EPA's failure to *promulgate* a rule, rather than a judicial vacation of a rule, there are no clearly applicable duties or time lines. Moreover, since the applicable deadlines for the Boiler MACT are long passed, some argue that a court or EPA must establish a new schedule before case-by-case Boiler MACT applications under Section 112(j) are required.

State Efforts to Take the Wheel

Absent guidance from EPA, different states have taken different approaches to these and other questions posed by the regulatory void. The following is a snapshot of how various Great Lakes states have responded to the vacatur of the Boiler MACT rule and the purported triggering of the Section 112(j) "hammer."

Illinois

Illinois Environmental Protection Agency ("IEPA") has taken the position that Section 112(j) Part 2 applications were due within 60 days following the issuance of the Appellate Court mandate vacating the rule. Unlike many other states, Illinois simply implements the federal NESHAP program, and does not adopt separate state regulations. On August 31, 2007, IEPA sent a letter to approximately 200 permittees stating that Part 2 applications "must be submitted to the IEPA no later than October 1, 2007." While IEPA received many responses to its August 31, 2007 letter, some permittees did not respond. In some cases, the permittee refused to submit a Part 2

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and instead responded stating that IEPA had no authority to require Part 2 Applications at this time. By virtue of having initiated the Part 2 process, IEPA triggered a statutory 60-day clock for making application "completeness" decisions. IEPA is hoping that EPA will issue guidance on the timing and the required content of the Part 2 applications before its completeness determinations are required. Among the issues in question, is whether the Part 2 applications must contain proposed emission limits, control technology, monitoring and recordkeeping and reporting provisions. While the express language of 40 CFR 63.54(b)(3) states that the Part 2 application "may, but is not required to, contain" these case-by-case MACT proposals, some IEPA lawyers are arguing that the Title V regulations require that this information be included. It is interesting that EPA's Section 112(j) webpage formerly included an example of a Part 2 Application, but that exemplary language was recently removed from the webpage. (Note: It can still be found at www.epa.gov/ttn/atw/112j/part_2_form2.pdf.)

IEPA argues that by submitting a Part 2 application, Illinois permittees gain the benefit of a "shield" against enforcement under 40 CFR 63.52(e)(5) for failure to have a permit addressing Section 112(j). But given the many questions that are unresolved at this point, IEPA may well be wishing it hadn't jumped to the front on this issue.

Minnesota

Like Illinois, the Minnesota Pollution Control Agency (MPCA) concluded that the Section 112(j) "hammer" had fallen when the D.C. Circuit's mandate issued. MPCA posted notice on its webpage stating that permittees were obligated to submit Section 112(j) applications by September 28, 2007. MPCA later modified its webpage posting, stating: "*...The specific timing for when the applications must be submitted is one of several outstanding questions. However, to identify the universe of facilities that will be impacted by the court's action so that a strategy can be developed for how to proceed,* the MPCA is requesting the following information, *that would be included in a 112(j) application,* be provided to MPCA, Air Quality Permit Document Coordinator by September 28, 2007." In other words, despite acknowledging the existence of "several outstanding questions," MCPA required permitees to submit an extensive list of detailed information on each emission unit — essentially a Part 1 and Part 2 application under 40 CFR 63.53 – within less than 60 days after the Court's mandate issued.

In its notice, the MCPA also takes the position that an affected source permitted before the date of the Court's mandate (July 31, 2007) is an "existing source" for purposes of the Boiler MACT. By defining an "existing source" on the basis of when the judicial mandate issued, Minnesota is again providing an interpretation on a timing question that may be odds with subsequent EPA guidance.

Indiana

Indiana had already incorporated the EPA Boiler Rule by reference in its state regulations by the time the D.C. Circuit vacated the rule. When the rule was vacated, the Indiana Department of Environmental Management ("IDEM") initially took the position that its incorporation by reference of the federal rule into the Indiana rules at 326 IAC 20-95-1 remained valid. However, IDEM has since concluded that its rule is unenforceable.

IDEM now takes the position that its rule is "no longer effective" because it references federal rules that are no longer effective. IDEM recently sent letters to permittees suggesting that they can apply for minor permit modifications to remove the boiler MACT provisions from their permits. Unlike Illinois and Minnesota, IDEM is waiting for written EPA guidance before initiating a Section 112(j) permit process.

Wisconsin

Wisconsin is another Region 5 state that implements the federal NESHAP program through its own state regulations. Like Indiana, Wisconsin had already adopted EPA's Subpart DDDDD as the Wisconsin Boiler MACT rule at the time the rule was vacated. Recognizing that its NESHAP program is designed

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to parallel the federal NESHAP program, Wisconsin issued an emergency order staying the implementation of its state rule, effective September 13, 2007. Wisconsin has not put out a "call" for Part 2 applications or otherwise taken steps to initiate a Section 112(j) "case-by-case" MACT decision making process.

Michigan

The Michigan Department of Environmental Quality ("MDEQ") adopted Subpart DDDDD in its state regulations by reference and has inserted Boiler MACT requirements in permits. While the state regulation remains on the books, MDEQ now considers any permit condition reflecting the Boiler MACT to be null and void. In a "Boiler MACT Q & A" document posted on its webpage, MDEQ has invited permittees to seek permit modifications if they have questions about the applicability of certain provisions.

MDEQ has also advised that in the absence of the Boiler MACT, Section 112(g), another Clean Air Act provision requiring case-by-case MACT determinations, may apply at new major HAP sources or existing major HAP sources installing new boilers that in themselves qualify as major for HAP. However, MDEQ has not issued any advice as to what constitutes a "new" or "existing" affected source in this unique context.

As to the applicability of Section 112(j), MDEQ is taking a cautious approach and admits "At this time we are not sure it applies." MDEQ's latest update to its Boiler MACT Q & A document, dated October 10, 2007, states "We understand EPA is now certain that 112(j) applies but they have not determined what the trigger date should be. The guidance document they are preparing should cover these issues. The new estimated timeframe given for distribution of the guidance is another 2-3 weeks."

MDEQ also takes the position that a permittee's duty to submit a Part 1 MACT application is not triggered until such time as the MDEQ notifies the facility that the "Hammer" now applies to them. MDEQ states "Since we currently do not believe the rule applies, we do not intend to make this official notification; however, one factor that might force a resolution to this issue could be permitting actions associated with the [Title V] program at existing facilities with boilers."

Ohio

Ohio EPA has taken the cautious approach and decided to await EPA guidance before taking any regulatory action relating to sources covered under the Boiler MACT.

Are We There Yet?

The vacatur of the Boiler MACT and its repercussions is a prime example of how a single change in the complex network of Clean Air Act requirements can produce an array of questions with real world consequences for regulated industries. In the absence of a national "map," states have reached different conclusions as to where the "on" and "off" ramps are in this new territory. Many have gone in one direction initially only to change direction as the consequences of their interpretations become clear. All parties have an interest in EPA acting quickly to re-promulgate the Boiler MACT, but in a "best case" that process is likely to take 2 – 3 years. In the interim, EPA and the states are likely to embark on the Section 112(j) case-by-case MACT determination process. What that process will be and what case-by-case MACT controls (or "no control") for boilers will be is still unknown. In short, we're not home yet. Stay tuned … for more twists in the road.

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