

EPA Announces Reconsideration of NSR Equipment Replacement Rule

On July 1, 2004, EPA formally announced its reconsideration of three aspects of the Equipment Replacement Provision (ERP) rule adopted as part of the routine maintenance, repair and replacement exclusion in October 2003. 69 Fed. Reg. 40278. The D.C. Circuit stayed the effectiveness of the rule on December 24, 2003. A number of environmental groups and several states filed reconsideration petitions in late 2003 and early 2004.

In its general discussion of the reconsideration petitions, EPA states that “to date, petitioners have not provided information which persuades [EPA] that our final decisions are erroneous or inappropriate.” EPA states that it decided to grant reconsideration on three issues “because of the importance EPA attaches to ensuring that all have ample opportunity to comment.” The three issues on which EPA grants reconsideration are petitioners' contentions (1) that the legal basis for the ERP is flawed, (2) that EPA's selection of 20% for the equipment replacement cost threshold is arbitrary and capricious and lacks a sufficient record, and (3) that EPA should provide an opportunity for comment on the revised format for incorporating PSD FIPs into state plans.

EPA's Federal Register notice contains little additional support for its decisions on the three issues. With regard to the legal basis for the ERP, EPA simply recounts the broad range of views of commenters in the original rulemaking as to how

the ERP could or could not be justified. In discussing the 20% replacement cost threshold, EPA points out that it had requested comments on equipment replacement percentages up to 50%. It then points out that construction building codes typically interpret “improvements” to be based on a 50% cost threshold and asks for comment on the relevance of the building “improvement” threshold. EPA's revisions to the format for incorporating PSD FIPs into state plans eliminated the requirement for updating FIPs every time changes are made by including language in 40 C.F.R. 52.21 that would automatically revise FIPs.

Comments are due on the reconsideration notice on August 30. EPA intends to hold a public hearing on August 2, and will issue a separate notice later establishing the hearing date. ”

NAS Begins Review of NSR Reforms

Congress enacted provisions in the 2003 EPA Appropriations bills calling on the National Academies of Science to convene a panel of experts to study the effects of the recently-adopted NSR rules. The panel that has been assembled is primarily made up of individuals with technical backgrounds in clean air-related disciplines, such as atmospheric modeling and health effects. One member is a law professor who was formerly on the staff of Congressman Henry Waxman (D-Cal.).

The panel held its first meeting on May 24 in Washington, D.C. The speakers included EPA Air Assistant Administrator Jeff Holmstead, Bill Becker of STAPPA/ALAPCO, and several industry and environmental group representatives. The industry representatives emphasized that the threshold challenge for the panel is to determine how to establish the baseline for judging the effects of the NSR reforms. They pointed out that, if a comparison is made to the prior rules applied in the manner that was originally intended, the NSR reforms should be found to have little or no effect on emissions or air quality. On the other hand, if the interpretations put forward by environmental group representatives are considered, the results may be different. Even under those interpretations, though, because industry has made and would continue to make operational adjustments to avoid costs associated with NSR, it is still likely that the emissions and air quality implications of environmentalists' interpretations would not differ significantly from the results under industry interpretations. The principal difference would be that, under industry interpretations, burdens associated with NSR permitting would be reduced and impediments to efficiency improvements would be diminished significantly.

The panel is scheduled to issue a draft report in early 2005 and a final report in early 2006. Its second meeting was scheduled to be held on July 14 in Washington D.C. It is expected that at least one additional public meeting will be held this fall."

EPA Announces Title V Implementation Task Force

On June 14, 2004, EPA announced the membership of its Task Force on Title V Implementation Experience. The Task Force will

gather information to characterize the perspectives of stakeholders on Title V implementation. It will hold three or four public meetings to receive presentations on Title V issues. The first meeting was held on June 24 in Washington, D.C. Subsequent meetings will be held in Chicago and Phoenix, and possibly in the State of Washington. The Chicago meeting will likely be held in September. The Task Force will receive comments until March 1, 2005.

The Task Force will report to the Permitting Subcommittee of the Clean Air Act Advisory Committee on the experiences of stakeholders who have been working in the Title V permitting arena. The report is to reflect the perspectives of all stakeholder groups. EPA staff have indicated that the principal goal is not to develop consensus statements and recommendations; however, the Task Force may include consensus statements and recommendations in its report. At a minimum, the report should detail the full range of issues discussed and views expressed during the process.

EPA charged the Task Force with specifically attempting to answer two questions:

1. How well is the Title V program performing? For example, has it:
 - # Resulted in permits that clearly compile all of a source's applicable requirements into a single document?
 - # Enabled sources, States, EPA, and the public to better understand the requirements that apply to a source?

- # Enabled sources, States, EPA and the public to better know whether a source is meeting these requirements?
 - # Triggered actions that result in better compliance with the CAA?
 - # Allowed for better enforcement of CAA requirements?
 - # Improved citizen participation in air quality decisions by involving the public in the issuance of permits?
 - # Improved EPA's ability to implement and oversee CAA programs, including air toxics, acid rain, etc?
 - # Enhanced governments' ability to do air quality planning?
 - # Ensured self-funding adequate to run effective programs?
 - # Resulted in better air quality?
2. What elements of the program are working well/poorly?

The members of the Task Force are:

Marcie Keever, Our Children's Earth
 Keri Powell, NY Public Interest Research Group
 Verena Owen, Lake Co. (IL) Conservation Alliance
 Bob Palzer, Sierra Club
 John Higgins, New York DEC
 Don van der Vaart, North Carolina DEM
 Adan Schwartz, Bay Area AQMD
 Shelly Kaderly, Nebraska DEQ

Steve Hagle, Texas TCEQ
 Bob Hodanbosi, Ohio EPA
 Bernie Paul, Eli Lilly
 Bob Morehouse, ExxonMobil
 David Golden, Eastman Chemical
 Mike Wood, Weyerhaeuser
 Lauren Freeman, Utility Air Regulatory Group (UARG)
 Shannon Broome, Air Permitting Forum "

EPA Proposes "Clean Air Interstate Rule"

On January 30, 2004, EPA proposed a rule designed to greatly reduce and permanently cap emissions of sulfur dioxide and nitrogen oxides from electric utilities. EPA initially referred to this proposed rule as the "Interstate Air Quality Rule." In a June 10, 2004 proposal, EPA redesignated the proposed rule as the "Clean Air Interstate Rule." This article will review both the initial and supplemental proposals.

The overriding purpose of the proposal is to reduce power plant emissions that are contributing to fine particle and ozone pollution in downwind states in the Eastern United States. The proposed rule is a principal element of the Bush Administration's plan to assist states and cities in achieving health-based national ambient air quality standards.

The proposed rule would cover a total of 29 states and the District of Columbia. It includes an alternative analysis to determine cutoffs that could be used in deciding which states should be included, which would result in two additional states (North Dakota and Oklahoma) being covered. EPA focused on power plants in the identified states because it believes that reduction in emissions would be both beneficial from an air quality standpoint and highly cost effective.

States could meet the proposed emissions reduction using one of two compliance options: (1) requiring utilities to participate in an interstate cap and trade system that caps emissions, or (2) meeting an individual state emissions budget through measures determined by the state. The proposed cap and trade program would reduce power plant SO₂ emissions by approximately 3.6 million tons in 2010, with reductions ultimately reaching more than 5.5 million tons annually. When fully implemented, NO_x emissions reductions would be about 1.5 million tons in 2010 and 1.8 million tons in 2015. Under the cap and trade program, NO_x emissions would be reduced by about 65% in 2015 and SO₂ emissions by about 50%. When fully implemented, SO₂ emissions reductions would be approximately 70%. EPA estimates that the rule would help approximately 90% of “non-attainment areas” attain national ambient air quality standards for ozone and particulate matter.

The supplemental proposal issued in June includes regulatory text for the multi-state cap and trade program, and outlines criteria which states choosing to control non-electric generators must follow. EPA would be responsible for assigning the state emissions budgets, reviewing and approving state plans, and administering the emissions and allowance tracking systems.

EPA also proposes that the emissions reductions under the proposed rule, if achieved by power plants under the “model cap-and-trade” programs, would satisfy the best available retrofit technology (BART) requirements of the regional haze program as a “better than BART” alternative. EPA has concluded that the SO₂ and NO_x emissions model trading programs would be expected to achieve greater emissions reductions from power plants and, on average, greater visibility improvements in impacted Class I areas than source-specific BART.

EPA Issues Best Available Retrofit Technology Proposal

On May 5, 2004, EPA issued proposed revisions to the Best Available Retrofit Technology (“BART”) provisions of the Regional Haze Rule and re-proposed the BART implementation guidelines issued July 20, 2001. The proposed revisions to the BART regulations were issued in response to the D.C. Circuit’s vacating the BART provisions of the Regional Haze Rule in *American Corn Growers Ass’n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002).

Remand of the Regional Haze Rule in *American Corn Growers*

In July 1999, EPA published a final rule to address a type of visibility impairment known as regional haze. 64 Fed. Reg. 35,714. The Regional Haze Rule requires states to submit SIPs to address regional haze visibility impairment in 156 Class I areas. The final Regional Haze Rule included a requirement for BART for “BART-eligible” sources.

Under the Act, BART is required for any BART-eligible source which “emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any [federal Class I] area.” Section 169(A)(g)(7) requires that states consider five factors in making BART determinations. The fifth of those factors is “the degree of improvement in visibility which may reasonably be anticipated to result from the use of [BART] technology.” In its July 1999 rule, EPA required states to look at the contributions of all BART sources, rather than the contribution of individual sources, to the problem of regional haze in determining both applicability and the appropriate level of control. EPA also provided that, in weighing the factors set forth in the statute

for determining BART, the states should consider the collective impact of BART sources on visibility.

In *American Corn Growers*, the Court ruled that the BART provisions in the 1999 Regional Haze Rule were inconsistent with the provisions in the Act “giving the states broad authority over BART determinations.” 291 F.3d at 8. Specifically, the Court held that the method EPA had prescribed for determining which eligible sources are subject to BART illegally constrain the authority Congress had conferred on the states. However, the Court did not expressly rule that EPA could not incorporate some methodology for a collective contribution approach to determining BART applicability. The Court stated that the collective contribution approach, for example, may have been acceptable if EPA had allowed for a state exemption process based on an individualized contribution determination.

The Court in *American Corn Growers* also found that EPA’s interpretation of the Act requiring that states consider the degree of improvement in visibility that would result from the cumulative impact of applying controls in determining BART was inconsistent with the language of the Act. The Court ruled that states were to consider each of the five statutory factors in making BART determinations.

In addition, the Court remanded the schedule in the Regional Haze Rule for the submission of implementation plans for areas that commit to regional planning. The Court ruled that the use of such “committal SIPs” do not satisfy the statutory requirements.

Proposed Changes in the Visibility Regulations

In the Federal Register notice, EPA proposes the following changes to the Regional Haze Rule:

- # Because the provisions related to assessing visibility impacts on a cumulative basis were included in the preamble to the 1999 rule, EPA concludes that no changes in the regulations are required and, instead, provides states in the BART guidelines (discussed below) a number of options for determining which BART-eligible sources will potentially contribute to visibility impairment.
- # EPA proposes to amend the Regional Haze Rule to require states to consider the degree of visibility improvement resulting from a source’s installation and operation of retrofit technology, along with other statutory factors, when making a BART determination.
- # In response to Congress harmonizing PM_{2.5} designations and regional haze SIP deadlines, EPA proposes to provide that regional haze SIPs are due no later than January 31, 2008, and to eliminate the “committal” SIP provision.

Reproposal of the BART Guidelines

EPA’s Federal Register notice also repropose the guidelines for the regional haze BART process originally proposed on July 20, 2001, and takes into account the proposed changes to the Regional Haze Rule. Also, EPA takes into account some of the comments that it received in response to the 2001 guidelines proposal.

The proposed BART process is set forth in the repropose BART guidelines. EPA’s guidelines

provide for both (1) the process for determining which BART-eligible sources may be reasonably anticipated to cause or contribute to visibility impairment, and thus should be subject to BART, and (2) the process for evaluating visibility impacts for an individual source's BART determination.

The process for establishing BART limitations can be broken down into three steps: First, states identify those sources which meet the definition of "BART-eligible source." Second, states determine which sources "emit[] any air pollutants which may reasonably be anticipated to cause or contribute to any impairment of visibility" in a Class I area. A source fitting this description is "subject to BART." Third, for each source subject to BART, states then identify the appropriate type and the level of control for reducing emissions.

The Act defines BART-eligible sources as those sources which (a) fall within 1 of 26 specific source categories, (b) were built during the 1962-1977 period, and © have potential emissions greater than 250 tons per year. The remand did not address the step of identifying BART-eligible sources.

In response to the *American Corn Growers* decision, EPA proposes several approaches for states to make the determination of whether a source "emits any pollutants which may be reasonably anticipated to cause or contribute to any visibility impairment." EPA does not propose to require that states look at an individual source's contribution to haze. EPA states that, just as the Court ruled that EPA should not tie the hands of states by forcing them to consider the collective contribution of BART-eligible sources, EPA also should not, it says, tie the hands of states by requiring them to consider individualized contributions of sources. EPA proposes three

options, two of which will allow states to consider sources on a collective basis. The third would allow them to consider the individualized contribution of a BART-eligible source. One of the two "collective" options would allow states, without any further analysis, to find that all BART-eligible sources are subject to BART, and a second option under which states could perform an analysis to show that the full group of BART-eligible sources cumulatively do not cause or contribute to any visibility impairment in Class I areas. Thus, states would have a great incentive to simply find that all BART-eligible sources within the state are subject to BART, since this is the only option under which an extensive analysis would not be required.

EPA's proposed BART guidelines provide that the state should determine the degree of improvement in visibility from various BART control levels using either the "CALPUFF" model or another EPA-approved model, using site-specific data. To estimate a source's impact on visibility, the source would run the model using current allowable emissions, and then again at the post-control emissions level (or levels) being assessed. Results would then be tabulated for the 20% worst modeled days at each receptor.

The foregoing is simply an overview of highlights of the BART proposal. Comments were due on July 15, 2004. "