

CLIENT UPDATE

FULL STEAM AHEAD: EPA REGULATIONS PUT INDUSTRIAL BOILER EMISSIONS UNDER PRESSURE

NEW YORK

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On December 20, 2012, the United States Environmental Protection Agency (the “EPA”) finalized regulations imposing air emissions limits on major source boilers. The regulations, commonly known as the “Boiler Maximum Achievable Control Technology” or “Boiler MACT” rules, have been the subject of fierce debate and litigation over the last few years. Companies with boilers that are not in compliance with the new Boiler MACT standards may incur millions of dollars in capital costs in order to curtail their air emissions.

BACKGROUND

Industrial boilers, fueled by a variety of materials including coal, oil, natural gas and biomass, produce heat or electricity for use in industrial processes. Pursuant to the Clean Air Act, the EPA has authority to regulate toxic air pollutants emitted from major source boilers. In March 2011, the EPA issued rules that required owners of industrial boilers to comply with strict air emissions standards for certain substances. At the same time, the EPA published a notice asking for additional public input regarding these standards. The rules became subject to administrative reconsideration by the EPA. The EPA later issued a stay of the rules pending the outcome of the reconsideration process.

After publishing new proposed rules in December 2011, a January 2012 court ruling found that the EPA was not permitted to stay the effective date of the March 2011 regulations. As a result, the March 2011 rules became effective even though the EPA was reconsidering these rules. This created some uncertainty surrounding industry's compliance obligations. In February 2012, the EPA issued a No Action Assurance letter to the regulated community stating its intention to exercise its enforcement discretion in not pursuing enforcement actions for violations of the March 2011 regulations. The effectiveness of the No Action Assurance letter is set to expire upon the effective date of the final regulations.

After considering numerous petitions by industry groups, environmental organizations and others, the EPA decided to revise certain aspects of the regulations issued in March 2011.

FINAL REGULATIONS

The final regulations cover "major source boilers." Major source boilers are significant sources of air pollutants and are typically located at large industrial facilities such as oil refineries, chemical plants and large manufacturing plants. The EPA estimates that there are approximately 14,000 units nationwide covered by the regulations. Operators of major source boilers have until 2016 to comply with air emissions limits for particulate matter, sulfur dioxide, mercury and other pollutants.

According to the EPA, of the approximately 14,000 major source boilers covered by the regulations, approximately 12% will not be in compliance with the new emissions limits by 2016 unless boiler operators install pollution control equipment to curtail air emissions. Operators of the remaining boilers will have to comply with less restrictive measures, such as mandated annual inspections.

The final regulations adjusted the limits proposed in March 2011 for various air emissions. The new rule requires greater emission reductions for some pollutants, including mercury, hydrogen chloride and sulfur dioxide, while reducing emission reduction requirements for other pollutants, including particulate matter and volatile organic compounds. Boilers burning natural gas are not subject to the new emissions limits and instead are subject to less restrictive work practice standards. Existing units subject to the final regulations will have three years from the date of publication of the final rule to comply. Boiler operators may request an additional year to comply.

According to the EPA, the final regulations will prevent thousands of premature deaths, heart attacks and asthma attacks. At the same time, the EPA maintains that the final

regulations are addressing concerns articulated by industry by adding some flexibility to the rules.

The EPA estimates that the cost to implement the final regulations covering major source boilers will be \$1.4 - \$1.6 billion. According to the EPA, on a per boiler basis, the cost of complying with the December 2012 regulations is lower than the cost of complying with the March 2011 regulations. In the past, some industry representatives have criticized the Boiler MACT rules due to the potentially significant compliance costs.

In addition to the regulations covering major source boilers, the EPA finalized regulations covering area source boilers and waste incinerators. Area source boilers are smaller sources of air emissions than major source boilers and are typically located at universities, hospitals, hotels and other commercial facilities.

The final Boiler MACT rules can be found at <http://www.epa.gov/airquality/combustion/actions.html>.

SEC DISCLOSURE

Companies that have been disclosing the Boiler MACT rules in their filings with the United States Securities and Exchange Commission may need to update their disclosure to account for the new rules. Some companies have been disclosing that the rules were being reconsidered by the EPA, which made it difficult for the companies to estimate potential compliance costs and the dates of such compliance. The recently issued rules may help minimize some of these uncertainties.

We will continue to monitor developments regarding the Boiler MACT rules.

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Please do not hesitate to contact us with any questions.

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