

Boiler MACT Rule/Clean Air Act: U.S. Court of Appeals District of Columbia Circuit Remand

Arkansas Environmental, Energy, and Water Law Blog



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The United States Court of Appeals for the District of Columbia Circuit ("Court") issued a December 23rd decision remanding the United States Environmental Protection Agency's ("EPA") Clean Air Act Boiler Maximum Achievable Control Technology ("MACT") rule. See *United States Sugar Corporation v. EPA*, No. 11-1108.

The MACT is remanded to EPA without vacatur.

The Clean Air Act Boiler MACT rule was promulgated on March 21, 2011. See *National Emission Standards for Hazardous Pollutants for Major Sources: Industrial, Commercial and Institutional Boilers and Process Heaters*, 76 Fed. Reg. 15608, as amended, *National Emission Standards for Hazardous Pollutants for Major Sources: Industrial, Commercial and Institutional Boilers and Process Heaters*, 78 Fed. Reg. 7,138 (Jan. 31, 2013).

The Boiler MACT rule affects various industrial, commercial and institutional boilers through the imposition of new emission limits and work practice standards.

Section 112 (c) of the Clean Air Act requires EPA to publish a list of industry group (major source and area source) categories and subcategories that employ, manufacture or emit hazardous air pollutants ("HAP"). The 1990 Clean Air Act Amendments require EPA to promulgate technology-based emission standards and allow for the possible supplementation of health-based standards. The regulatory standard for the HAP sources is the Maximum Achievable Control Technology standard.

The Court had initially granted a petition brought by the Environmental Petitioners to review the EPA decision to exclude certain sources from its calculation of MACT emission standards for major-boilers subcategories, and vacated any standards that had been affected by the flawed calculation citing *U.S. Sugar Corp. v. EPA*, 830 F. 3d. 579,632(d)(c)(Cir. 2016).

EPA filed a petition on September 12, 2016 seeking a panel rehearing asking that the major-boiler standards be "remanded" to EPA without vacatur for the agency to conduct rulemaking and determine which standards are 'affected' and to modify them in accordance with the Court's opinion. The Court states in its December 23rd decision that "all relevant parties in this matter support the EPA's request."

The Court notes in discussing a remand without vacatur that it may:

. . . in some circumstances invite prejudicial delay. . . , in other circumstances vacatur itself carries more-harmful consequences. We have, therefore, frequently remanded without vacating when a rule's defects are curable and "where vacatur 'would at least temporarily defeat. . . the enhanced protection of the

environmental values covered by [the EPA rule at issue],” . . . Vacating with the standards at issue here would unnecessarily remove many limitations on emissions of hazardous air pollutants from boilers and allow greater emissions of those pollutants until EPA completes another rulemaking and implements replacement standards. . .

The Court concludes it is appropriate to remand without vacating the numeric MACT standards set in the Major Boilers Rule for new and existing sources in each of the 18 subcategories. It further states that on remand:

. . .the EPA is to identify those standards for which the MACT floor would have differed if the EPA had included all best-performing sources in each subcategory in its MACT-floor analysis. EPA must then revise those standards consistent with the Court’s July 29, 2016 opinion on this issue.

“Industry Petitioners” concerns regarding the importance of EPA “expeditiously completing the rulemaking” are noted in the decision. However, the Court declines to impose a deadline by which the agency must act. Nevertheless, it stresses to the agency that:

. . .we expect the EPA to complete this rulemaking promptly. We also “remind the Petitioners that they may bring a mandamus petition to this court in the event that [the] EPA fails to” revise its standards on remand “in a manner consistent with our” earlier opinion.

[A copy of the decision can be downloaded below.](#)