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Court overturns EPA rule allowing backup generators to run more often absent controls

By [Glen Boshart](#)

In a blow to demand response providers and with a nod to FERC's expertise, a federal appeals court has ruled that the U.S. EPA acted arbitrarily and capriciously when it modified emissions standards to let emergency backup diesel generators operate without emissions controls for up to 100 hours annually.

The EPA in 2010 began allowing backup generators to operate without emissions controls for 15 hours annually as part of demand response programs during "emergency conditions that could lead to a potential electrical blackout."

But that agency in January 2013 issued new standards — the reciprocating internal combustion engines national emissions standards for hazardous air pollutants, or RICE NESHAP — that allowed backup generators to operate exempt from emissions controls to provide "emergency demand response" for up to 100 hours each year, in addition to actual emergency situations and maintenance.

Environmental groups fiercely opposed the new rule, claiming that it amounted to a loophole that could undermine efforts to clean up the air and potentially posed a threat to public health. In particular, they argued that the rule provides a subsidy allowing some consumers to replace the supply of capacity from traditional sources with that provided by much dirtier backup generators.

The Electric Power Supply Association and electric generators also opposed the rule, arguing that it distorts the marketplace by giving demand response providers a competitive advantage. Because backup generators do not have to comply with the same emissions regulations as regular power plants, their electricity costs less to produce and they can charge less and underbid conventional power suppliers in capacity markets, they maintained.

Some generators also asserted that the rule could harm system reliability because as backup generators displace traditional power plants in capacity markets, demand for traditional power generation drops and as a result generators underinvest in power plants that produce electricity for the energy markets.

But the EPA and other proponents maintained that a lifting of the cap was needed so engines could meet ISO and RTO requirements for participation in emergency demand response programs and assist with grid stabilization, preventing electrical blackouts and supporting local electric system reliability.

Siding with the rule's opponents, the court found that the EPA failed to consider their concerns about the rule's impact on the efficiency and reliability of the energy grid, such as what happens when backup generators respond to incentives to participate in capacity markets, forcing out more efficient, traditional power generators in the process.

"EPA's action was arbitrary and capricious on that ground alone," wrote Judge A. Raymond Randolph, who penned the court's [May 1 opinion](#). Instead of taking those concerns seriously, the judge continued, the EPA used the excuse that issues related to the management of energy markets and competition between various forms of electric generation "are far afield" from the agency's responsibilities.

The court further found that the EPA appears to have relied on faulty evidence when justifying the exemption increase from 15 hours to 100 hours. The 2013 rule was grounded in a [PJM Interconnection LLC](#) requirement that does not exist for individual engines, the court noted, and therefore was arbitrary and capricious on that ground as well.

The D.C. Circuit also faulted the agency for failing to consider the option of limiting the 100-hour exemption to areas of the country not served by organized markets to avoid disrupting those markets. Because the EPA "too cavalierly sidestepped its responsibility to address reasonable alternatives, its action was not rational and must, therefore, be set aside," Randolph wrote.

Finally, the court chastised the EPA for failing to obtain the views of FERC or the North American Electric Reliability Corp. on the reliability considerations that were used to justify the new standards when grid reliability "is not a subject of the Clean Air Act and is not the province of EPA."

"EPA's response to comments suggests that its 100-hour rule, to the extent that it impacts system reliability, is not 'the product of agency expertise,'" Randolph concluded.

The court therefore vacated and remanded to the EPA the portions of the rule that contain the 100-hour exemption for emergency engines, and urged the agency to "solicit input from FERC, as necessary."

Hearing the case — *Delaware Department of Natural Resource v. EPA* (13-1093) — along with Judge Randolph were Chief Judge Merrick Garland and Judge Stephen Williams.