



D.C. Circuit Requires EPA to Consider All HAPs When Reviewing NESHAPs

07.14.2020

In 2001, EPA promulgated the National Emission Standards for Hazardous Air Pollutants (NESHAP) for pulp and paper combustion sources. The rule addressed some, but not all, of the hazardous air pollutants (HAPs) these sources are known to emit. In 2017, EPA conducted its first review of the NESHAP, but decided to review only the emission limits on HAPs already controlled by the NESHAP. The Louisiana Environmental Action Network (LEAN) and other environmental groups took issue with the fact that EPA's review did not address every HAP the pulp and paper source category is known to emit. They petitioned the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to review EPA's action. In a recent decision, the Court agreed with the petitioners and found that section 112 of the Clean Air Act (CAA) requires EPA to consider and address all 190 listed HAPs when issuing or revising NESHAPs.

At the center of the appeal was the Risk and Technology Review (RTR) of the NESHAP. The RTR process involves reevaluating health risks associated with toxic air emissions, as well as any new control technologies or processes that should be incorporated into the emissions limits and requirements of the NESHAP. EPA is required to perform an RTR eight years after promulgating a HAP emissions standard. In this case, EPA began the RTR process in 2011 some ten years after issuance of the NESHAP. However, EPA did not begin the RTR rulemaking process until 2016, operating under a court ordered deadline of October 1, 2017 to issue a final rule. The 2016 proposal included some changes to the rule, but did not add emissions limits for HAPs that EPA recognized were not addressed in the rule. The 2017 final rule also did not address these HAP emissions.

EPA recognized that new emission limits may be developed as part of the RTR process, but found there was no obligation to do so. It argued Section 112 of the CAA did not require it to address pollutants that were not addressed by the original NESHAP when the NESHAP is periodically reviewed. The Court disagreed and remanded the 2017 rule to EPA with instructions to "set limits" on the remaining HAP emissions.

The question now for all industry is to what extent the LEAN decision will impact other RTRs. Of particular interest is the potential impact on the recently issued RTR for Combustion Turbines (CTs) and

Coal and Oil-fired Utility Boilers (MATS rule). The CT NESHAP was promulgated in 2004. It regulates formaldehyde emissions from new and reconstructed CTs at major HAP sources, but does not contain any requirements for existing CTs. In the preamble to the NESHAP and in the RTR, EPA found that HAPs are contained in CT exhaust gases. These HAPs include formaldehyde, toluene, benzene and acetaldehyde. Metallic HAPs are also present in oil-fired CTs. The rule only sets a limit for formaldehyde (at 91 parts per billion) and requires that new or reconstructed CTs incorporate lean premix gas-fired and/or lean pre-mix oil-fired burners. As an aside, compliance with these requirements is stayed and has been stayed since issuance of the rule.

EPA finalized the CT RTR on March 9, 2020. The RTR contained no change to formaldehyde requirements for new or reconstructed CTs and again included no requirements for existing units. Does the LEAN decision require that EPA must have performed a complete assessment of the 190 air toxics and required limits for air toxics other than formaldehyde? Throughout EPA's CAA rules, emissions limits on certain pollutants are found to be surrogates for other pollutants, and that is EPA's argument as to why the formaldehyde limit is adequate. By controlling formaldehyde through clean combustion, EPA's position is that all other HAPs are adequately controlled. Thus, consistent with the Court's holding, EPA believes the rule addresses all CT HAP emissions without the need to set individual emissions limits for each. EPA will now have the opportunity to defend that position in court because a challenge to the CT RTR was recently filed in the D.C. Circuit.

The second question concerns the MATS rule RTR issued in April 2020. The MATS rule was developed through a comprehensive evaluation of all 190 listed air toxics. In the final rule, EPA allowed coal and oil-fired utility boilers to comply with particulate matter (PM) and sulfur dioxide (SO₂) emissions limits as surrogates for all HAPs except mercury, for which there are separate emissions limits. MATS units can also choose to comply with specific HAP limits.

There is no question that the MATS rule addressed all listed HAPs. Thus, the only potential impact of the LEAN decision would be if the D.C Circuit were to determine that the MATS RTR should have set specific limits for all toxics analyzed in the rulemaking. That result seems implausible. This MATS rule RTR is being challenged, but the appeal is focused on EPA's determination that it is not "appropriate and necessary" to regulate mercury emissions from utility boilers.

We see some risk from the LEAN decision for the CT RTR and CT NESHAP, but none for the MATS RTR and the MATS rule. The bigger issue is how the LEAN decision will impact other NESHAPs when they come up for review.

Louisiana Environmental Action Network v. Environmental Protection Agency, 18-1245 (D.C. Cir. Apr. 21, 2020).

CT RTR, 85 Fed. Reg. 13524 (March 9, 2020).

MATS RTR, 85 Fed. Reg. 31286 (May 22, 2020).

Related People

Related Services

- Environment & Natural Resources