KEAN MILLER
KEAN MILLER HAWTHORNE D'ARMOND McCOWAN & JARMAN LLP
BATON ROUGE NEW ORLEANS LAKE CHARLES PLAQUEMINE
KEANMILLER.COM ATTORNEYS AT LAW

ENVIRONMENTAL NOTES
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PETITION FOR REHEARING FILED ON D.C. CIRCUIT DECISION

On April 3, 2009, the National Environmental Development Association (NEDA) filed a petition for rehearing *en banc* on a controversial decision (*Sierra Club v. EPA*) by the D.C. Circuit Court of Appeals. In that case, decided December 19, 2008, the court vacated the Startup, Shutdown, Malfunction (SSM) rules contained within the NESHAP General Provisions, 40 C.F.R. Part 63, Subpart A. The exemption has been in place since the EPA adopted the General Provisions to 40 C.F.R. Part 63 in 1994 pursuant to Section 112 of the federal Clean Air Act. Until this decision, sources were exempted from MACT technology-based emission limits if all elements of the SSM exemption were satisfied. Sources were nevertheless required by the general duty clause to minimize emissions to the greatest extent possible. The appeal stems from proposed rulemakings by the EPA in 2002, 2003 and 2006 to revise the SSM requirements.

In its petition, NEDA argued that the panel's jurisdictional ruling could not be reconciled with the court's precedents concerning the constructive reopening doctrine. The majority panel in *Sierra Club v. EPA* vacated the rule entirely despite the fact that the statutory time period to appeal the initial rule promulgated in 1994 had long passed. According to the petition for rehearing, that doctrine has been traditionally limited to cases involving "regulated entities" (Petition for Rehearing, p. 8). NEDA also emphasized the dissenting judge's conclusion that the EPA rules on appeal "did not alter the [SSM] exemption" in any way. (*Id.*, p. 10). The dissenting judge also noted the potentially troubling precedent that the majority's decision would have if "each time [an agency] changes [a] regulation, it risks subjecting every related regulation to challenge." (*Id.*, p. 11).

NEDA also argued that the decision would have 'draconian consequences' on the nation's manufacturing industries if the decision were not reversed. NEDA's petition states that "because most MACT standards are based on normal operations, sources may not be able to comply with such standards during SSM events." (*Id.*, p. 12). In addition, compliance with MACT standards during startup and shutdown may not be possible for certain types of pollution control equipment.

If the decision is upheld, it may call all existing MACT rules into question. Because all of the MACT rules were premised upon the existence of the SSM exemption, the revocation of the exemption could allow regulated entities to challenge the underlying MACT rules (ironically, under the constructive reopening doctrine) as being too stringent without the consideration of data from SSM periods for development of the MACT floor. MACT standards would then need to be evaluated on a source category by source category basis for SSM events. The case will have significant impacts if the initial decision by the three-judge panel is allowed to stand.

Kyle B. Beall, Partner
225.382.3493
kyle.beall@keanmiller.com

EPA ISSUES PROPOSED REPORTING RULE FOR GREENHOUSE GAS EMISSIONS

The EPA has proposed a rule that would require mandatory reporting of greenhouse gas(GHG) emissions from large sources in the United States. The proposed rule was signed by the EPA Administrator on March 10, 2009 and published in the Federal Register on April 10, 2009 (74 Fed. Reg. 16,448). As proposed, the rule will require reporting of stationary source GHG emissions for the 2010 calendar year by March 31, 2011. According to the EPA, the proposed rule is intended to "collect accurate and comprehensive emissions data to inform future policy decisions."

The reporting requirements apply to suppliers of fossil fuels or industrial GHG manufacturers of vehicles and engines, and facilities with GHG emissions of 25,000 metric tons of carbon dioxide equivalent (mtCO2e) or more per year. Based on EPA's estimations, the threshold emission level would be equal to the annual GHG emissions from approximately 4,500 passenger vehicles. According to the EPA, "the vast majority of small businesses would not be required to report their emissions because their emissions fall well below the threshold." But around 13,000 facilities, accounting for about 85 to 90 percent of GHG emissions in the United States, would be covered under the proposed rule according to EPA.

GHG compounds covered by the proposed rule include carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), sulfur hexafluoride (SF6), and other fluorinated gases, including nitrogen trifluoride (NF3) and hydrofluorinated ethers (HFE). Certain listed direct-emission sources must comply with the reporting requirements and include the following sectors: adipic acid production; aluminum production; ammonia manufacturing, cement production, HCFC-22 production; certain specified HCFC-23 destruction processes; lime manufacturing; nitric acid production; petrochemical production; petroleum refineries; phosphoric acid production; silicon carbide production; soda ash production; titanium dioxide production; electric power systems that exceed certain nameplate capacities; electricity-generating facilities that exceed certain emission levels; electronics manufacturing facilities that exceed certain production levels; landfills that generate methane in amounts equal to or greater than 25,000 mtCO2e per year certain manure management systems; and certain underground coal mines. The EPA found that nearly all of the above facilities emit more than 25,000 mtCO2e per year and that only a few facilities emit marginally below this level. Suppliers of coal, petroleum products and natural gas are also covered.

The only agricultural source of GHG emissions covered by the proposed rule is manure management systems that have emissions equal to or greater than 25,000 mtCO2e per year. Enteric fermentation (emissions of methane from the digestive system of cattle and other ruminant livestock), rice cultivation, field burning of agricultural residues, composting, and agricultural soils will not be subject to the reporting requirements of the rule.

There is no requirement in the proposed rule for mandatory third-party verification for the emissions reports. EPA estimates that compliance with the reporting requirements will cost the private sector $160 million in the first year and $127 million in following years. Public hearings were held in Virginia and California in April 2009. Written comments must be received by June 9, 2009. The text of the proposed rule and additional information can be found at the following EPA website: http://www.epa.gov/climatechange/emissions/ghgrulemaking.html

Laura L. Hart, Associate
225.389.3730
laura.hart@keanmiller.com