

Uncertain Skies for Power Plants Across the US? EPA Issues Final Utility MACT Rule and Federal Appeals Court Stays the Cross-State Air Pollution Rule

The transition to 2012 has brought two important developments in federal Clean Air Act (“CAA”) rules that may affect power plants across the US. In late December, the US Environmental Protection Agency (“EPA”) finalized the new power plant emissions standards for mercury, acid gases, and non-mercury metallic toxic pollutants (including arsenic, chromium, nickel, and others) for new and existing coal- and oil-fired utility steam generating units. Dubbed the “Utility MACT,” these new standards apply in all 50 states and will affect many of the nation’s 1,400 oil- and coal-fired electric steam generating units (“EGUs”) at approximately 600 power plants throughout the country. This marks the first time that EPA has set national emissions limits on mercury from power plants.

Meanwhile, on December 30, 2011, the DC Circuit Court stayed implementation of EPA’s new Cross-State Air Pollution Rule (“CSAPR” or the “Transport Rule”), finalized in July 2011, while the court considers the legality of the rule. The Transport Rule regulates certain power plant emissions in 27 states in the eastern half of the US, including Iowa, Wisconsin, Minnesota, and Illinois.

The Utility MACT

The Utility MACT is part of four interrelated rules that govern emission standards under the CAA for boilers and incinerators that combust fossil fuels for electrical power, process operations, or heating. The four rules are aimed at reducing hazardous air pollutants (“HAPs”) that affect air quality in communities where the boilers and incinerators are located.

EPA derives its authority to regulate power plant emissions from § 112 of the CAA. The CAA lays out a specific structure for how EPA determines whether and when to regulate power plant emissions. Section 112 of the CAA established the National Emissions Standards for Hazardous Air Pollutants program (“NESHAP”) which covers 188 HAPs including mercury, acid gases, various metals. EPA is required to identify categories of sources of HAP emissions in the US (“source categories”), such as fossil fuel-fired units. EPA must set emissions standards for each category of HAP sources listed in § 112. Once a

source category is listed, EPA has just two years to set emissions standards for the source category.

For major emission sources, EPA sets “maximum achievable control technology” or “MACT” standards. Major sources are sources that emit 10 tons per year or more of a single HAP, or 25 tons per year or more of a combination of multiple HAPs. MACT standards require the maximum degree of reductions in HAP emissions achievable, taking into account certain statutory factors, which cannot include cost. The standards for existing sources must be at least as stringent as “the average emission limitation achieved by the best performing 12 percent of existing sources in the category.” For categories with less than 30 sources, the standard must match the best performing five sources in the category.

Where the Utility MACT Applies

Which of the four rules applies to any given emissions unit depends on three primary factors: (1) the size of the unit (in megawatts, megawatt-electric, or British thermal unit per hour) according to the unit’s original rated nameplate

capacity; (2) the boiler or furnace technology; and/or (3) the portion of the electrical output of the unit (if any) for sale to any utility power distribution system.

The Utility MACT regulates emissions from certain EGUs. Section 112 of the CAA defines an EGU, in part, as any “fossil fuel-fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale,” and includes some cogeneration units. Specifically, “[a] unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale” is considered an EGU and is subject to the Utility MACT.

The final rule also defines the term “fossil fuel-fired” for the purposes of the rule and clarifies when the Utility MACT applies to units that fire mostly non-fossil fuels such as biomass or natural gas. In addition, it includes revisions to the new source performance standards (“NSPS”) for fossil fuel-fired EGUs. NSPS are limits on particulate matter, sulfur dioxide, and nitrogen oxides for new power plants.

Timeframe for Coming Into Compliance

Existing sources generally will have four years to comply with the new standards, according to EPA. The rule provides a so-called safety valve provision for “reliability critical units” that require more time to come into compliance, giving them an additional year. EPA will address noncompliance by other sources on a case-by-case basis. However, EPA asserts that the timeline provided under the rule is adequate for all or nearly all sources.

Projected Effects

EPA estimates that the Utility MACT will put the power plant industry on target to reduce its mercury emissions—an estimated 29 tons per year—by roughly 90 percent. According to EPA, power plants emit 50 percent of the mercury, more than 75 percent of the acid gases, and as much as 60 percent of many toxic metals currently emitted in the United States. EPA points out that widespread mercury contamination in rivers, streams, and lakes has prompted the issuance of fish consumption advisories across the United States. Other heavy metals targeted under the new final rule are also known or suspected causes of serious health concerns.

According to EPA, most power plants will come into compliance by way of a range of strategies, including using existing emission control technologies already installed, upgrades, installing new pollution controls, or

fuel-switching. EPA acknowledges that some older facilities may be retired given the high cost of retrofitting.

Critics of the new Utility MACT argue that complying with the standards will be far too expensive for power plants, will lead to higher energy costs and job losses, will weaken the competitive position of US manufacturers, and could potentially impair electric grid reliability if too many power plants close as a result of the new standards—all claims EPA and supporters of the new Utility MACT dispute.

EPA projects that the new final rule will cost \$9.6 billion—roughly \$1 billion less than its previously proposed standards. EPA points out, however, that the Utility MACT and the Transport Rule (addressed in detail below) together will provide \$150-380 billion a year in benefits, including the prevention of premature deaths, asthma attacks, emergency room visits, and sick days. Critics of the new rule dispute those figures.

The Transport Rule

The Transport Rule (or CSAPR) is aimed at decreasing air pollution from power plants that can be transported across state lines and contributes to fine particle pollution and ground-level ozone in downwind states. EPA’s final rule requires power plants in the 27 regulated states to substantially reduce emissions of sulfur dioxide and nitrogen oxides. The Transport Rule implements both emissions limits and a cap and trade system to help ensure power plants achieve the new emissions standards and was intended to replace the Clean Air Interstate Rule (“CAIR”). CAIR was originally overturned by the US Circuit Court of Appeals for the District of Columbia (“DC Circuit Court”) in 2008. However, the temporary stay of the Transport Rule just issued by the DC Circuit Court means that CAIR goes back into effect.

After EPA finalized the Transport Rule in July 2011, several states and power providers (“Petitioners”) sued in federal court to prevent EPA from implementing the rule, arguing that the Transport Rule is invalid. Several separate suits were subsequently consolidated into the case of *EME Homer City Generation, L.P. v. EPA*. The Petitioners in the case make several arguments. For example, the Petitioners argue that the Transport Rule is invalid in part because it is inconsistent with what the Petitioners describe as the CAA’s “cooperative-federalism scheme” wherein EPA sets air quality standards and individual states then develop plans to implement the standards. According to the Petitioners’ motion to stay, the

Transport Rule conflicts with this scheme by “unilaterally impos[ing] on upwind [s]tates a federal implementation plan . . . that dictates the way [s]tates must meet EPA’s new standards.”

The Petitioners and other critics of the Transport Rule also allege that the Transport Rule would inevitably lead to electricity disruptions and blackouts. However, EPA denies those dire predictions and projects that the Transport Rule would help prevent roughly 13,000 to 34,000 premature deaths a year and reduce hospital and emergency room visits by similar numbers. EPA argues that it is well within its authority under the CAA to impose a federal plan for meeting the new emissions standards.

Controversy Over Both New Rules

Both the Utility MACT and the Transport Rule have been the subject of intense controversy for some time. As reported in our September 30, 2011, Client Alert, both the Transport Rule and the Utility MACT were the subject of a bill passed by the US House of Representatives earlier this year. H.R. 2401, known as the TRAIN Act, would have eliminated the Transport Rule and reinstated CAIR, and would have similarly done away with the Utility MACT as written and replaced it with a rule that likely would have meant less stringent standards that, according to some in the utility industry, would have been more attainable. However, the Senate did not subsequently approve its own version of the bill.

In addition, EPA received over 900,000 comments when it proposed the new Utility MACT rule, which, according to EPA, “is substantially more [public comments] than for any other prior regulatory proposal.” EPA reports that the final Utility MACT is “mostly unchanged” from the proposed rule, but has a slightly lower price tag than the proposed rule. There are threats to overturn the Utility MACT through legislation, but such attempts are likely to face the same opposition in the Senate as the TRAIN Act.

What’s Next

The Utility MACT will go into effect 60 days after it is published in the Federal Register, which is expected to occur in January or February 2012. The Transport Rule was set to take effect on January 1, 2012, but the court’s order stays EPA’s implementation of the rule. However, the stay is not a ruling on the merits of the case and is not a clear indication of the ultimate fate of the Transport Rule. The court is expected to issue a ruling on the merits in Spring 2012.

For more information about these or other Clean Air Act requirements, contact Kevin R. Murray, Nicole Carlisle Squires, or Ashley A. Peck at (801) 533-0066.

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