

**Potential Removal of Excess Emission Allowances from Pulp and
Paper Industry NESHAPs
December 12, 2011**

National Emission Standards for Hazardous Air Pollutants for the Pulp and Paper Industry, 40 C.F.R. Part 63 Subpart S, require that various processes in the pulp mill be enclosed and vented into a closed-vent system and routed to a control device. The regulations provide that periods of excess emissions must be reported but will not be considered a violation if, for each semi-annual reporting period, the time of excess emissions (excluding periods of startup, shutdown, or malfunction) divided by the total process operating time does not exceed 1% for control devices used to reduce emissions from the low volume, high concentration system and 4% for control devices used to reduce emissions from the high volume, low concentration system (or used for both LVHC and HVLC systems). 40 C.F.R. § 63.443(e). For control devices used to treat pulping process condensates (wastewaters) from specified pulp mill processes, the excess emission allowance (including periods of startup, shutdown, or malfunction) is 10%. 40 C.F.R. § 63.446(g). In addition to continuous monitoring of the control devices, the regulations require indicators on closed-vent system bypass lines, periodic inspections for leaks, procedures for prompt repair of defects in the enclosures or piping, inspection and maintenance recordkeeping, and so forth.

In the course of conducting the eight-year review of developments in control technologies under Clean Air Act section 112(d)(6) and the residual risk review under Clean Air Act section 112(f) for the Pulp and Paper category, EPA has indicated recently that it plans to propose to eliminate the excess emission allowances in 40 C.F.R. § 63.443(e) and 40 C.F.R. § 63.446(g). It would be improper and unlawful to do so, for the reasons set forth below.

Emission standards incorporating the excess emission allowance represent the Maximum Achievable Control Technology

The excess emission allowance provisions in the current Subpart S regulations reflects EPA's careful determination, after years of study of a large quantity of emissions information and public comments, that the "MACT floor," representing the emissions of the "best performers," includes emissions during unavoidable periods of releases of uncontrolled or partially controlled pulping process vent gases and unavoidable sewerage of untreated or partially treated pulping process condensates. See 63 Fed. Reg. 18,504, 18,529 (April 15, 1998). "EPA established appropriate excess emission allowances to approximate the level of backup control that exists at the best-performing mills and the associated period of time during which no control device is available." *Id.* After "an analysis of the public comments and the available data regarding excess emissions and the level of backup control in the industry," EPA determined that the "best-performing mills achieve a one percent downtime in their LVHC system control devices" and "best-performing mills achieve a four percent downtime in the control devices used to reduce emissions from their HVLC system to account for flow balancing problems and unpredictable pressure changes inherent in HVLC control systems." *Id.* "The allowances address normal operating variations in the LVHC and HVLC system control devices for which the equipment is designed. The variations would not be considered startup, shutdown, or malfunction under the Part 63 General Provisions...." 63 Fed. Reg. at 18,530. The 10

percent excess emission allowance for steam strippers systems “accounts for stripper tray damage or plugging, efficiency losses in the stripper due to contamination of condensate with fiber or black liquor, steam supply downtime, and combustion control device downtime.” *Id.*

EPA adopted the excess emission allowances after reviewing extensive data from continuous monitoring systems and considering industry comments that although some mills had backup combustion devices as part of their LVHC control system, venting of pulping gases is an essential safety practice (because of their explosion hazard) even for those systems with backup control devices, since the startup of, and transfer of vent gases to, the backup controls cannot be immediate or automatic for safety reasons, and operating variability in the control devices themselves was unavoidable for process and other reasons. See, e.g., Pulp, Paper and Paperboard Industry – Background Information for Promulgated Air Emission Standards – Final EIS, EPA-453/R-93-050b (October 1997) (“*BID*”) at 4-81, 4-82 to 4-84. For HVLC systems, few mills had backup controls that could handle the large volume of vent gases, so any standard that required the use of backup devices would have been beyond the MACT floor and would not have been cost-effective due to the low concentration of pollutants in the large gas stream. See 63 Fed. Reg. at 18,529; *BID* at 4-81 to 4-82.

In short, the MACT determinations that EPA made when promulgating the Subpart S emission standards correctly concluded that available technology involves unavoidable periods where not all vent gases or condensates can be routed to the control device, and/or when the control device is inoperable or necessarily operating at a reduced rate. The Subpart S emission standards (including the excess emission allowances) were designed to reflect the performance of the MACT technology and the actual performance of the “best performing” mills. Without the excess emission allowances, the remainder of the Subpart S emissions standards would impose limitations not achieved even by the “best performers” and not demonstrated as achievable at any facility. This plainly is not what Congress intended. See, e.g., *Sierra Club v. EPA*, 353 F.3d 976, 980 (D.C. Cir. 2004).

EPA has no technical justification for eliminating the excess emission allowances

EPA is supposedly carrying out Congress’ directive in Clean Air Act section 112(d)(6) that, at least every eight years, EPA review whether “developments in practices, processes, and control technologies” necessitate revision of MACT emissions standards. Nothing has changed about the technology available to control volatile HAP emissions at pulp mills that eliminates the unavoidable excess emission the events that EPA accurately described when promulgating the current MACT standards. Absent such new technology, there is no statutory predicate for EPA to go back and change the MACT standards at this time. *Cf. NRDC v. EPA*, 529 F.3d 1077, 1084 (D.C. Cir. 2008) (rejecting contention that CAA section 112(d)(6) requires EPA to “start from scratch” and develop new MACT standards).

But even if the section 112(d)(6) technology review were an opportunity to second-guess and revise the existing MACT standards, EPA has no technical basis for eliminating the Subpart S excess emission allowances. An agency cannot simply change its mind and reach a diametrically opposed conclusion from the determination is made in a prior rulemaking. Rather, EPA must demonstrate sufficient basis for changing its prior conclusions; in this case, technical justification for concluding that mills with MACT do not experience the unavoidable variability accommodated by the excess emission allowance. See, e.g., *FCC v. Fox Television Stations*,

Inc., 556 U.S. 502, 129 S. Ct. 1800, 1811 (2009) (“a reasoned explanation is needed for disregarding facts and circumstances that underlay...the prior policy”); *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996).

Nor is there any health or environmental imperative for eliminating the excess emission allowances in Subpart S. EPA has just completed an assessment of the risk to human health and the environment from emissions in compliance with Subpart S, for its “residual risk” review. The tentative conclusion of that assessment is that there is no significant risk from those emissions, including excess emissions allowed under the Subpart S regulation. (The emissions data that EPA used in its risk modeling included emissions during bypassing of control equipment or other excess emissions covered by the Subpart S excess emission allowances.)

Intervening court decisions do not justify eliminating the excess emission allowances

The Subpart S NESHAPs were never judicially challenged, and the time for such a challenge under CAA section 307(b) has long passed. Even if there were some portion of an opinion in one of the many cases challenging other NESHAPs that was contrary to the approach EPA took in promulgating the Subpart S NESHAPs, that would not provide a means nor a justification for reopening the Subpart S standards that were never challenged on that grounds. But in any event, none of the holdings in those other cases undercuts EPA’s determination to include the current excess emission allowances in the Subpart S regulations.

EPA may believe that elimination of the excess emission allowances is justified or required by the D.C. Circuit’s decision in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), *cert. denied*, 130 S. Ct. 1735 (2010), which vacated the “exemption” for excess emissions during SSM events contained in the 40 C.F.R. Part 63, Subpart A General Provisions for emission standards for hazardous air pollutants. The D.C. Circuit’s *Sierra Club* decision does not, however, compel or even support EPA’s retroactive elimination of the Subpart S excess emission allowances.

First, the *Sierra Club* decision interpreted the NESHAPs General Provisions, not the Subpart S NESHAPs or indeed any categorical NESHAPs. Secondly, the decision addressed an exemption for startups, shutdowns, and malfunctions, while the Subpart S excess emission allowance for pulping vent gases specifically does not address excess emissions during startup, shutdown, and malfunction (and the allowance for pulping condensates only covers such events because EPA did not have data to distinguish those situations from “normal stripper operating emissions”). See 72 Fed. Reg. at 18,529-30.

Thirdly, the *Sierra Club* decision rejected the General Provisions’ blanket, open-ended exemption for emissions during startup, shutdown, and malfunction periods, finding it to be inconsistent with Congress’s intention that “there must be continuous section 112-compliant standards” for sources subject to MACT standards, rather than periods where no standard of any kind applies. See 551 F.3d at 1027. The *Sierra Club* opinion did not address a situation, such as the Subpart S standards, where EPA finds that the MACT standard, which applies continuously, must account for periods of higher emissions during unavoidable operational variability to accurately reflect the available technology and the best performers’ emissions.