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## ENVIRONMENTAL LAW

### Emergency Demand-Response Provisions of EPA's RICE Rule

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In May, the U.S. Court of Appeals for the D.C. Circuit stuck down the federal regulatory provisions that allow emergency stationary combustion engines to participate in demand response programs for up to 100 hours per year. But on Aug. 14, the court granted the U.S. Environmental Protection Agency's motion to stay issuance of the court's mandate, leaving the regulatory provisions in place through May 1, 2016.

In *Delaware Department of Natural Resources and Environmental Control v. EPA*, 785 F.3d 1 (D.C. Cir. 2015), the court vacated two provisions of the EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) for Reciprocating Internal Combustion Engines (RICE), codified at 40 C.F.R. Part 63, Subpart ZZZZ (the RICE rule). These provisions allow RICE to operate for up to 100 hours per year during a grid operator-declared Energy Emergency Alert Level 2, or during periods when voltage or frequency deviate by 5 percent or more below standard, while still qualifying as "emergency" RICE under the regulation.

The "emergency" designation is critical, because RICE in this category are only subject to relatively painless work practice standards. Non-emergency RICE, by contrast, generally have to meet numeric emission limits that are often unachievable without the installation of costly add-on controls, particularly for older engines. The court also vacated the analogous provisions for emergency engines in the EPA's New Source Performance Standards for Stationary Internal Combustion Engines, codified at



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40 C.F.R. Part 60, Subparts IIII and JJJJ; while most of the issues are the same, this article focuses on the RICE rule.

#### Role of RICE in Emergency Demand Response

RICE are combustion engines used in industry to drive process equipment, such as compressors, pumps and other mechanical devices. Additionally, certain types of RICE, known as backup generators, are used for standby power generation. RICE typically run on diesel fuel, but can also combust natural gas. RICE emit a number of different pollutants, including carbon monoxide, nitrogen oxides, particulate matter and formaldehyde, among others. As a result, the EPA has regulated RICE under Section 112 of the Clean Air Act, in one form or another, for many years.

The Federal Energy Regulatory Commission (FERC) is the federal agency tasked with maintaining the

reliability of the country's electric grid. FERC-regulated grid managers, known as independent system operators (ISOs) and regional transmission organizations (RTOs), are responsible for ensuring electric reliability within specific geographic regions. For example, PJM Interconnection LLC is the RTO that operates the power grid and wholesale electricity market in Pennsylvania, New Jersey, and several other Mid-Atlantic and Midwestern states.

ISOs and RTOs have to ensure that grid reliability will be maintained even during high electricity demand periods (e.g., hot summer months) and severe weather events. To do so, these grid managers typically utilize capacity markets to guarantee that sufficient electricity will be available if it is needed. As the court explained in *Delaware Department of Natural Resources*, "'capacity' is not electricity itself but the ability to produce it when necessary," quoting *Connecticut Department of Public Utility Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009). Of course, conventional power plants that generate electricity can supply capacity. But, capacity can also be provided by demand-response resources, which commit, if called upon, to reduce the amount of electricity they pull from the grid.

Demand-response resources can reduce their draw from the grid in one of two ways: they can reduce consumption through electricity-saving measures, or they can switch to backup power, allowing them to disconnect from the grid without having to curtail their own consumption. Because there is no differentiation among different types of capacity resources within the marketplace, resources are almost always selected based on price. RICE

owners can therefore opt to participate in capacity markets for the opportunity to earn payments in exchange for acting as demand-response resources. Participation in demand-response programs can be profitable, depending on the location of the RICE and the relative cost of other demand-response resources in the area.

## Legal Challenges to the RICE Rule

The current RICE rule, which was promulgated in 2013, increased the allowance for emergency demand response from 15 hours (as established in a prior version of the regulation) to 100 hours per year. The “100-hour allowance” enables owners of emergency RICE to participate in capacity markets as demand-response resources without having to install pollution controls to meet the more stringent emission standards that apply to non-emergency engines. In justifying the jump to 100 hours, the EPA explained that the nation’s electric reliability depends on participation of these RICE in emergency demand-response programs; if RICE are required to install add-on controls in order to participate in such programs, then emergency demand response might not make economic sense for these engines.

The Delaware Department of Natural Resources and Environmental Control, along with a group of industry representatives and environmentalists, pushed back, appealing the RICE rule to the D.C. Circuit in 2013. Petitioners challenged the RICE rule on a number of grounds, but as to the 100-hour allowance for emergency demand response, petitioners argued that the EPA failed to take into account certain capacity market dynamics, resulting in a growing reliance on backup power in lieu of cleaner, but potentially more costly, conventional capacity resources. As summarized by the court, “as the [traditional] power supply decreases and the grid becomes less stable, the number of power emergencies increases. And ... as emergencies increase, the actual use of ‘dirty’ backup generators correspondingly increases, causing greater pollution.”

In the end, the court sided with the petitioners, finding that the EPA had acted arbitrarily and capriciously when it failed to properly consider and respond to

petitioners’ “well-founded concerns” during the notice and comment period for the RICE rule. The court also noted the EPA did not consult with FERC on the “reliability considerations” at the core of EPA’s rationale. The court vacated and remanded to the EPA for further action the relevant emergency demand response and voltage deviation provisions of the RICE rule.

## EPA Seeks to Keep Provisions in Effect Pending Remand

Shortly after the court issued its decision, the EPA filed a motion requesting a stay of the issuance of the court’s mandate to keep the vacated provisions in effect through May 1, 2016. The EPA was clear that it would not interpret the court’s vacatur of the 100-hour allowance provisions as having the effect of reinstating the analogous 15-hour provisions in the EPA’s prior regulation, meaning that engines operating for emergency demand response or in response to voltage deviations would not qualify as emergency RICE under the rule, absent some further action by the EPA on remand. The EPA therefore argued that the court’s mandate should be withheld (1) to ensure grid reliability; (2) to allow affected engines reasonable time to install necessary emission controls; and (3) to allow the EPA adequate time to evaluate the need for, and possibly promulgate, a follow-up rule on remand. In support of its motion, the EPA pointed to concerns expressed by PJM about possible operational challenges if diesel engines affected by the court’s ruling could not be called upon during the 2015 summer season. On Aug. 14, the court granted the EPA’s motion to stay issuance of the court’s mandate through May 1, 2016.

## What’s Next?

For the time being, the 100-hour allowance provisions of the RICE rule will remain in effect. RICE can therefore continue to participate in emergency demand-response programs for up to 100 hours per year without compromising their emergency classification under the regulation, at least for now. But because some RICE operators participate in three-year forward capacity markets, like PJM’s, they likely will not be able to operate (if

called upon) for the entire three-year period for which they committed to be available without installing controls required for non-emergency engines. The EPA believes the stay will allow reasonable time to install the required controls if operators so choose. But RICE operators who would rather not upgrade their existing engines may need to make some difficult choices: install the required controls (which may not be economically justified) in order to fulfill their pre-existing capacity commitments, or conform to the new restrictions on emergency-use engines, but run the risk of being unable to honor those commitments if called upon.

We will not know for several months what the “new” RICE rule will look like. Will the EPA introduce some scaled-back version of the demand response allowance for emergency engines, perhaps with additional input from FERC? Or, will the EPA do away with the demand response option for emergency RICE altogether? Time will tell. But regardless of how the remand process plays out, we know the 100-hour allowance provisions have a finite shelf life. Therefore, current emergency RICE owners who want to ensure they can continue to participate in demand-response programs beyond May 2016 should start thinking about whether they need to install additional pollution controls, as this process can easily take up to a year or longer. And since the 100-hour allowance provisions are among the key compliance demonstration requirements for all emergency RICE, even engine owners not directly affected by the court’s ruling should start thinking about whether their air permits will eventually need to be modified to reflect the forthcoming elimination of these provisions from the RICE rule.

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