

## EPA (Environmental Protection Agency) Boiler Regulations Survive Challenge ... For Now

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The U.S. Court of Appeals for the D.C. Circuit issued its ruling in [Utility Air Regulatory Group v. EPA](#) yesterday. The court's opinion upheld the **EPA's** rules revising new source performance standards for **steam generating units** (40 C.F.R. Part 60 – Subparts D, Da, Db, and Dc), while declining to address select issues that remain pending before the EPA on petitions for reconsideration.

**Utility Air Regulatory Group** (Air Group) and the State of Texas challenged EPA's revised rules on several grounds:

- Subparts D, Db and Dc boilers (see below) emitting more than 0.03 lb/MMBtu of particulate matter should not be subject to an opacity standard (Air Group challenge)
- Subparts D, Db and Dc boilers emitting more than 0.03 lb/MMBtu of particulate matter should not be required to either install a continuous opacity monitoring system or perform periodic visual inspections (Air Group challenge)
- EPA's final rule expanded the boilers subject to the rules by including Subpart D boilers in periodic visible emissions when Subpart D boilers had initially been exempted proposed in the rulemaking (Air Group challenge)
- EPA promulgated the rules without proper notice (Air Group challenge)
- EPA promulgated the rules without addressing public comments made during a previous rulemaking (Air Group challenge)
- Challenges related to Subpart Da boilers (see below) (Air Group challenge)
- Challenges related to the frequency of periodic visual inspections of certain boilers (Air Group challenge)
- A challenge related to the disallowance state-law affirmative defenses (Texas challenge)

The boilers subject to regulation fall into four categories: Subpart D, Subpart Da, Subpart Db, and Subpart Dc. Subpart D encompasses fossil-fuel-fired electric utility steam generating units (EGUs) of greater than 73 megawatts (MW) heat input capacity, on which construction, modification, or reconstruction commenced after August 17, 1971 and on or before September 18, 1978. Subpart Da encompasses EGUs of greater than 73 MW heat input capacity, on which construction, modification, or reconstruction commenced after September 18, 1978. Subpart Db encompasses industrial-commercial-institutional steam generating units with a heat input capacity of greater than 29 MW on which construction, modification, or reconstruction commenced after June 19, 1984. Finally, Subpart



Dc encompasses industrial-commercial-institutional steam generating units with a heat input capacity between 2.9 MW and 29 MW on which construction, modification, or reconstruction commenced after June 9, 1989.

The court quickly dismissed the majority of these challenges finding that EPA promulgated the rules reasonably and not in an arbitrary or capricious manner. The court highlighted the EPA's explanations for the final rule, finding that the EPA identified a reasonable rationale why opacity standards for boilers emitting greater than 0.03 lb/MMBtu were needed (boilers emitting less than that amount "operate with little or no visible emissions" as found by the EPA) and that the EPA "articulated a reasonable explanation for requiring opacity monitoring" for boilers whose emissions exceeded 0.03 lb/MMBtu. The court also found that the EPA appropriately considered the burdens of subjecting Subpart D boilers to the rules. Finally, the court determined that the most recent rule promulgation cured any procedural missteps occurring in previous rulemaking proceedings involving the affected rules.

The court declined to address the last three challenges identified in the bullet points above. The court determined that petitions for reconsideration before the EPA addressed the final three challenges, and because those challenges contained arguments raised for the first time in the petition for reconsideration, the challenges need resolution before the EPA before consideration by the court.

While the EPA's revised rules pertaining to new source performance standards for steam generating units survived the challenges before the court, the Air Group and Texas remain hopeful that their arguments left unconsidered by the court will ultimately prevail.

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