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EPA Takes Final Action On NSR Reconsideration Petitions

On November 7, EPA took final action on petitions for reconsideration of the NSR reforms in the December 31, 2002 final rule that had been filed by state and local agencies and environmental groups. 68 Fed. Reg. 63,021. EPA did not make any substantive changes to the NSR reforms. However, the Agency did clarify the final rule in two minor respects. EPA denied reconsideration on all issues other than those on which it had previously granted reconsideration, with one exception. No action was taken on a reconsideration petition filed by Newmont Mining Corporation with respect to the inclusion of fugitive emissions in determining NSR applicability.

The six issues upon which EPA had granted reconsideration and takes final action are as follows:

Supplemental Environmental Analysis – EPA states that, after reviewing the numerous comments submitted on the report, it has concluded that the report's conclusion is valid. The report concluded that the NSR reforms would likely result in greater environmental benefits than the prior requirements.

Treatment of replacement units under the actual-to-projected-actual method – In its reconsideration notice, EPA requested comment on its decision to provide that the actual-to-projected-actual method for determining emissions increases can be used for replacement units at both utility sources and non-utility sources. EPA reaffirms its authorization of using this emissions increase methodology for replacement units and includes a definition of replacement unit in the final rules. EPA provides that a replacement unit is a unit that meets the following criteria:

- The emissions unit is a reconstructed unit under NSPS or one that completely takes the place of an existing emissions unit.

- The unit is identical to or functionally equivalent to the replaced unit.

- The replacement does not alter the basic design parameters of the process unit.

- The replaced emissions unit is permanently removed or otherwise permanently disabled or barred from operation by a permit that is enforceable as a practical matter.

Newly constructed units under the PAL provisions – Under the final rule's PAL provisions, a facility must use the same emissions baseline period for all units at the facility, but may use a different period for different pollutants. With regard to a unit where construction begins after the baseline period, the regulatory authority is to use the potential to emit of the unit in establishing the actual emissions baseline for the PAL. EPA revises the NSR rule language to clarify that the potential to emit of a unit is only to be used for emissions units added after the 24-month baseline period and is not available to emissions units that existed during the baseline period whether or not they have been modified since that time.

Synthetic minor limits under the PAL provisions – Under the final rule, synthetic minor limits taken to avoid NSR can be eliminated once a PAL is in effect. In addition, such synthetic minor limits are not reinstated when the PAL expires. EPA reaffirms this approach in the notice.

Reporting and recordkeeping requirements under the actual-to-projected-actual approach – Under the final rule, non-utilities must meet reporting and recordkeeping requirements regarding emissions projections and post-change emissions only if there is a "reasonable possibility" that the project in question will result in a significant emissions increase. EPA reaffirms this provision in its notice.

Clean Units and changes in attainment status – Under the final rule, if a unit qualifies as a Clean Unit, its status would not change if it were located in an attainment area that subsequently was redesignated as a non-attainment area. EPA also reaffirms this provision.

EPA Confirms New NSR Enforcement Policy

In November, senior EPA officials confirmed that Agency leadership had made some changes in the policy that would be implemented in determining whether there were violations of the NSR requirements for which enforcement should be pursued. Based on public reports and conversations with EPA staff, it appears that the following reflects EPA's current intentions about the course of future enforcement:

EPA will continue to prosecute NSR enforcement cases that have already been filed in federal court.

EPA will apply the criteria in the Equipment Replacement Provision (ERP) rule, which elaborates on the

routine maintenance, repair and replacement exclusion, in determining whether to pursue further enforcement with respect to coal-fired power plants that have received section 114 requests and/or been issued NOVs. As a practical matter, this may mean that EPA will pursue no further enforcement against those power plants, because the replacement projects EPA has targeted are generally believed to be exempt under the ERP criteria.

- Although there is some uncertainty as to whether EPA will apply the ERP criteria in determining whether to initiate or pursue further enforcement with respect to past replacement projects in industries other than electric utilities, it seems likely that EPA will conclude, for reasons of treating sources equitably, that it has no choice but to apply those criteria in determining whether to take further action with regard to past replacement projects at facilities in all industries.

- EPA's announcement to enforcement staff with regard to a change in enforcement policy apparently relates only to applying the ERP criteria in determining whether to pursue enforcement alleging that past replacement projects were subject to PSD/NSR permitting. In other words, it appears that EPA management has not advised enforcement staff that they are to apply the 2002 NSR applicability reforms (the new baseline emissions provision and actual-to-projected-actual methodology) in determining whether to challenge past projects that would not be excluded as routine maintenance, repair and replacement. However, in light of recent court decisions rejecting the actual-to-potential test for determining PSD applicability to changes to existing emissions units, it is expected that non-utility industrial sources will be increasingly successful in arguing that EPA should apply an actual-to-actual test in determining NSR applicability to past projects. ″

States And Environmental Groups Challenge And Seek Stay Of NSR Equipment Replacement Rule

On October 27 and 28, the day the NSR equipment replacement rule was published in the Federal Register and the day following, 14 states and several environmental groups filed petitions for review of the final Equipment Replacement Provision (ERP) rule in the D.C. Circuit. Docket No. 03-1380 (and consolidated cases). The ERP rule establishes criteria that, if satisfied, will allow replacement projects to automatically qualify for the routine maintenance, repair and replacement exclusion from NSR applicability. (*See* September 2003 *Washington Report* at WR-489).

Several weeks later, both the state and environmental group petitioners filed separate motions with the court asking it to stay implementation of the ERP rule. The state petitioners argue that the rule represents a "radical departure" by EPA from "twenty-five years of . . . agency precedent regarding the applicability of the NSR requirements to plant modifications." Similarly, the environmental group petitioners claim that EPA has "dramatically broadened" existing law. EPA and industry group intervenors in support of EPA intend to file oppositions rejecting the state and environmental group characterizations of the rule. Also, they will point out that the ERP rule provides needed clarification of the scope of the RMRR exclusion and reflects only a minor change to the applicability of the NSR requirements.

The petitioners' stay motion is premised on the claim that EPA only has authority to adopt an exclusion under the de minimus doctrine. In its justification of the ERP rule, EPA did not rely on the de minimus doctrine. Rather, EPA pointed out that it had discretion as to how it defined the term "physical change or change in the method of operations." Since replacement projects authorized under the ERP rule would not alter the basic design and capacity of the process unit, EPA concluded that there would not be a change that should be potentially subject to NSR applicability,.

The oppositions of EPA and intervenors in support of EPA are due on December 5. The petitioners' reply will be due a week later. It is unclear when the court will take action on the stay motion, but it is likely that it will occur within a few weeks after the petitioners' replies are filed. ″

EPA Agrees That Title V Monitoring "Sufficiency Reviews" Are Impermissible

In the Title V rule and preamble issued in 1992, EPA made clear that, where applicable requirements contain periodic monitoring, no additional monitoring is authorized to be incorporated in Title V permits. For the past five years or so, EPA has attempted to reinterpret or rewrite its initial regulatory requirements without revising its regulations. EPA first attempted this by issuing periodic monitoring guidance that authorized "sufficiency reviews" of periodic monitoring in applicable requirements. That guidance was overturned in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). Since the time of the court's decision in *Appalachian Power*, EPA has taken the position that the court's ruling was based on its interpretation of section 70.6(a)(3) and that EPA has authority under section 70.6(c)(1) to require such sufficiency reviews. The Utility Air Regulatory Group (UARG) and Clean Air Implementation Project (CAIP) filed challenges in 2002 with the D.C. Circuit in which they argued that EPA's position, which had been stated in several Title V permit objection decisions, is unlawful. The court ruled that the industry petitioners did not have standing and did not reach the merits of the issue.

In an attempt to give itself authority for sufficiency reviews, EPA proposed in 2002 to amend its regulations by deleting language in section 70.6(c)(1) that industry argues confirms

that EPA cannot undertake such reviews. In the preamble to that proposal and to an interim final rule EPA issued, EPA stated again that it has the authority under the 1992 regulations to require sufficiency reviews and that the proposed revision to section 70.6(c)(1) is merely to clarify that it has such authority. UARG, CAIP and other industry trade associations challenged EPA's interpretation and, once again, argued in their initial brief that it is contrary to the clear language of the Title V regulations and the 1992 preamble.

Just before EPA's respondent brief was due, industry petitioners reached an agreement with EPA to settle the litigation, in which EPA agrees to do the following three things:

- Take final action declining to adopt the proposed revision to the text of sections 70.6(c)(1) and 71.6(c)(1).
- State that EPA has determined that the correct interpretation of those sections is that they do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of the review and enhancement that is authorized for standards with no periodic monitoring under sections 70.6(a)(3) and 71.6(a)(3).
- State that EPA does not intend to address what constitutes a "gap" in monitoring under section 70.6(a)(3)(i)(B) or 71.6(a)(3)(i)(B), or criteria for how a "gap" should be filled.

In sum, EPA will, in effect, reinstate the interpretation in the 1992 preamble that EPA only has the authority to require new periodic monitoring where applicable requirements do not contain such monitoring. ″

STAPPA/ALAPCO Issues NSR Options Report

In mid-October, STAPPA/ALAPCO issued a "final review draft" of a report titled "New Source Review: A Menu of Options." The Menu generally conforms to the outline of options that STAPPA/ALAPCO had previously announced it would be addressing. In the opinion of industry representatives, the options, when viewed in their entirety, would have the effect of completely undermining the benefits that would be derived from EPA's promulgation of NSR reforms in the December 2002 and August 2003 final rules.

STAPPA/ALAPCO's report sets out options for each of the five reforms in the 2002 final rule and for the 2003 equipment replacement rule. The materials released by STAPPA/ALAPCO total about 230 pages. The apparent intent is to provide materials that state and local air pollution control agencies could use as a substitute for EPA's reforms, with little rewriting required on the part of any agencies wishing to adopt any of the options. The response so far has been mixed from state and local officials, although there are clearly some states that have challenged the EPA reforms in the D.C. Circuit that intend to pursue adoption of the options.

STAPPA/ALAPCO has indicated that it intends to finalize the report in early 2004. Industry representatives urge that states adopt EPA's NSR reforms in their entirety and, if

later they determine that fine tuning is desirable, take that action after they have real world experience with implementation of the reforms. Industry representatives also have stated their intent to work with individual states in addressing whatever concerns they have with regard to the reforms.

The following table prepared by STAPPA/ALAPCO (with minor clarifications) provides a comparison of EPA's reforms with the key options included in the STAPPA/ALAPCO draft report.

Summary of EPA's NSR Rule Revisions and Regulatory Alternatives Presented in STAPPA and ALAPCO's New Source Review: A Menu of Options

October 16, 2003

Summary of EPA's NSR Rule Revisions	Summary of STAPPA/ALAPCO Menu of Options
Baseline Emissions: • Source allowed to look back over last 10 years to select any 24-month period upon which to establish baseline against which emissions increases are measured • May select different 24-month period for each regulated NSR pollutant	**Baseline Emissions:** • Sets most recent 2 years as presumptive baseline most representative of current operation and design • Provides two options for alternative baseline (with permitting authority approval) based either on 1) actual emission rates or 2) utilization rates • Requires use of single baseline period for each project for all affected emission units and regulated NSR pollutants
NSR Applicability Test: • Allows use of "actual-to-projected-actual" emissions test to predict emissions 5 years into the future • Allows "demand growth exclusion" for all existing sources	**NSR Applicability Test:** • Option 1: Use "actual-to-potential" emissions test (as under old federal rule) • Option 2: Use "actual-to-projected-actuals" test, but enhance oversight and enforcement tools and eliminate demand growth exclusion • Option 3: Use "actual-to-projected-actuals" test and enhanced recordkeeping and reporting for electric utility steam generating units only

Summary of EPA's NSR Rule Revisions	Summary of STAPPA/ALAPCO Menu of Options
Clean Unit Exclusion: • Provides automatic designation as "Clean Unit" for any unit that has installed BACT or met LAER in last 10 years • Allows sources to receive "Clean Unit" status if they demonstrate other controls are "comparable to BACT" • Does not consider emission increases at a "Clean Unit" (i.e., no NSR at "Clean Units") for 10 years	**Clean Unit Exclusion:** • Includes special provisions for "Clean Units," but does not ignore any emission increases from a project affecting the unit • Option 1: Bases "Clean Unit" status – effective for 5 years – on BACT determinations made up to 2 years before revised state/local NSR rule adopted • Option 2: Bases "Clean Unit" status – effective for 5 years – on control technology determinations made after revised state/local NSR rule takes effect
Pollution Control Project (PCP) Exclusion: • Expands NSR exemption for PCPs (i.e., projects that result in significant emissions increases, but are exempt from NSR due to decreases in emissions of another pollutant) to all source categories • Eliminates requirement that "primary purpose" of PCP must be to reduce emissions • Lists PCPs presumptively deemed "environmentally beneficial" and allows demonstration that others are "environmentally beneficial"	Pollution Control Project (PCP) Exclusion: • Retains "primary purpose" test • Provides state/local agency authority to rebut presumption that a project is "environmentally beneficial" • Clarifies that PCP exclusion is not applicable to replacement or reconstruction of existing emissions unit
Plantwide Applicability Limits (PAL): • Allows facility to take PAL (i.e., a source-wide emissions cap), under which any changes are exempt from NSR • PAL based on highest level of actual emissions over past 10 years • PAL does not decline • New sources allowed to operate under PAL without mandatory control requirement	**Plantwide Applicability Limits (PAL):** • Option 1: "Declining" PAL based on last 2 years (or other 2-year period in last 5, with permitting authority approval) and source required to install BACT on all significant units within 5 years • Option 2: "Declining" PAL based on last 2 years (or other 2-year period in last 5, with permitting authority approval) and source required to achieve emissions levels equivalent to those achieved if BACT installed on all significant emissions units within 5 years • Option 3: "Non-declining actuals" PAL set at actual emissions level of last 2 years (or other 2-year period in last 5, with permitting authority approval)

Summary of EPA's NSR Rule Revisions	Summary of STAPPA/ALAPCO Menu of Options
Equipment Replacement Exclusion: • Allows replacement of existing equipment with new equipment costing up to 20% of current replacement value of entire process unit, without NSR	**Equipment Replacement Exclusion:** • Option 1: Adopts specific criteria to be considered by source when determining if a change is "routine" and provides guidelines on how to use criteria • Option 2: Permitting authority publishes lists of "routine" and "not routine" activities and applies same criteria and guidelines as under Option 1 for unlisted activities

D.C. Circuit Denies Sierra Club Motion To Stay Final General Provisions/Section 112(j) Rule

The D.C. Circuit in a brief order denied the Sierra Club's motion to stay the General Provisions/Section 112(j) rule, published on May 30, 2003.[1/] The Sierra Club had claimed that the bifurcated section 112(j) permit application process and the deadlines for submitting a complete application contained in their rules are unlawful and causing irreparable harm. The Sierra Club's position was particularly ironic in light of the fact that the environmental group had entered into a settlement agreement with EPA which provided for the permit application process and deadlines included in the final rule. It is expected that a briefing schedule will be established for the litigation within the next month or so. ″

[1/] *See* the May 2003 *Washington Report* at WR-473 and the July 2003 *Washington Report* at WR-487 for a discussion of the May 30 rule and the history of the General Provisions/Section 112(j) litigation.