KEAN MILLER
FROM MAIN STREET TO WALL STREET
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ENVIRONMENTAL NOTES
October 2004

FINAL BOILER/HEATER MACT ISSUED BY EPA

On September 13, 2004, EPA issued final NESHAP regulations for boilers and process heaters, at 40 C.F.R. 63.7480, *et seq*. (Subpart DDDDD). The final rule applies to industrial boilers, institutional and commercial boilers, and process heaters, but excludes a number of sources, including any boiler or process heater specifically regulated under another MACT standard, electric utility steam generating units, blast furnace stoves, temporary boilers, and blast furnace fuel-fired boilers and process heaters. Additional exemptions are noted in 40 C.F.R. 63.7491.

The final regulations seek to limit emissions of four categories of hazardous air pollutants (HAPs): mercury (Hg), non-mercury metallic HAPs, inorganic HAPs, and organic HAPs. Emissions of the latter three categories of HAPs will be controlled using three surrogate emissions, including particulate matter (PM), hydrochloric acid (HCl), and carbon monoxide (CO). A fourth surrogate, total selected metals (TSM), is available as an alternative to the PM emission limit as described in 40 C.F.R. 63.7500 and Table 1 of Subpart DDDDD.

The final rule categorizes all boilers and process heaters into nine subcategories, including (1) large solid fuel, (2) limited use solid fuel, (3) small solid fuel, (4) large liquid fuel, (5) limited use liquid fuel, (6) small liquid fuel, (7) large gaseous fuel, (8) limited use gaseous fuel, and (9) small gaseous fuel. Each subcategory is defined in Section 63.7575. Testing and initial compliance requirements vary depending on the subcategory classification of the unit and whether the unit is new or existing. For example, existing units in the small solid fuel subcategory and existing units in any of the liquid or gaseous fuel subcategories do not have applicable emission limits and therefore, are not required to conduct stack tests or fuel analyses. However, other units are required to conduct fuel analyses or initial and annual stack tests to determine compliance with PM, HCl, and Hg standards within the time periods established in Section 63.7510(d)-(g).

A number of revisions were made to the boiler/heater MACT rule since the January 13, 2003 proposed rule. Significant revisions include the exemption of certain sources and changes to the definition of "affected source" and to the definitions of "large gaseous fuel," "limited use gaseous fuel," and "small gaseous fuel" categories. In addition, EPA has included a compliance alternative to allow emissions averaging between existing large solid fuel boilers.

New facilities are required to comply with the Boiler/Heater MACT requirements by **November 12, 2004**, or upon startup. Existing facilities must achieve compliance no later than **September 13, 2007**. Compliance demonstrations must be performed within 180 days after the compliance deadline. For more information, the complete rule preamble is available at 69 Fed. Reg. 55,218, or online at **http://www.epa.gov/ttn/atw/boiler/boilersfinalrule.pdf**.

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WETLANDS LOSS DAMAGES TO PROPERTY

On October 21, 2004, the Louisiana Supreme Court (NO. 2004-C-0968) will hear oral arguments in Castex Energy's appeal of the decision by the Third Circuit upholding wetlands loss damages to a lessor/landowner's property.

At the trial court, the plaintiff/mineral lessor, Terrebonne Parish School Board ("TPSB") sued defendants/mineral lessees, claiming entitlement to $3,217,960 in restoration damages, a sum they claimed would be sufficient to restore property dredged for access canals by plugging and backfilling the canals and planting marsh vegetation. The trial court (i) concluded that the defendants/mineral lessees were liable to TPSB for restoration of two canals and a slip dredged in performance of mineral lease operations (covering about 27.74 acres); (ii) awarded the sum of $1,100,000 (about $39,654 per acre); (iii) ordered that the sum awarded be deposited into the registry of the court, that the restoration cost not exceed the sum of $1,100,000, and that any portion of the fund not used in restoration be returned to the Defendants; and (iv) appointed a special master to oversee the restoration. Both sides appealed the trial courts decision to the Louisiana Third Circuit Court of Appeal.

The following material facts were either undisputed or were found by the appellate court to be supported by the record (i) the express terms of the mineral lease granted to the lessee the right to dredge canals: (ii) the mineral lease contained no express provisions addressing any obligation to restore the surface; (iii) the canals were dredged as a necessary incident of exploration and production of oil and gas pursuant to the terms of the mineral lease; (iv) there was no evidence which showed the mineral lessees dredged the canals in a negligent or unreasonable manner, or used the surface of the property beyond what was necessary for exploration; and (v) the custom of the industry with respect to surface restoration at the termination of a lease is that dredged canals are not backfilled by the mineral lessee.

In its decision, the appellate court held that Article 122 of the Louisiana Mineral Code imposes an implied obligation upon a mineral lessee to restore the surface of land subject to an oil and gas lease to as near as practicable to its original condition on completion of operations, despite the lack of an express provision so requiring. It further found that this implied obligation in Article 122 is retroactively applicable to pre-Mineral Code leases (pre-January 1, 1975). The appellate court also found that a mineral lessor is entitled to compel specific performance of the implied obligation to restore the surface. However, citing *Corbello v. Iowa Production*, the appellate court held that the damage award for the breach of a contractual obligation to reasonably restore property need not be tethered to the market value of the property (in this case $6,935).

Because of the impact this decision will have on oil and gas operations and coastal restoration projects in coastal areas of Louisiana, interest in this case is high with numerous *amicus curiae* briefs being filed in support of both parties. (Kean Miller has filed amicus *curiae* brief in this case on behalf of the American Petroleum Institute, the Louisiana Mid-Continent Oil and Gas association, and the Louisiana Independent Oil and Gas Association).

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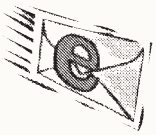

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