THE ADMINISTRATIVE WATCH

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D.C. Circuit Reinstates the CAIR Rule and Vacates the Start-up, Shutdown, or Malfunction Exemption

On December 23, 2008, the U.S. Court of Appeals for the D.C. Circuit reinstated the Clean Air Interstate Rule ("CAIR"), reversing a July 11, 2008 vacatur of the rule. This decision means the first phase of NO_x reductions starts on January 1, 2009, followed by the first phase of SO_2 reductions starting January 1, 2010. Additionally, in another major decision on December 19, 2008, the D.C. Circuit struck down the EPA's long-standing start-up, shutdown, or malfunction exemption ("SSM exemption") for section 112 sources of hazardous air pollutants ("HAPs"). This decision may expose subject sources to greater enforcement action for exceeding emission limits during SSM events.

The D.C. Circuit revisited its July 11, 2008 vacatur of CAIR following a September 24, 2008 Petition for Rehearing from EPA. Among other things, EPA argued that it should have an opportunity to fix CAIR's legal flaws, rather than having the rulemaking vacated outright (which would have required EPA to begin a new rulemaking process). EPA and other interest groups also argued that vacatur of CAIR and the delay associated with a new rulemaking process would result in a negative impact on the nation's air quality. In a short opinion, the D.C. Circuit held that "we are convinced that, notwithstanding the relative flaws of CAIR, allowing CAIR to remain in effect until replaced by a rule consistent with our [July 11th] opinion would at least temporarily preserve the environmental values covered by CAIR. Accordingly, a remand without vacatur is appropriate in this case." The D.C. Circuit established no specific timeframe for EPA to revise CAIR. Therefore, it is unclear at this time when EPA might issue a revised CAIR rulemaking to address the identified legal flaws. In the meantime, subject sources should carefully evaluate their compliance obligations under CAIR.

The D.C. Circuit considered the SSM exemption pursuant to a Petition for Review filed by the Sierra Club challenging recent amendments to the exemption. EPA adopted the SSM exemption in 1994 to excuse compliance with numeric emission limits during start-up, shutdown, or malfunction events, provided that the source developed and abided by an SSM plan. EPA subsequently amended the SSM exemption via a series of regulatory amendments, beginning in 2002. The Sierra Club argued that recent amendments to the original SSM exemption removed the statutory requirement that emission standards apply to HAPs on a "continuous basis." The D.C. Circuit held that although "continuous" does not mean "unchanging," the SSM exemption violates the Clean Air Act's requirement that some section 112 standards apply continuously and it therefore vacated the exemption. In light of this decision, subject sources should carefully evaluate their section 112 compliance during SSM events.

BCCZ's Environmental Health and Safety Group closely tracks Clean Air Act legislative, regulatory, and litigation developments. For more information regarding the cases discussed above or their impact on your business, please contact Michael H. Winek at (412) 394-6538 or mwinek@bccz.com or Seth A. Rice at (412) 394-5490 or srice@bccz.com.

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