

EPA Submits Residual Risk Report to Congress, Concludes That No Legislative Changes Are Necessary

On March 5, 1999, EPA submitted to Congress its final report on residual risks called for by section 112(f)(1) of the Act. That provision requires EPA to have submitted a residual risk report to Congress by November 15, 1996 and sets forth the specific topics to be covered in the report. Among other things, EPA's final report is significant because it sets forth the Agency's general framework for promulgating residual risk standards under section 112(f). In addition, EPA concluded in the report that no changes in the current statutory scheme are needed in order to address residual risks.

Under the statute, residual risks are defined as those risks remaining to public health and the environment after implementation of the section 112(d) MACT standards. EPA must determine whether to promulgate residual risk standards for each source category within either 8 or 9 years of promulgating MACT standards for that category. As a result, all or some

sources within a category might be required to achieve HAP reductions beyond those that can be achieved by use of MACT. Promulgation of the first residual risk standard, if necessary, would be due in 2001.

Although the report sets forth the general framework and methodology EPA plans to use in implementing section 112(f), EPA acknowledges that there are many substantive areas where the Agency lacks the necessary data, studies, or analytical tools to carry out the statutory scheme. One question that arises from the report is whether EPA will have the ability to make reasonable decisions regarding whether section 112(f) standards should be promulgated for particular categories and, if so, whether such standards would be legally and factually supportable. Below we list the specific topics that section 112(f) requires be addressed by the report and summarize the report's discussion of each topic.

Methods of Calculating the Risk to Public Health Remaining, or Likely to Remain, From Sources Subject to Regulation under Section 112 After Application of MACT Standards

According to the report, EPA's approach to setting standards under section 112(f) for carcinogens will be based on the approach taken in promulgating the Benzene NESHAP. (That standard was promulgated in 1989 under the pre-1990 version of section 112.) The approach set forth in the preamble to the Benzene NESHAP is a two-step process: (1) EPA is to determine what constitutes a "safe" level of the pollutant based solely on health factors; and (2) EPA is to determine whether the standard should be lowered after considering costs and technical feasibility to provide an "ample margin of safety." In addition, the report indicates that, where EPA concludes that the risk is unacceptable from only some facilities in a category, the residual risk standard will focus on those portions of the category.

Public Health Significance of Estimated Remaining Risks

EPA states in the report that, given the schedule for promulgation of MACT standards, residual risk assessments for source categories have not been completed, and EPA "is not able to report on the actual public

health significance of any residual risks at this time."

Technologically and Commercially Available Methods and Costs of Reducing Risks

Although EPA states that it believes that methods to reduce emissions beyond MACT exist, "it is not possible to determine specific methods or to estimate the costs to reduce residual risks . . ." in the report.

Actual Health Effects with Respect to Persons Living in the Vicinity of Sources

The Agency concedes that its current understanding of risks to nearby individuals is limited and confounded by other factors.

Any Available Epidemiological or Other Health Studies

The report notes that "very few well-conducted health effects studies have focused on air toxics exposures to populations near sources of HAPs . . ." In addition, EPA acknowledges that it has very little actual data on HAP emissions in general.

Risks Presented by Background Concentrations of HAPs

According to the report, "EPA does not have comprehensive Agency-wide guidance or policies on incorporating background

concentrations into risk assessments and risk management decisions." Moreover, the report states that very few data on background concentrations are currently available.

Uncertainties in Risk Assessment Methodology or Other Health Assessment Techniques

The report points out that EPA has published several guidance documents addressing the issues of uncertainty and variability in risk assessment.

Any Negative Health or Environmental Consequences to the Community of Efforts to Reduce Such Risks

EPA recognizes the possibility of creating or transferring risks as an unintended consequence of actions taken to reduce residual risks from HAPs and intends to take such factors into account in promulgating residual risk standards.

Recommendations as to Legislation Regarding Such Remaining Risk

EPA recommends no legislative changes because it believes that section 112(f) as written provides it "with adequate authority to address residual risks to public health and the

environment and provides a comprehensive and flexible strategy for addressing a variety of air toxics risk concerns.” After EPA issued its draft residual risk report last year, many industry groups had urged EPA to request new legislative authority so that it would have additional time and resources to develop the information and methodologies necessary to implement section 112(f) in a reasonable manner. In addition, EPA’s Science Advisory Board (SAB) had suggested that EPA request new authority to conduct integrated risk assessments addressing both HAPs and criteria pollutants. □

EPA Draft Memorandum Focuses on Enforcement of NSR/PSD Provisions and Air Toxics Provisions

EPA’s Office of Enforcement and Compliance Assurance (OECA) recently provided a draft Memorandum of Agreement (MOA) to the EPA regions and the states. That memorandum, which was circulated for comments, will be used to define EPA’s enforcement priorities during 2000 and 2001 and to provide guidance to regions and the states in conducting their enforcement activities.

With regard to Clean Air Act enforcement, the draft MOA sets forth initiatives focusing on enforcement of the Act’s NSR/PSD provisions as well as

the Act’s air toxics provisions. The draft memorandum also targets the petroleum refining industry for intensive enforcement activities. The key points in the memorandum are summarized below.

NSR/PSD Enforcement

- compliance with NSR/PSD provisions is designated as a “priority area”
- in enforcing NSR/PSD requirements, regions and states are to focus on coal-fired electric utilities and petroleum refineries
- regions and states are to identify targeted facilities and develop a list of potential modifications that were not subject to NSR/PSD review
- regions and states are to inspect the identified facilities and “issue CAA [section] 114 [information] requests and/or conduct administrative depositions of key plant personnel to identify NSR or PSD modifications”
- each region should select at least two facilities in each state within the region for “in-depth investigations”

Air Toxics Enforcement

- compliance with MACT standards is designated as a “priority area”
- regions are to identify high-risk air toxics sources and target them for compliance monitoring activities
- regions are to determine if sources emitting hazardous air pollutants (HAPs) are properly permitted as major sources
- each region is to adopt two or three MACT standards and become “the champions and national enforcement/compliance experts for those MACT standards”
- regions are to share with other regions the findings and other materials developed in connection with their adopted MACT standards

Petroleum Refinery Initiative

- regions are to focus on use of investigations of petroleum refineries, rather than merely conducting traditional single/multimedia inspections
- regions are to focus on NSR/PSD modifications (the draft memorandum suggests that they use Region III’s database for

petroleum refineries for this purpose)

- regions should increase investigations concerning the leak detection and repair (LDAR) program (EPA estimates that 50% of the emissions from refineries comes from fugitive sources) □

EPA Region III Initiates NSR/PSD Enforcement Against Pulp and Paper Mills

EPA Region III announced on April 20 that it has issued notices of violation (NOVs) to seven pulp and paper mills in the states of Virginia, Maryland, and Pennsylvania based on alleged violations of the Act’s prevention of significant deterioration (PSD) requirements. The NOVs were issued as another step in implementing the Agency’s policy of focussing on PSD violations in targeted sectors such as the electric utility industry, the petroleum refining industry, and the pulp and paper industry. See the related article above discussing EPA’s general NSR/PSD enforcement initiative.

According to the EPA press release, the alleged violations “resulted from the mills’ expanding operations without installing the necessary pollution control equipment or obtaining the required permits.” EPA said that the principal targets of the

NOVs are boilers used to generate electricity at the mills. EPA stated that it will seek civil penalties based on the “economic benefit” which EPA alleges the companies received by not installing pollution control equipment and taking other necessary measures. EPA estimated that the potential civil penalties in each case will be “in the millions of dollars.”

Each NOV provides that the mill involved has seven days from receipt of the NOV in which to request a conference with EPA to discuss the Agency’s allegations. Pursuant to section 113(a)(1) of the Act, within 30 days of the issuance of an NOV, EPA may (1) issue an order requiring compliance, (2) issue an administrative penalty order, or (3) bring a civil action in federal district court seeking injunctive relief and/or civil penalties. □

EPA Issues Rule Extending Section 112(j) Permit Application Deadlines for 29 Source Categories

To prevent sources in 29 different categories from being required to submit section 112(j) permit applications on May 15, 1999, EPA has published a direct final rule that extends the application deadline from May 15 to December 15, 1999. 64 Fed. Reg. 18,824 (April 16, 1999). That action was taken in connection with a proposed consent decree in a citizen suit that would require EPA to promulgate MACT standards for the 29 source categories pursuant to a schedule contained in the proposed consent decree.

Under section 112(e)(1), EPA is to promulgate MACT standards in a phased approach and must have promulgated MACT standards for 50% of all listed source categories no later than seven years after enactment of the 1990 amendments, i.e., by November 15, 1997. Section 112(j) of the Act provides that, if EPA has not promulgated the necessary MACT standards by the statutory date of promulgation, the so-called “MACT hammer” falls 18 months later. (For the “7-year MACT standards,” the MACT hammer falls on May 15, 1999.) Under section 112(j), sources must submit applications for individual permits by the MACT hammer date,

and permitting authorities are to issue permits requiring compliance with MACT requirements determined on a case-by-case basis.

In the notice, EPA explains that a schedule for promulgating the 29 “7-year MACT standards” not yet been adopted is contained in a proposed consent decree pending in the U.S. District Court for the District of Columbia. Under that schedule, 25 of the 29 MACT standards are to be promulgated by May 15, 1999. The Agency states that requiring permit applications for those categories to be submitted on the same day that EPA is obligated to promulgate the standards for the categories would serve no purpose if EPA meets the schedule. Moreover, unless the permit application deadline is extended, sources would have to run the risk of noncompliance if EPA misses the promulgation date. Accordingly, EPA plans to extend the permit application deadline for those categories. EPA also concludes that it would be inappropriate to extend the application deadline for some applicants but not for others. Moreover, since all remaining 7-year standards except one are expected to be promulgated by December 15, 1999, EPA notes that it is doubtful that any permit application would be acted upon prior to promulgation of the standard in question. Thus, EPA concludes that its regulations should be amended so that the section 112(j) permit application

deadline is extended to December 15, 1999.

Under the direct final rule procedure used in this instance, the final rule amendment will become effective on Monday, May 17, unless EPA receives adverse comments by April 26. In case adverse comments are received, EPA simultaneously published a proposed rule containing the same amendments and would take final action on that proposal, if necessary, after consideration of public comments. □

D.C. Circuit Concludes That EPA Failed to Justify Its Approach in Determining MACT Floor

In a decision that may have important implications for the promulgation of future MACT standards, the D.C. Circuit ruled that EPA had failed to support its MACT floor determinations in setting the performance standards for medical waste incinerators. *Sierra Club v. EPA*, No. 97-1686 (D.C. Cir., March 2, 1999). The court made clear that EPA must explain with sufficient detail how it determines what constitutes the MACT floor for a category and may not simply base the MACT floor on existing regulatory and permit limits. The court remanded the standards to EPA for further explanation.

The case involved a challenge to EPA's promulgation of performance standards for medical waste incinerators pursuant to section 129 of the Act. Although the case involved section 129 rather than section 112, the court's reasoning would apparently apply as well to section 112 MACT standards because of the nearly identical language used in both sections to describe the criteria for determining the MACT floor. Section 129(a)(2) provides that

[t]he degree of reduction in emissions that is deemed achievable for new units in a category shall not be less stringent than the emissions control that is achieved in practice by the best controlled similar unit, as determined by the Administrator. Emissions standards for existing units in a category may be less stringent than standards for new units in the same category but shall not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category

The language above is essentially identical to the MACT floor language in section 112(d)(3).

MACT Floor for Existing Sources

With regard to the section 129 standards for existing sources, the Sierra Club primarily argued that the statute forecloses EPA from relying on regulatory data, i.e., regulatory limits or permit limits, in determining the MACT floor and that EPA's approach to setting the MACT standards was otherwise arbitrary and capricious. In particular, the petitioner claimed that EPA had not adequately explained how it determined the average performance of the best performing 12% of sources.

The D.C. Circuit first of all rejected the Sierra Club's argument that, as a matter of statutory construction, the Act forecloses EPA from relying on regulatory data in any situation. The court ruled that "the use of such information is permissible as long as it allows a reasonable inference as to the performance of the top 12 percent of units."

However, the court concluded that EPA had failed to justify in the record its MACT floor determination for existing sources. The court stated that EPA, in using permit limits to calculate the MACT floor, had not considered the possibility that medical waste incinerators were "substantially overachieving the permit limits." The court noted that it appeared that, relying on permit limits, the best performing 12% of sources actually

emitted twice as much pollution as the units that were uncontrolled – a result that the court believed was irrational. Furthermore, the court stated that EPA had assumed without justification that medical waste incinerators that were not subject to permit limits had no emissions controls at all. In addition, the court questioned why some of the best performing 12% of sources apparently included some units that had no controls.

MACT Floor for New Sources

To determine the MACT floor for new sources, EPA identified the most effective technologies in use for each subcategory and reviewed test data regarding the performance of the technologies. It then identified the highest emissions level recorded in any test of an incinerator in the subcategory using the technology and increased that level by 10% to arrive at the emissions level it ultimately used for that technology.

The Sierra Club attacked this approach on two principal grounds: (1) that EPA should have identified the best performing unit in the subcategory rather than considering the performance of other units using that same technology; and (2) that EPA further erred by basing the floor on the emissions of the worst-performing unit that it examined.

The D.C. Circuit ruled that, in order to determine what is “achieved in practice,” EPA could examine the performance of a unit under the worst foreseeable circumstances. However, the court stated that the record contained no explanation that this was the path the Agency had actually followed. Moreover, the court stated that EPA had failed to explain why the phrase “best controlled similar unit” could encompass all units using the same technology as the unit with the best performance, rather than just that unit alone. The court additionally noted that there was no adequate explanation for the method by which EPA had increased observed levels by 10% and rounded them upward.

Standards Are Not Vacated

Despite all the deficiencies identified by the court, it did not vacate the standards because it believed that “an explanation might be possible.” The court simply remanded the standards to EPA so that it could explain the basis for its MACT floor determinations. □

Court of Appeals Upholds Conviction of Supervisor for Criminal Negligence

The U.S. Court of Appeals for the Ninth Circuit recently ruled that ordinary negligence on the part of a supervisor was enough to trigger criminal penalties under the Clean

Water Act. *United States v. Hanousek*, No. 97-30185 (9th Cir., March 19, 1999). By 2 to 1 vote, a panel of judges upheld the conviction of the supervisor of a workman who accidentally ruptured an oil pipeline near Skagway, Alaska. The panel rejected the defendant's argument that the word "negligently" in the criminal enforcement provisions of the Clean Water Act should be read to entail more than ordinary negligence.

Because the relevant statutory language is essentially identical to the language of section 113(c)(4) of the Clean Air Act, the reasoning of the court would presumably apply also to criminal enforcement actions under that provision of the Clean Air Act. Section 113(c)(4) of the Clean Air Act provides in relevant part as follows:

Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to [section 112] . . . and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by

imprisonment for not more than 1 year, or both.

Hanousek, the defendant, was responsible, among other things, for the safety and construction of the track and other structures of a railway company in Alaska. As a crew under his general supervision was removing rocks from an outcropping near the track, a backhoe operator took his backhoe from a work platform to pick up fallen rocks. The backhoe drove on top of a nearby oil pipeline covered by only a few inches of soil and subsequently punctured the pipeline. Approximately 5,000 gallons of oil were discharged into the Skagway River.

EPA charged the defendant with violating section 309(c)(1) of the Clean Water Act, which makes it a crime to "negligently" discharge pollutants into a navigable waterway. The defendant contended that, rather than applying the ordinary negligence standard of "failure to use reasonable care," the trial court should have applied a heightened criminal negligence standard based on a "gross deviation from the standard of care a reasonable person would observe in the situation." The defendant further maintained that applying the ordinary negligence standard under the circumstances in this case would constitute a denial of due process.

The Ninth Circuit ruled that, because Congress had not specifically defined the word “negligently” in the statute, the court would presume that the word should have its ordinary meaning. The court rejected the due process claim, concluding that the defendant was aware of the location of the pipeline and should have foreseen that it would be subject to strict regulatory measures.

The defendant was sentenced to six months in prison, six months in a halfway house, and six months of supervised release. He was also fined \$5,000. □

EAB Upholds PSD Permit Against Contention That Future Operational Changes Must Be Addressed in Initial Permit Application

EPA’s Environmental Appeals Board (EAB) has rejected arguments that the PSD permit for a cogeneration facility must limit the permittee’s ability to apply in the future for a modification of the permit’s terms. *In re: Encogen Cogeneration Facility*, PSD Appeal Nos. 98-22 through 98-24 (EAB, March 26, 1999). The EAB also ruled, among other things, that (1) the permittee need not be required to provide notification of fuel switches so

long as the limits on sulfur content are not exceeded and (2) BACT controls need not be required for reduction of lead emissions in this case.

The PSD permit in question was issued by the Hawaii Department of Health (DOH) for construction of a new cogeneration facility by Encogen Hawaii. (Because Hawaii does not have an approved PSD program but is delegated authority to administer the federal program, the EAB is responsible for hearing appeals concerning PSD permits in the State.) Three petitioners challenged the permit on a number of grounds.

In its decision, the EAB first rejected contentions that the permit must restrict the future ability of the permittee to modify the permit’s fuel use restrictions. The permit restricted the permittee to burning only naphtha, gasoline, or low sulfur fuel oil – all with a sulfur content of less than .05% by weight. The petitioners argued that the permit should expressly prevent the permittee from seeking modification of the permit to use more polluting fuels. However, the Board concluded that the PSD regulations “do not require that future operational changes, which require modification of a permit, be considered as part of the initial application process.”

Second, the EAB ruled that the DOH was not required to include a provision contained in the draft permit which would have required the permittee to provide notification when switching among the three allowable types of fuel. The Board explained that the petitioners' concerns were "speculative" and that they had failed to show that more frequent switching would increase sulfur emission levels so long as the permit provision limiting sulfur content to less than .05% was met.

Finally, the petitioners maintained that the DOH had erred in calculating potential lead emissions levels because the calculation had been based on the burning of naphtha (.11 tpy) rather than gasoline (.22 tpy). The DOH conceded that it had miscalculated the worst-case lead emissions. However, the EAB ruled that this error was irrelevant because the correct figure was still well below the PSD significance level of .60 tpy for lead. After denying numerous other challenges to the permit, the Board upheld the permit in its entirety. □