

Industry Representatives Discuss NSR Reform Proposals with EPA

Efforts by industry representatives to reach a mutually agreeable approach with EPA for reforming the new source review (NSR) program have been continuing. Industry representatives supporting the “complex manufacturing” proposal met with EPA officials on September 29 to discuss the proposal in more detail. (That proposal, which, if accepted, would essentially replace the current NSR scheme, is also referred to as the Basic Applicability Program (BAP).) In addition, on October 11, industry representatives sent a letter to EPA responding to a series of questions about the BAP raised by the Agency in an August 23 letter from the Office of Air Quality Planning and Standards (OAQPS).^{1/}

Two other industry groups — electric utilities and certain companies focussing on the use of plantwide applicability limits (PALs) — have submitted separate proposals to EPA for reforming the NSR program. Those proposals are consistent with the BAP and could be implemented along with it. Representatives of those two groups also had meetings with EPA in September to discuss their respective proposals for NSR reform.

EPA officials have indicated that, if EPA were to move forward now to finalize an NSR reform proposal, the Agency would not expect to

send a package to OMB until February. As a result, EPA would probably not be able to promulgate a final rule until the completion of a 90-day OMB review period in June. EPA officials have suggested that further discussions on the BAP might result in the timetable for promulgation being extended beyond June 2000. Those officials have also indicated that there may be some parts of the rule that would need to be issued as a proposal before they could be finalized.

Below we outline the key elements of the BAP and summarize the discussions that occurred at the September 29 meeting.

Addition of New Emitting Units

The principal feature of the BAP from EPA's perspective is that new emitting units would not be able to net out of a requirement to install best controls. Under the industry proposal, new units with a potential to emit (PTE) of 100 tons per year (tpy) would be required to install federal BACT or LAER depending on whether the unit was in an attainment or non-attainment area (Category C). Units with a PTE between 40 tpy and 99 tpy would be required to put on State best available technology (Category B), with units of 39 tpy or less being subject to State minor NSR requirements (Category A).

EPA has raised two primary concerns with this aspect of the proposal. First, EPA is concerned about the control requirement for units in Category B, because industry has insisted that EPA not have a veto over State decisions

1/ The October 11 letter is available on the Network's website under the “New Source Review” category.

regarding these controls. EPA officials have indicated, however, that it might be possible to work out a mechanism for establishing an expeditious process to identify an appropriate level of control. The second concern relates to the potential for a facility to install multiple new units of 39 tpy or slightly less than that amount and still not be subject to the mandatory control obligation.

With regard to specifying what the control obligation would be for Category B units, industry representatives suggested the possibility of a "non-top down" approach that would take into account incremental costs of control options, with NSPSs (where established) being the minimum level of control. EPA suggested the possibility of establishing presumptions based on cost-effectiveness, percent reduction of emissions (on a pollutant-by-pollutant basis), or a MACT floor-type approach at least as stringent as recent BACT determinations in the EPA Clearinghouse. Industry representatives have agreed to work with EPA to establish a means for requiring "Category B-BACT." Under this approach, controls would be acceptable if they satisfy any one of several criteria.

As to EPA's desire for some type of aggregation, industry representatives suggested the possibility of aggregating post-control emissions of new units on a "project" basis to determine whether the new units would be subject to Category A, B, or C control. EPA officials strongly expressed the need to establish a means for aggregation over time, e.g., on a rolling 12-month basis. Industry representatives have expressed a willingness to work with EPA in attempting to develop such an aggregation approach.

Modification of Existing Units

Under the proposed new system, the methodology for determining whether there are emissions increases at existing emitting units would be made by comparing pre-change and post-change maximum achievable hourly emissions. EPA officials have indicated that they have significant concerns about this "potential-to-potential" approach. However, industry representatives emphasized the importance of this approach as an element of any package that would provide for no netting in determining whether controls would be required on new units.

Reconstruction of Existing Units

In prior meetings, EPA had seemed to indicate that the inclusion of a test for determining whether units are "reconstructed" would be necessary so that significantly changed units would over time be required to have controls installed. Industry representatives intend to base this test on the current NSPS test, but provide that the 50% replacement cost analysis take into account "capital" costs over a two-year period.

Voluntary Controls on Existing Units

Industry representatives also suggested the possibility of establishing an approach that would, on a voluntary basis, provide for "effective retrofit control technology" to be installed on existing units. The principal elements of the proposal would allow for units to be excluded from the NSR requirements for a 15-year period, if sources agreed to install effective retrofit controls during that time. □

Petitioners Seek Stay of EPA's Final Rule Addressing

Northeastern States' Section 126 Petitions

On August 26, 1999, industry and labor union petitioners filed a motion before the D.C. Circuit to stay EPA's section 126 rule pending a decision by that court on the merits of their challenges to the rule. The motion was filed in a set of consolidated cases involving challenges to the April 30 final section 126 rule, in which EPA found that NO_x emissions from numerous sources located mostly in the Midwest are "significantly contributing" to ozone nonattainment problems in certain northeastern states. *Appalachian Power Co. v. EPA*, Nos. 99-1200 *et al.* (D.C. Cir.). The section 126 rulemaking proceeding arose in response to administrative petitions filed by eight northeastern states pursuant to section 126(b) of the Act. In those petitions, each state alleged that certain sources in other states are "significantly contributing" to ozone nonattainment within its borders.

The petitioners' motion to stay the section 126 rule follows on the heels of an order by the D.C. Circuit indefinitely staying EPA's closely related NO_x SIP call rule. *Michigan v. EPA*, No. 98-1497 (D.C. Cir. May 25, 1999). In that order, the D.C. Circuit ruled that the petitioners in that case had satisfied their burden of establishing that the September 30, 1999 deadline for submitting SIP revisions pursuant to the SIP call should be stayed until the court could rule on the merits of their challenges.

The court's stay of the NO_x SIP call rule also affects EPA's implementation of the section 126 rule. EPA has treated the two rules as being closely linked. EPA had originally determined that it would rely primarily on the NO_x SIP call to address what it believes are substantial ozone transport problems in the eastern United States. Under this approach, the Agency indicated that it would rely on the section 126 rule essentially as a backup measure in the event that the NO_x SIP call

were not fully implemented. In particular, the section 126 rule provides that, if EPA has not approved a SIP revision for a state by November 30, 1999 (or promulgated a FIP for the state by that date), any section 126 petition covering sources within that state will automatically be deemed granted on that date if EPA has already found that the petition had "technical merit."

If the court grants the motion to stay the section 126 rule, that decision would likely have substantial impacts on EPA's current strategy for addressing ozone nonattainment issues, which relies heavily on the section 126 rule. On June 24, 1999, EPA took two actions regarding the section 126 rule in response to the D.C. Circuit's stay of the NO_x SIP call rule as well as that court's decision in *American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), remanding the revised ozone standard.

- First, EPA announced an "interim final" stay of the section 126 rule until November 30, 1999. 64 Fed. Reg. 33,955. The purpose of that temporary stay is to provide EPA additional time to address issues raised by the D.C. Circuit's two rulings.
- Second, EPA issued a proposed rule that would (1) delete the automatic trigger set for November 30, 1999, based on actions under the NO_x SIP call rule; and (2) stay indefinitely its determinations on the section 126 petitions to the extent they are based on the revised 8-hour ozone standard. 64 Fed. Reg. 33,962. In that notice, the Agency stated that the judicial stay of the NO_x SIP call rule makes it "no longer appropriate to link [EPA's] findings under section 126 to the compliance schedule for the NO_x SIP call." Under the proposal, EPA would take final action on the section 126 petitions by November 30.

In short, EPA intends to decouple the section 126 rule and the NOx SIP call rule and instead rely primarily on the section 126 rule to address ozone nonattainment.

The petitioners argue in their stay motion that EPA's temporary stay of the section 126 rule is insufficient and that the court will not be able to decide the merits of the section 126 case until sometime after April 2000 "when, according to EPA, affected sources must know their compliance obligations if they are to meet the rule's compliance date of May 1, 2003." As a result, they contend that the rule should be stayed until the court is able to decide the case on its merits.

In its response filed on September 24, EPA argues that the petitioners have not met their burden of demonstrating that temporary injunctive relief beyond November 30 is necessary. In particular, EPA maintains that petitioners will incur negligible costs prior to the time that the case is decided on its merits and that they cannot show they will suffer any "irreparable harm." EPA additionally contends that the public interest would be significantly harmed if the rule were stayed and it could not proceed to address ozone nonattainment in the affected states. □

EPA Guidance Memorandum Discusses Manner in Which SIP Provisions Are to Address Startups, Shutdowns, and Malfunctions

On September 20, 1999, EPA issued a guidance memorandum setting forth the Agency's policy concerning the way in which SIPs must address excess emissions during startup, shutdown, or malfunction (SSM) conditions. *State Implementation Plans: Policy Regarding Excess Emissions*

During Malfunctions, Startup, and Shutdown.^{2/} The memorandum states that EPA is re-affirming its policy on exceedances during SSM conditions set forth in guidance memoranda issued in 1982 and 1983 but supplementing that policy in certain respects. The new guidance memorandum was issued jointly by the Office of Enforcement and Compliance Assurance (OECA) and the Office of Air and Radiation (OAR).

According to EPA, the policy set forth in the new memorandum will determine whether EPA will approve SIP provisions addressing SSM conditions.^{3/} Although the Agency states that its basic 1982/1983 policy has not been followed in the past in all instances, EPA indicates that the policy must be followed in the future. The September 20 memorandum directs each EPA Region to review the SIPs within its jurisdiction and to take steps to ensure that each SIP is consistent with the guidance.

The memorandum states that, under the 1982/1983 policy, a SIP cannot provide an "automatic exemption" from emission limits for exceedances occurring during SSM conditions. In other words, EPA's position is that all exceedances

2/ The September 20, 1999 guidance document can be found on the Network's website under "Nonattainment Requirements" and "Enforcement."

3/ It should be noted that the guidance memorandum does not directly address exceedances during SSM conditions involving new source performance standards (NSPSs) under section 111 of the Act or national emissions standards for hazardous air pollutants (NESHAPs) under section 112 of the Act. Both Part 60 (NSPSs) and Part 63 (NESHAPs) of Title 40, C.F.R., contain special provisions addressing exceedances during SSM conditions.

of emission limits contained in the SIP must initially be regarded as violations. However, because some exceedances may be caused by circumstances beyond the source's control, the state or EPA may exercise its "enforcement discretion" and determine not to bring an enforcement action under those circumstances.

SIP Provisions Allowing Affirmative Defenses

The memorandum explains that one question that has arisen regarding the 1982/1983 policy is whether states can go beyond the "enforcement discretion" approach and provide for some type of affirmative defense. An affirmative defense would, in the context of an enforcement action, excuse a source from paying penalties if the source could demonstrate that it satisfied certain objective criteria. The memorandum "clarifies" previous guidance to provide that states have the discretion to provide an affirmative defense for SSM episodes under certain conditions.

The memorandum states that an "acceptable" affirmative defense provision for startups, shutdowns, or malfunctions may only apply to actions for penalties, not to actions for injunctive relief. In addition, the affirmative defense approach would only be appropriate in situations where no single source or small group of sources has the potential to cause an exceedance of a NAAQS or a PSD increment. EPA indicates that it will not approve SIP provisions that would allow the state's decision regarding an affirmative defense to bar the ability of EPA or citizens to enforce applicable requirements. Finally, EPA is including additional recordkeeping and notification criteria in its policy.

For malfunctions, the affirmative defense must provide that the defendant has the burden of demonstrating that the excess emissions were caused by a sudden, unavoidable breakdown of process or control equipment beyond the control

of the source, in addition to nine other elements. These elements include the following: that the excess emissions not stem from any activity or event that could have been foreseen and avoided, or planned for; that the equipment at issue was maintained and operated in a manner consistent with good practice for minimizing emissions; that repairs were made expeditiously; that the amount and duration of the excess emissions were minimized; and that the source properly and promptly notified the appropriate regulatory authority. Similar criteria apply to use of an affirmative defense for startups or shutdowns.

Source Category-Specific Rules for Startups and Shutdowns

The September 20 memorandum also provides a new mechanism that states can use to address exceedances during startups and shutdowns. According to the memorandum, "EPA recognizes that, for some source categories, even the best available emissions control systems might not be consistently effective during startup or shutdown periods." As a result, the memorandum provides for the use of source category-specific SIP provisions to address this situation. Under this approach, the states, in consultation with EPA, may "create narrowly-tailored SIP revisions that take . . . technological limitations into account and state that the otherwise applicable emissions limitations do not apply during narrowly defined startup and shutdown periods. The memorandum sets forth a list of "requirements" that such revisions must meet in order to be approved. □

Legislation Addressing Section 112(r) Risk Management Plans Enacted

On August 5, 1999, the President signed into law the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act ("the

Chemical Safety Information Act”), which addresses the public’s access to information regarding the offsite consequences of accidental releases of hazardous and toxic chemicals regulated under section 112(r) of the Clean Air Act. Section 112(r) requires certain facilities to have developed and implemented a risk management plan (RMP) and to have submitted a summary of the plan to EPA by June 21, 1999. A separate section of the newly enacted statute deals with the coverage of flammable fuels within RMPs.

Public Access to OCA Information

EPA’s risk management program regulations require that an RMP include an offsite consequences analysis (OCA) that encompasses a facility’s worst case projections for deaths, injuries, and property damage during an accidental release. Because such OCA information could be made public through requests under the Freedom of Information Act (FOIA), concerns about misuse of the information by terrorists arose.

The Chemical Safety Information Act prohibits the federal government from disclosing OCA information to the public under FOIA for one year from the date the Act is signed, except that such information will be available to certain officials for emergency planning and response purposes. During the one-year exemption period, the agency is required to assess the consequences of releasing OCA information to the public. This assessment must consider the increased risk of terrorist and other criminal activity associated with posting OCA data on the Internet and the incentives created for reducing the risk of accidental releases by publicly disclosing such information. EPA must subsequently promulgate

regulations based on the assessment results. Those regulations must: (1) provide the public access to paper copies of the OCA information for a limited number of facilities anywhere in the nation; (2) allow additional public access to OCA data “as appropriate”; (3) provide access to OCA data for official use by certain state and local officials; and (4) by request to EPA, grant access to OCA data to state and local officials not otherwise available. The prohibition against disclosure is inapplicable if the regulations are not promulgated within a year.

Until one year after enactment of the statute or the promulgation of the regulations addressing public access to OCA data — whichever is earlier — EPA is required to make OCA data available to the public in a manner that does not disclose the identity or location of a facility. Within six months of enactment, each facility subject to the risk management program must hold a public meeting to describe and discuss the local implications of its RMP. Each owner or operator of a facility subject to the program must certify to the Federal Bureau of Investigation that it has held a meeting or publicly posted the summary information. Facilities that choose to publicly distribute their OCA information without restrictions must notify EPA.

Exemption for Certain Flammable Fuels

The Chemical Safety Information Act also exempts flammable fuels used as fuel or held for sale as fuel at retail facilities from the risk management program requirements. Significantly, the exemption is limited to those fuels that are listed solely due to their explosive or flammable properties. Moreover, it only applies to fuels at such facilities where the impacts to humans are

caused by heat of fire or explosion. Flammable fuels used as feedstock or held for sale at a wholesale facility remain subject to the program requirements. □

Colorado Refinery Enters Into Consent Decree; Agrees to Pay \$1.1 Million Penalty

A Colorado refinery has entered into a consent decree that would require it to pay \$1.1 million in civil penalties as well as to take numerous measures at its facility to address alleged violations of the Clean Air Act and RCRA. The consent decree, which has not yet been finally approved, arose from an enforcement action brought by EPA as an “overfiling” of a prior settlement reached between the company and the Colorado Department of Public Health. *United States v. Colorado Refining Co.*, Civ. No. 99-N-1759 (D.C. Colo.). The filing of the enforcement action is additionally significant because EPA’s allegations were largely based on statements in the compliance certification contained in the company’s Title V permit application.

With regard to the Clean Air Act claims, EPA’s complaint alleged violations of the company’s construction permit, the Colorado SIP, and the NSPSs for petroleum refineries (Subpart J), volatile organic liquid storage vessels (Subpart Kb), and VOC emissions from petroleum refinery wastewater systems (Subpart QQQ). The alleged violations focused primarily on emissions from flares and storage tanks located at the facility’s loading docks. The complaint alleged, among other things, that the company could not establish that necessary reductions of VOCs were being achieved.

EPA’s enforcement action was based in large part on statements made by the company in

its Title V permit application compliance certification. The Colorado Department of Public Health had addressed the statements under its environmental audit privilege law and had reached a settlement with the company. Under that settlement, the company was required to undertake a number of measures to reduce emissions but received complete immunity from any civil, criminal, or administrative penalty pursuant to the state audit law. Despite the settlement between the Department and the company, EPA brought an enforcement action under section 113 of the Clean Air Act. EPA’s position was that, because the Part 70 regulations require that permit applicants sign a compliance certification, statements made in the certification cannot be considered “voluntary” under the state audit law. Accordingly, EPA asserted that there was no proper basis for granting the company immunity from all penalties.

In addition to payment of a \$1.1 million civil penalty, the consent decree with EPA requires that the company install new emissions control technologies and meet numerous additional monitoring and reporting requirements. Notice of the proposed consent decree was published in the *Federal Register* on September 29, 1999. 64 Fed. Reg. 52,527. The consent decree will not be finalized until a 30-day public comment period has ended. □

EAB Overturns Startup and Shutdown Provision in State-Issued PSD Permit

EPA’s Environmental Appeals Board (EAB) has ruled that the Wisconsin Department of Natural Resources (WDNR) erred by including a provision in a PSD permit that allows a source to rely on a separate “startup and shutdown” plan during startup or shutdown periods. *In re: RockGen*

Energy Center, PSD Appeal No. 99-1 (August 25, 1999). The EAB's opinion reflects heavy reliance on non-binding Agency guidance and a stringent approach to addressing a source's compliance obligations during startup or shutdown periods.

The case involves WDNR's issuance of a PSD permit to RockGen authorizing the construction and operation of an electric power generating facility. WDNR issued the permit because it had been delegated authority from EPA to implement the federal PSD program. In relevant part, the permit provided that RockGen could exceed the permit's emission limits if the emissions are "temporary and due to startup or shutdown of operations carried out in accord with a plan and schedule approved by the Department" The petitioner contended, among other things, that the permit was unlawful because the startup and shutdown plan was not federally enforceable. In response, WDNR maintained that it may not be technically feasible to comply with all of the BACT limits during the startup or shutdown of a combustion turbine and that the plan would, in fact, be federally enforceable under the permit term in question.

In its decision, the EAB gave great weight to three EPA guidance documents that address compliance with emission limits during startup, shutdown, or malfunction conditions.^{4/} According

4/ The three guidance documents all focus on compliance with SIP requirements or new source review provisions during startup, shutdown, or malfunction (SSM) conditions. It should be noted that the three documents do not specifically address compliance with NSPSs or NESHAPs during SSM conditions. Parts 60 and 63 of Title 40, C.F.R., contain provisions that expressly address compliance with standards

to the EAB, those guidance documents indicate that, although it is likely that emission limits will be exceeded during startups or shutdowns, "such exceedances are common and can be reduced or eliminated with careful planning." The EAB ruled that it appeared from the record that WDNR had not given sufficient consideration to design changes or other possible changes to the proposed facility to address the issue of whether the exceedances could be prevented. Furthermore, the EAB believed that the permit was deficient because it did not indicate what conditions must be included in a startup/shutdown plan or what criteria would be used to determine the plan's validity. Based on this reasoning, the EAB remanded the relevant part of the permit to WDNR for an "on-the-record determination as to whether compliance with existing permit limitations is infeasible during startup and shutdown, and, if so, what design, control, methodological or other changes are appropriate for inclusion in the permit to minimize the excess emissions during these periods."

In addition, the EAB stated that, if the emission limits cannot be met during startup or shutdown conditions, WDNR "should specify and carefully circumscribe in the permit the conditions under which RockGen would be permitted to exceed otherwise applicable emissions limits and establish that such conditions are nonetheless in compliance with applicable requirements, including NAAQS and increment provisions."

during SSM conditions. Thus, although the EAB's opinion appears to apply generally to compliance with any emission limits during startup or shutdown and the ability to rely upon startup/shutdown plans to achieve compliance, the opinion should be read as being limited only to compliance with SIP requirements or new source review permit provisions.

The EAB indicated that WDNR should consider including a secondary PSD limit that would be applicable during startup and shutdown periods.□