Published on The National Law Review (http://www.natlawreview.com)

MATS Corrections --Mercury and Air Toxics Standards

Article By:
Laura M. Goldfarb

posted on: Friday, January 16, 2015

EPA is proposing to correct certain text of the final MATS Rule officially titled “National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units.” The December 19, 2014 Signature version, not yet published is available here. EPA is soliciting comments on all of these proposed corrections within thirty days of publication in the Federal Register.

EPA categorizes these corrections as: (a) resolution of conflicts between the preamble and regulatory text, (b) corrections that EPA stated it would make in response to comments that were “inadvertently not made,” and (c) clarification of language in regulatory text. A summary of the proposed corrections follows:

- Section 60.49Da(f) – revised to amend the procedures for calculating compliance with the NSPS daily average particulate matter (PM) emission limit for affected facilities using PM continuous emission monitoring systems and that commenced construction, modification or reconstruction before May 4, 2011.

- Section 63.9983(a) is revised to clarify that MATS does not apply to either major or area source combustion turbines, except for integrated gasification combined cycle (IGCC) units.

- Sections 63.9983(b) and (c) are revised so that sources will know the time period to consider when determining whether their coal or oil utilization triggers applicability of the MATS rule.

- Section 63.9983(e) is added to clarify CAA section 112 applicability to the units that meet the definition of a natural gas-fired EGU in MATS, and, because they combust greater than 10 percent biomass, also meet the definition of a biomass-fired boiler in the Industrial Boiler NESHAP (40 CFR Part 63, subpart DDDD).

- Sections 63.9991(c)(1) and (2) are being revised to clarify the conditions that are required in order to use the alternate sulfur dioxide (SO2) limit.

- Section 63.10000(c)(2)(iii) is revised to state that EGU owners or operators who choose to use quarterly testing and parametric monitoring for hydrogen fluoride (HF) or hydrogen chloride (HCl) compliance must include the continuous monitoring systems (CMS) that will be used in their site-specific monitoring plans to comply with the monitoring requirements.

- Section 63.10001 is revised to remove the affirmative defense. (See additional discussion below)

- Section 63.10006(f) is revised to specify EGU operational status with respect to performance testing; to identify the requirements – including make-up testing and reporting – if the performance testing schedule is missed apart from using existing skip procedures; and to identify intervals between performance tests.

- Sections 63.10009(a)(2) and (a)(2)(i) are revised to clarify that the 90-boiler operating day averaging period is available as an option for Hg emissions from non-low rank virgin coal-fired EGUs (i.e., EGUs in the subcategory “unit designed for coal ≥8,300 Btu/lb”).

- Section 63.10009(b)(1) is revised to clarify group eligibility equations 1a and 1b.

- Section 63.10009(f) is revised to clarify the conditions for determining the ability of the emissions averaging group to meet the emissions limit and to clarify use of the alternate Hg emission limit.

- Section 63.10010(a)(4) is revised to add a requirement to route exhaust gases that bypass emissions control devices through stacks that contain monitoring so that emissions can be measured and to clarify that hours that a bypass stack is in use are to be counted as hours of deviation from monitoring requirements.

- Section 63.10010(f)(3) is revised to clarify that 30- boiler operating day rolling averages are to be based only on valid hourly SO2 emission rates.

- Sections 63.10010(h)(6)(i), 63.10010(h)(6)(ii), 63.10010(j)(5)(A), 63.10010(j)(5)(B), 63.10010(j)(4)(i)(A), and 63.10010(j)(4)(i)(B) are revised to clarify that data collected during certain periods are not to be included in compliance assessments but
such periods are to be included in annual deviation reports.

- Sections 63.10010(l), 63.10010(l)(4) and 63.10020(e) references to work practice standards in paragraph (2) clarified.

- Sections 63.10011(c)(1) and 63.10011(c)(2) are revised to clarify the date by which compliance must be demonstrated by EGUs that use CEMS or sorbent trap monitoring systems.

- Section 63.10011(g)(4)(v)(A) and Table 3 are revised to clarify our intent regarding clean fuel use “to the maximum extent possible.”

- Sections 63.10023(b) and Table 6 are revised to clarify that all EGUs using PM continuous parametric monitoring systems (CPMS) for compliance purposes are to follow the same procedure for determining the operating limit.

- Section 63.10030(e)(7)(i) is revised to clarify that the date of each stack test conducted for purposes of demonstrating LEE eligibility is to be provided.

- Section 63.10030(e)(7)(iii) is added to establish the procedures by which an EGU owner or operator may switch between mass per heat input and mass per gross output emission limits.

- Section 63.10030(e)(8)(i) is revised to clarify that it applies only to those EGU owners or operators who choose to meet the work practice standards contained in paragraph (2) of the definition of startup.

- Section 63.10032(f) is revised to clarify that the requirements of section 63.10032(f)(1) apply only to those EGU owners or operators who choose to meet the work practice standards contained in paragraph (1) of the definition of startup, while the requirements of section 63.10032(f)(2) apply only to those EGU owners or operators who choose to meet the work practice standards contained in paragraph (2) of the definition of startup.

- The definitions of “Coal-fired electric utility steam generating unit,” “Coal refuse,” “Fossil fuel-fired,” “Integrated gasification combined cycle electric utility steam generating unit or IGCC,” “Limited-use liquid oil-fired subcategory,” “Natural gas-fired electric utility steam generating unit,” and “Oil-fired electric utility steam generating unit” in Section 63.10042 are revised to clarify the period of time to be included in determining the source’s applicability to the MATS.

- Revised the term “gross electric output” to “gross output” in Sections 63.10009(b)(2), 63.10009(b)(3), 63.10042 and Tables 1 and 2.

- Changes to Tables 1 through 9.

**Removal of Affirmative Defense**

EPA proposes to remove MATS rule provisions establishing an affirmative defense for malfunction events in light of the United States Court of Appeals for the District Court of Columbia Circuit decision in NRDC v. EPA, 749 F.3d 1055 (D.C. Cir., 2014) (vacating affirmative defense provisions in Clean Air Act section 112 rule establishing emission standards for Portland cement kilns). The court held that EPA lacked authority to establish an affirmative defense for private civil suits and that the authority to determine civil penalty amounts in such cases lies exclusively with the courts. The scope of this decision appears to be limited to the affirmative defense provision EPA created for cases of “unavoidable” malfunctions in the NESHAP promulgated by EPA under Clean Air Act § 112 as evidenced by footnote 2, which provides “The Fifth Circuit recently upheld EPA’s partial approval of an affirmative defense provision in a State Implementation Plan. See Luminant Generation Co. v. EPA, 714 F.3d 841 (5th Cir. 2013). We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan.”

The court relies on the citizen suit provision of § 304(a) of the Clean Air Act to conclude that the authority over private suits lies with the courts and EPA’s authority is limited to administrative penalties. The court held:

> Section 304(a) grants “any person” the right to “commence a civil action” against any person “who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of” an emission standard or limitation under the Clean Air Act. 42 U.S.C. § 7604(a). The statute further provides that the federal district courts “shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation … and to apply any appropriate civil penalties.” Id.

... Section 304(a) creates a private right of action, and as the Supreme Court has explained, “the Judiciary, not any executive agency, determines ‘the scope’ – including the available remedies – of judicial power vested by statutes establishing private rights of action.” City of Arlington v. FCC, 133 S. Ct. 1863, 1871 n.3 (2013) (emphasis added) (quoting Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990)). Section 304(a) is in keeping with that principle. By its terms, Section 304(a) clearly vests authority over private suits in the courts, not EPA. As the language of the statute
makes clear, the courts determine, on a case-by-case basis, whether civil penalties are “appropriate.” By contrast, EPA’s ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative penalties, not to civil penalties imposed by a court. See 42 U.S.C. § 7413(d)(2)(B) (Administrator may “compromise, modify, or remit, with or without conditions, any administrative penalty”). To the extent that the Clean Air Act contemplates a role for EPA in private civil suits, it is only as an intervenor. See id. § 7604(c)(2). EPA also of course could seek to participate as an amicus curiae.

Id. (Emphasis added.)

Other agency action following this decision seems to indicate that EPA is broadly construing this decision as evidenced by its supplemental notice of proposed rulemaking “State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Supplemental Proposal To Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional State; Proposed Rule” where the agency proposed “to apply its revised interpretation of the CAA, but only with respect to affirmative defense provisions in state implementation plans.” 79 Fed. Reg. 55,920 (September 17, 2014) available at http://www.gpo.gov/fdsys/pkg/FR-2014-09-17/pdf/2014-21830.pdf.

© Steptoe & Johnson PLLC. All Rights Reserved.