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Recordkeeping Mandate May Spur Industry Suit On EPA Combustion Rules

EPA's final revised combustion air rule package includes what industry attorneys call "draconian" recordkeeping requirements that could form the basis for another industry lawsuit over the rules, casting further uncertainty over the fate of the boiler and incinerator rules that have undergone several years of revisions and legal challenges.

The package includes boiler air toxics rules for major and area sources, and a more stringent emissions rule for incinerators, alongside a waste definition rule that determines which requirement facilities are subject to depending on the materials they burn. EPA mandates that companies seeking to avoid the incinerator rule keep detailed records to demonstrate they are not burning waste as fuel, because that combustion is regulated under the incinerator rule.

EPA also mandates facilities that fail to keep these records are automatically considered to be incinerators — but that language is only in the text of the incinerator rule and not in the boiler or waste definition rules.

As a result, a company could "read every word" of the waste rule "and not know you would have to make records of these determinations," attorney Dick Stoll of Foley & Lardner told a March 12 BNA webcast.

That information is limited to EPA's incinerator emissions rule, which notes that if operators cannot produce the records upon inspection, then facilities are automatically subject to the strict incinerator requirements.

Stoll predicted a fight over the recordkeeping provisions and said "people challenging these rules and seeking reconsideration are definitely going to be going after EPA on that point because it seems so grossly unfair."

The provisions are "unfortunate" and likely to prompt both lawsuits and petitions for EPA to administratively reconsider the rules, Stoll said, further exacerbating long-running battles over the rules, which EPA first issued in 2011, but then revised in response to industry petitions that claimed the standards were too stringent. Lawsuits over the original versions of the rules were put on hold pending EPA's issuance of the final revised rules.

In the regulatory revisions, EPA generally took significant steps to make it easier for industry to qualify for the boiler maximum achievable control technology (MACT) air toxics rule rather than the stricter commercial and solid waste incinerator (CISWI) emissions standards. To achieve this approach, the agency revised its non-hazardous secondary materials (NHSM) rule that defines wastes burned, making it easier to demonstrate a material is a fuel and qualify for the MACT.

Environmentalists are expected to litigate over the changes, which they oppose because they soften the earlier rules. But industry has been generally satisfied with the package since it was signed late last year.

However, Stoll expects industry to pursue administrative and legal challenges to the recordkeeping provisions of the rules. The Clean Air Act 60-day window to file suit over the CISWI rule is April 7, as it was published in the Feb. 7 *Federal Register*. The NHSM rule is under a Resource Conservation Recovery Act 90-day clock so it has a May 7 deadline for legal challenges.

"What [the recordkeeping issue] means is you really are burning something at your facility that everybody would agree is not a solid waste but you don't have in your files that determination, the CISWI rule then says you are a CISWI unit. That's a big deal and people have got to be aware of it," Stoll said on the webcast.

He noted that many people would not necessarily read the CISWI rule after determining they are not subject to it, and therefore would likely be unaware of the mandate in the rule to keep strict records.

The NHSM rule is a "jurisdictional decider," Stoll's colleague Cathy Basic said on the same webinar, because it determines that the facility is a boiler and subject to the MACT rules under section 112 of the Clean Air Act, or that the unit in question is an incinerator and subject to the more stringent CISWI provisions under section 129.

These recordkeeping requirements are also "NOT mentioned AT ALL" in a related MACT for cement plants, the presentation notes. "Thus non-CISWI [P]ortland cement kilns are nevertheless governed by extremely critical provisions found only in this CISWI rules."

In a followup, Stoll notes, "It is the NHSM recordkeeping requirement not being in the NHSM rule but only in the CISWI rule — and only in the CISWI rule does that draconian requirement appear that says if you fail to keep and produce your NHSM records, you are automatically a CIWSI unit. . . . At least the various boiler rules have the NHSM recordkeeping provisions imbedded within them, but those boiler rules don't tell you that if you fail to keep and produce such records you are automatically a CISWI unit. And the cement [MACT doesn't] even bother to tell you about the NHSM recordkeeping requirements (that aren't in the NHSM rules but the CISWI rules)!"

The MACT is seen as the "more preferable regime," while the 129 rules are considered "harsh" enough that EPA has

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recognized that many facilities would cease combusting solid waste to avoid the rules, Basic said on the webcast.

The only possible advantage to being classified as a CISWI rather than a boiler is EPA provides an additional two years for compliance — five years instead of three under the MACT, according to Stoll. The agency in the final rulemaking package identified only 106 incinerators across the country compared to 2,300 major source boilers.

He added, "We can clearly expect some major challenges to these rules," especially from environmental groups who have criticized the revisions as removing clean air protections.

An EPA spokeswoman says the agency cannot comment on potential challenges to its regulations. — *Dawn Reeves*

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