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NRDC Petition for EPA to Propose Amendments to Numerous NESHAPs

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By Chris S. Leason and Rhett B. Larson

On January 14, 2009, the Natural Resources Defense Council ("NRDC") petitioned the U.S. Environmental Protection Agency ("EPA" or "Agency") to revise a number of National Emission Standards for Hazardous Air Pollutants ("NESHAPs"). NRDC's stated purpose for filing the petition is to: (1) "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 ("CAA");" (2) "eliminate unlawful exemptions and alternative standards promulgated under CAA § 112(d)(4);" and (3) "eliminate unlawful or invalid use of surrogates" for HAPs monitoring. NRDC further requested that EPA "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."

I. Statutory Background – Clean Air Act § 112

The CAA requires EPA to establish emission standards for "major sources" of HAPs listed in the statute, and to periodically review the list and revise it by rule, when appropriate. CAA § 112(d)(1). A "major source" is any stationary source that emits ten tons per year or more of any single HAP or 25 tons per year or more of any combination of HAPs. CAA § 112(a)(1). Emission standards for HAPs under the CAA must require the maximum degree of reduction in HAPs emissions "that the Administrator, taking into consideration the cost of achieving such emission reduction, and the nonair quality health and environmental impacts and energy requirements, determines is achievable . . . through application of measures, processes, methods, systems, or techniques including, but not limited to . . . process changes, substitution of materials or other modifications." CAA § 112(d)(2).

Additionally, the CAA includes minimum stringency requirements for HAPs emissions that apply without regard to costs or other factors and methods, as set forth above. These minimum requirements differ depending on whether a source is "new" or "existing."[1] New source minimum requirements "shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator." CAA § 112(d)(3). Existing source minimum requirements must not be less stringent than "the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information)." *Id.*

EPA implements these emission standards through a two-step process. First, EPA sets the minimum standards required under CAA § 112(d)(3), which EPA refers to as "floors." Second, and after establishing floors, EPA determines, taking cost and other factors into consideration pursuant to CAA § 112(d)(2), whether more stringent standards are achievable – requirements referred to as "beyond floor" standards.

II. Underlying Court Decisions

In its petition, NRDC largely relies on the reasoning of the D.C. Circuit in its decision in *National Lime Association v. EPA*. 233 F.3d 625 (D.C. Cir. 2000). In National Lime, the court considered a claim brought by the Sierra Club against EPA, in which the Sierra Club alleged that EPA failed to comply with its statutory obligation to establish floors for certain HAPs and inappropriately relied on particulate matter as a surrogate for certain HAPs.

With respect to these HAPs, EPA took a technology-based approach to setting emission floors for new sources. EPA identified the emission control technology used by the best performing source for which it had information and called this the maximum

[1] A "new source" is a "stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing" air pollution standards applicable to such sources. CAA § 111(a)(2). An existing source is any stationary source other than a new source. CAA § 111(a)(6).

achievable control technology ("MACT") floor. EPA then looked at emissions data from all plants using the MACT floor (not just data from the best performing plant) and set the emission floor at the highest emission level reported by a plant using that MACT. EPA took a similar approach with existing sources. EPA identified the MACT used by the median plant out of the best 12% of plants for which it had information and set the emission floor at the level of the worst performing plant using that MACT. If EPA found an insufficient number of plants from that source category relying on this MACT for a particular HAP, it determined that the emission floor was "no control."

The court agreed with Sierra Club's reading of CAA § 112(d)(3). The court held that "[n]othing in the statute even suggests that EPA may set emission levels only for those listed HAPs controlled with technology. To the contrary, the statute lists over one hundred specific HAPs . . . and required EPA to promulgate regulations establishing emission standards for each category or subcategory of major sources of hazardous air pollutant listed for regulation." *National Lime*, 233 F.3d at 630. NRDC's petition argues that *National Lime* stands for the proposition that EPA must set emission standards for each listed HAP based upon emission levels actually achieved by the best-performing sources in a given category, regardless of cost or whether such plants are implementing (or even can implement) air pollution control technology to limit their emissions. NRDC cites the court's language in *National Lime*, stating 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 [CAA § 112.(d)(2)]." [emphasis added].

The court in *National Lime* further held that EPA may use a surrogate to regulate HAPs if it is reasonable to do so, but "[e]ven a reasonable surrogate, of course, may not be used where doing so would be otherwise contrary to law." 233 F.3d at 637. The court upheld EPA's use of particulate matter as a reasonable surrogate for metal HAPs. As noted above, part of NRDC's petition is a request to limit EPA's use of HAPs surrogates.

NRDC also relies on another D.C. Circuit court case in requesting that EPA delete its startup, shutdown, and malfunction ("SSM") exemptions from 40 C.F.R. Part 63 NESHAP regulations. *See Sierra Club v. EPA*, 2008 WL 5264663 (D.C. Circ. 2008). In Sierra Club, the court vacated a longstanding EPA regulation which exempted emissions during periods of SSM from permitted emission limits, because emissions during SSM periods are not representative of normal operations (though the rule did establish a general duty to minimize emissions during SSM events along with SSM deviation reporting requirements). *See* 40 C.F.R. §§ 63.1-63.16.

III. The Petition

NRDC's petition states that "EPA must amend its Clean Air Act regulations for numerous categories of sources of hazardous air pollutants . . . to correct the failure [of those regulations] to comply with the [CAA] and controlling precedent of the United States Court of Appeals for the District of Columbia Circuit." Among the 34 NESHAPs specifically identified by the NRDC's petition for revision are: (1) lime manufacturing plants; (2) phosphoric acid manufacturing and phosphate fertilizers production; (3) hydrochloric acid production; (4) asphalt processing; (5) carbon black production; (6) ethylene production; (7) oil and natural gas production; (8) petroleum refineries; (9) lead smelting; (10) iron ore processing; (11) publicly-owned treatment works; and (12) stationary combustion turbines.

NRDC asserts that many of the NESHAPs fail to include standards for each HAP that a category emits, fail to satisfy CAA § 112(d)(3)'s floor requirement, or both. The NRDC's petition requests that EPA provide a "substantive response" within 180 days.

IV. Conclusion

The NRDC's petition signals its agenda to push for more stringent NESHAP regulations. For industry, this petition poses the prospect that long-relied upon exemptions, emissions surrogates and control strategies could be abandoned in favor of costly new requirements to reduce emissions for many small, temporary and difficult to control HAPs emissions.

If you have any questions regarding the NRDC petition, please contact Chris Leason (by telephone at (602) 530-8059, or by email at chris.leason@gknet.com) or Rhett Larson (by telephone at (602) 530-8064, or by email at rhett.larson@gknet.com).