

EPA Inspector General Alleges ERP Rule Hampers Utility NSR Enforcement

On September 30, 2004, EPA's Inspector General issued a report titled "New Source Review Rule Change Harms EPA's Ability to Enforce Against Coal-Fired Electric Utilities." The report focuses on the effects of EPA's Equipment Replacement Provision ("ERP") rule adopted to clarify the routine maintenance, repair and replacement ("RMRR") exclusion under the NSR requirements. The report indicates that the evaluation was undertaken "as a result of Congressional interest."

The report recounts the history of EPA's initiative to target "older" utilities "for compliance assessments, resulting in the identification of significant alleged violations." It indicates that EPA's enforcement actions have proven to be an effective approach for requiring utilities to install pollution controls and indicates that EPA has reached settlements with seven companies to date requiring installation of controls on 74 electric utility units, which is projected to reduce annual SO₂ emissions by more than 440,000 tons and NO_x emissions by more than 210,000 tons. It also indicates that enforcement cases that the Office of Enforcement and Compliance Assurance is currently pursuing against 97 electric utility

units could reduce SO₂ emissions by 1,750,000 tons and NO_x emissions by 629,000 tons annually.

The report states that the October 2003 ERP rule has "seriously hampered" OECA settlement activities, existing enforcement cases, and the development of future cases. It indicates that the provision authorizing replacement projects that come within the 20% replacement cost threshold to be excluded from NSR has encouraged utilities to forego settlement discussions with EPA. It also indicates that, contrary to the position of key EPA staff, certain enforcement officials believed prior to the ERP rule's adoption that the rule would have such negative effects on NSR enforcement. The report states that OECA staff had recommended that the replacement cost threshold be set at 0.75%, rather than the 20% level. The report further indicates that OECA officials estimate that, if the ERP rule is eventually implemented, only five smaller utilities emitting a relatively small amount of SO₂ and NO_x would be in violation of NSR.

The EPA Inspector General reports that EPA generally disagreed with the draft

report and asserted that it contained major flaws and was inaccurate, misleading, incomplete and superficial. The report indicates that many of the EPA comments focus on the fact that the report does not address the proposed emissions reductions that would be achieved from utilities when outstanding proposals are finalized. The Inspector General's response is that the review was not intended to consider programs other than NSR and thus any emissions reductions from other programs were not germane to her analysis.

The report includes a number of recommendations. Among them are:

- C The EPA Administrator should consider a range of lower replacement cost thresholds than the 20% level adopted, including the 0.75% threshold recommended by some OECA staff. It recommends that this be done as a part of the ERP reconsideration process in "an open manner," "fully explaining" the basis for EPA's ultimate decision.
- C The EPA Acting Assistant Administrator for OECA should pursue enforcement on an aggressive basis against all facilities "found in violation of NSR requirements." "

Court Denies Citizen Claims Based on "Credible Evidence"

In *Sierra Club v. TVA*, Case No.: CV-02-IHS-2279-NW (N.D. Ala.), the federal district court ruled that TVA had not violated opacity limitations, even though continuous opacity monitors ("COMs") at its Tuscumbia, Alabama power plant recorded approximately 9,000 exceedances of the opacity limitations. The State Implementation Plan provided that Method 9 was the reference method for the opacity standard. Sierra Club argued that the COMs provided "credible evidence" of violations and thus the court should find TVA to be in violation of the opacity limitations based upon COM data.

Factual Background

The TVA Tuscumbia plant operates four boilers for generating electricity. During the period that the alleged violations occurred, there had been no determination of violations based upon Method 9. Throughout the period, however, TVA operated COMs which, as indicated above, recorded about 9,000 exceedances. The Alabama Department of Environmental Management ("ADEM") adopted a "credible evidence" rule, which took effect on May 20, 1999, to allow data other than reference method tests results to be considered in determining violations.

Pre-Credible Evidence Rule Exceedances

The court ruled that, until the credible evidence rule took effect in Alabama, data from Method 9 was the exclusive basis for determining violations. Since no Method 9 data was available showing violations, the court granted TVA's summary judgment motion with respect to the alleged violations occurring before May 20, 1999.

Post-Credible Evidence Rule Exceedances

Sierra Club and TVA agreed that the COM data was properly considered after the credible evidence rule took effect. However, TVA argued that the COM measurements were "subject to a 2% *de minimis* rule." ADEM adopted a 2% *de minimis* rule under which up to 2% of COM-determined exceedances would not be considered violations of the opacity limitation. However, the 2% *de minimis* rule had not been formerly adopted at the time of the alleged violations and has yet to be included as a part of the Alabama SIP.

TVA argued that the opacity limitation – "when translated from its original formulation which was inherently based on **periodic** Method 9 compliance test – is not violated as long as non-exempt COMS readings greater than 20% do not occur more than 2% of the time." TVA further argued that, unless the 2% *de minimis* rule is

used, the opacity limitation requirement is changed from one requiring "periodic compliance to one requiring continuous compliance." It pointed out that it would be "literally impossible" for any power plant to always be below 20% and that "statutory construction dictates that an impossible result not be required."

ADEM supported TVA's position. When ADEM adopted the 2% *de minimis* rule, it stated that the proposed revision "would serve to codify the practices that [the] Department has been and is currently utilizing regarding COMS data." ADEM indicated that other jurisdictions had adopted the 2% standard and the court stated that its "own research into other state's regulations confirms that to be true."

The court pointed out that another federal district court had ruled in *National Parks Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 175 F. Supp. 2d 1071 (E.D. Tenn. 2001), that the Tennessee DEC had properly applied a 2% *de minimis* exclusion for opacity exceedances, even though the 2% limitation had not been included in the Tennessee SIP. The court pointed out that the requirement to use COM data on a continuous basis resulted in the "emission limit [being] more restrictive than that otherwise specified in the SIP (*i.e.*, Method Nine)." The Tennessee district court ruled that EPA approval was not required because, under the SIP, a more restrictive standard is to be included in a

source's permit and such permits are incorporated as a part of the SIP.

The Alabama court ruled that it had found no language in the SIP that would prevent TVA and the State of Alabama from establishing a more restrictive opacity limit than that included in the regulations. It also ruled that it had determined "that a continuous monitoring system is more restrictive and stringent than the opacity limit standard set out in the regulations." It pointed out that ADEM had used the 2% *de minimis* guidelines for years before the lawsuit was brought and, even though not specifically approved by EPA, TVA reasonably believed that ADEM's practices were "facially valid." Accordingly, the court found application of the 2% *de minimis* standard to be the proper standard to be applied and ruled that TVA was entitled to summary judgment on the alleged violation claims for the post-May 20, 1999 period, as well as for the period prior to that date. "

Court Issues Expansive Ruling on "Emissions Unit"

In *U.S. v. Westvaco Corp.*, CA No. MJG-00-12602 (D. Md. Aug. 27, 2004), the federal district court issued a series of rulings in connection with EPA's New Source Review enforcement action brought against Westvaco alleging that a series of projects at the company's Luke Mill Plant in Maryland violated the NSR requirements. The most

significant ruling was with regard to whether a power boiler could be considered an emissions control device for a digester and, as a consequence, part of the same emissions unit. If so, physical changes at the digester could potentially provide the basis for finding that BACT controls would be required on the power boiler.

Factual Background

EPA filed an NSR enforcement action against Westvaco claiming that a series of projects denominated as the "Digester Expansion Program" should be found to have triggered NSR permitting. None of the equipment installed or changed directly released pollutants into the air, but the court stated that the projects resulted in increased production of pulp and paper at the mill. Although the power boilers were not physically altered, the boilers produced greater amounts of steam and emitted greater amounts of pollutants as a result of the changes that were made. A central question as to which the court made no determination was whether a non-condensable gas including total reduced sulfur compounds produced by the digesters and "evaporators" was burned in a power boiler during the digester improvement program. Westvaco contended that its system to burn such gases in the power boiler was shut down prior to the improvement program and remained down during the time it was completed.

Westvaco also undertook a second series of improvement projects that was called the “Mill-Wide Expansion Program.” Here again, the equipment installed or modified did not directly emit pollutants into the air and the power boilers were not physically altered. However, EPA and Westvaco agreed that two power boilers were “control devices” for total reduced sulfur emissions.

Ruling on Scope of Emissions Unit

The central issue considered by the court was whether the power boilers should be included as a part of a multi-part “emissions unit” that would include digesters and other equipment. If so, a change to the digester could potentially result in the need to install best available control technology on the power boilers. The court pointed out that the pertinent provision of EPA’s regulations provides that:

A major modification shall apply best available control technology for each regulated [] pollutant for which it would result in a significant net emissions increase at the source. This requirement applies to each . . . **emissions unit** at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

40 C.F.R. § 52.21(j)(3) (emphasis added).

The court reviewed several EPA interpretations under which EPA stated that air pollution control equipment could be considered as part of the operational design of an emissions unit. Another interpretation stated that a process unit and its associated control equipment were “integral parts of a single emissions unit.”

EPA claimed that the power boilers should be considered to be a “control device” for a multi-part unit that was “modified” as a part of the physical changes to the digesters and other equipment. The court ruled that EPA was entitled to deference with regard to interpretation of its own regulations because its interpretation was not “plainly erroneous or inconsistent with the regulation.” Westvaco argued that the court should not apply EPA’s interpretations because other EPA interpretations suggested that control devices were not parts of emissions units subject to BACT. However, the court ruled that EPA’s interpretations could be applied retroactively because the other interpretations were, at most, “dictum.” Also, EPA’s interpretations would “serve the statutory interests of curbing harmful emissions from modified stationary sources.”

The court concluded that power boilers could be part of a multi-part emissions unit if they were a “control device” for the equipment that was altered or installed. The court further found that a power boiler

could be part of an emissions unit that included a variety of different equipment at a pulp and paper mill. The court ultimately concluded that a power boiler would be considered a part of a multi-part emissions unit *if it was actually used to burn non-condensable gases or total reduced sulfur compounds from other equipment or had the potential to be utilized to burn such pollutants.*

Applicability of PCP Exclusion

Another interesting aspect of the opinion, although not a part of a final ruling, was the court's recognition that Congress "must be presumed to have been aware of the extensive NSPS regulations interpreting § 7411(a)(4)'s definition of 'modification.'" It further stated that "when Congress adopted § 7411(a)(4) by reference into the PSD part of the statute, it presumably intended for these NSPS rules to apply in the PSD context." The court made these statements in connection with its finding that the pollution control project exclusion could potentially apply as a defense to one of the plaintiff's claims.

The central factual issue with regard to the applicability of the PCP exclusion was whether the power boilers' burning of gases was a system of pollution control that was "less environmentally beneficial" than the system it replaced. EPA had determined

that the new system was in fact less environmentally beneficial than the system it replaced. EPA had argued that the system Westvaco used was less environmentally beneficial because Westvaco could have used other more beneficial "alternate systems." The court pointed out that EPA is to compare the replacement system to the system replaced, "not to some hypothetical system or 'best possible' system." The court found that "the benchmark for the 'less environmentally beneficial' determination is the . . . control system employed by Westvaco before improving the power boilers, a system whereby [the non-condensable gas] was burned in the Mill's lime kiln." The court ultimately ruled that neither EPA nor Westvaco was entitled to summary judgment on this issue.

The court also found that Westvaco's failure to notify EPA of its intention to avail itself of the PCP exclusion should not "somehow preclude [] applicability" of the PCP exclusion. "

EAB Rules NSR Reforms Did Not Expand Scope of "Emissions Unit"

On August 3, 2004, the EPA Environmental Appeals Board ("EAB") issued a ruling interpreting the scope of the term "emissions unit" under the NSR

requirements in the context of a permit appeal in which the petitioner argued that BACT should be required when new steam lines were to be installed at a power plant. *In Re: Rochester Public Utilities* (PSD Appeal No. 03-03). The Minnesota Center for Environmental Advocacy petitioned for EAB review of a PSD permit issued by the Minnesota Pollution Control Agency (“MPCA”) to Rochester Public Utilities (“RPU”) for its Silver Lake Power Plant.

Factual Background

RPU proposed to install a steam line to run from its Silver Lake Plant to the Mayo Clinic’s Prospect Utility Plant. The steam from the Silver Lake Plant would be used to generate electricity at the Mayo Plant. As a result of the addition of the steam line, the RPU Plant would have an approximate 50% increase in its annual coal consumption rates.

The MPCA found that the project would constitute a major modification, but determined that the BACT requirement would only apply if there was modification to an “emissions unit.” The MPCA ruled that RPU’s project would not physically modify an “emissions unit” because the project involved construction on the steam pipes, rather than the boilers. As a result, the MPCA approved the permit without requiring BACT on the boilers.

Scope of “Emissions Unit” Under Modified Definition

The EAB stated that the petitioner apparently accepted the fact that BACT would not be required for the project under the definition of “emissions unit” as it existed prior to the NSR reforms. One aspect of the reforms was the addition of a specific reference to “electric utility steam generating units.” Thus, the narrow issue before the EAB was whether EPA had intended to expand the scope of the term “emissions unit” by specifically referencing electric utility units. The EAB found that EPA had not intended to expand the scope of the term, pointing out that one of EPA’s findings was that fewer projects would be subject to NSR under the reforms. Also, EPA did not evidence any intent to impose BACT on modifications to steam pipes for electric utility units. The EAB indicated that it disagreed with the arguments that the petitioner submitted and, as a result, it denied review of the environmental group’s petition.

In a supplemental opinion, one of the EAB judges indicated that the project at issue should result in BACT being required for the boilers since there would be increased coal consumption. He indicated that he believed that the term “emissions unit” should be construed to encompass the steam lines at RPU’s facility and included a 13-page

analysis explaining why he believed BACT should be required under EPA's rules in such a situation. He stated that EPA should conduct a rulemaking proceeding "if it wishes to continue on the path that it is currently following." A second judge indicated that he believed the regulations could be read consistently with EPA's historical interpretation and was disinclined to call into question that interpretation. A third judge stated that she would leave for another day the expression of her views on the questions addressed by her two colleagues. "