

**ENVIRONMENTAL DEFENSE TARGETS DIESEL EXHAUST  
FROM STATIONARY SOURCES FOR REGULATION**

*August 20, 2003*

Environmental Defense (“ED”) recently initiated a major campaign to compel the U.S. Environmental Protection Agency (“EPA” or “Agency”) to regulate diesel exhaust from stationary sources under the auspices of the Clean Air Act’s (“Act’s”) toxic air pollutant and New Source Performance Standard programs. ED’s initiative is directed at companies that own or operate diesel generators, diesel pumps, or other stationary equipment that emits diesel exhaust. That equipment, particularly diesel generators, plays a critical role in numerous companies’ operations. Given the recent blackout in the Eastern half of the United States, and the perceived vulnerability of the electricity grid, it is reasonable to expect that the importance of such equipment will grow. Accordingly, we explain below ED’s initiative, its potential impact on operations, and how companies can get involved in the process to best protect their interests.

**Listing of Diesel Exhaust as a  
Hazardous Air Pollutant under Section 112**

On August 11, 2003, ED filed a petition requesting EPA to list diesel exhaust as a hazardous air pollutant (“HAP”) under Section 112 of the Act. That listing threatens to expose diesel generators and other diesel equipment to costly and burdensome regulation under the Act, including Maximum Achievable Control Technology (“MACT”) standards, monitoring, recordkeeping requirements, and other obligations.

In particular, if granted, the petition could undo several proposed exemptions for diesel generators. See “National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines; Proposed Rule,” 67 Fed. Reg. 77,830 (Dec. 19, 2002) (“RICE Proposal”). The RICE Proposal exempts numerous categories of diesel generators from Section 112 rules, including all existing diesel generators, as well as new and reconstructed generators used for emergency power. ED’s petition criticizes the RICE Proposal, and asks EPA to abolish proposed exemptions.

EPA must rule upon ED’s petition within the next eighteen months, *i.e.*, on or before February 2005. In the interim, affected stakeholders should give serious consideration to providing submissions to ensure that EPA renders an informed and appropriate decision on the petition.

### **Section 111 New Source Performance Standards**

On August 11, 2003, ED also filed a 60 day notice to sue letter with EPA, seeking to compel the Agency to regulate stationary internal combustion engines, including diesel generators, under the New Source Performance Standard (“NSPS”) program of Section 111 of the Act.

If EPA regulates diesel generators under the NSPS program, all new, “modified,” and “reconstructed” diesel generators could be subject to costly and burdensome regulation, including emission limits, monitoring obligations, recordkeeping, and other requirements. Because EPA defines “modifications” broadly, existing generators that do any capital improvements could be swept into the NSPS program.

These rules are important because, among other things, several states exempt diesel generators used for only back-up or emergency power from emissions-based regulations. An NSPS for diesel generators could trump those state exemptions, potentially requiring compliance even if generation is limited to emergency or back-up use.

Under the Act, ED will be free to file suit in U.S. District Court within sixty days of its letter, *i.e.*, on or about October 10, 2003. Presumably, any such suit would seek to force EPA to conduct a rulemaking establishing an NSPS for stationary internal combustion engines, including diesel generators.

Before ED files suit, EPA could voluntarily agree to conduct such a rulemaking. While unlikely, this scenario again underscores the importance of affected stakeholders providing submissions to the Agency that would allow EPA to make informed and proper decisions.

If ED files suit, industry parties could seek to intervene on EPA’s behalf in the litigation, or file *amicus curiae* briefs supporting the Agency. Such participation makes it more likely that affected stakeholders’ interests would be considered in any judgment or settlement resulting from the litigation.

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For further information, please contact David Friedland (202.789.6047, [dfriedland@bdlaw.com](mailto:dfriedland@bdlaw.com)), Tom Richichi (202.789.6026, [trichichi@bdlaw.com](mailto:trichichi@bdlaw.com)), or Justin Savage (202.789.6094, [jsavage@bdlaw.com](mailto:jsavage@bdlaw.com)).

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