CLEAN AIR ACT
information network

EPA Circulates Draft NSR Reform Package

During the week of November 19, EPA circulated to other parts of the Bush Administration a long-awaited package of draft NSR reforms. The package reportedly contains some elements that could be included in a final rule because they were addressed in EPA's 1996 proposed NSR reform rule. Other elements would presumably need to be proposed and subjected to public comment before they could be finalized.

Proposed NSR Reform Measures

The NSR reform package is believed to include the following measures:

Plantwide Applicability Limits (PALs) % As set forth in the 1996 proposal, sources that agree to a PAL could undertake changes without triggering NSR so long as the plant's overall emissions did not exceed the PAL. EPA subsequently indicated that it was considering specifying conditions under which a PAL might later be adjusted downward.

Clean Unit Exclusion % Under this exclusion, which was also proposed in 1996, sources that have recently installed BACT, LAER, or comparable pollution controls on a unit may make further modifications to the unit without triggering NSR so long as the unit's hourly emissions rate does not increase.

Actual-to-Actual Emissions Test % The package reportedly contains a proposal to extend some form of the actual-to-actual emissions test contained in the 1992 WEPCO rule for electric utilities to all source categories. If so, this would signal a major shift from EPA's position in recent years that the actual-to-potential test is the exclusive test for determining whether a change will cause a "significant net emissions increase" for non-utility sources and that the actual-to-potential test should not be replaced by another test.

Clarification of Routine Maintenance, Repair, and Replacement Exclusion % The reform package apparently includes a proposal to refine the definition of "routine maintenance, repair, and replacement." It is believed that EPA is considering a State proposal to develop a list of "appropriate activities" that would qualify as "routine" and not be considered physical or operational method changes that could possibly trigger NSR.

NSR Investment Test % It is believed that the reform package contains some type of exclusion from NSR based on an "investment test." EPA has recently been attempting to develop a measure that would provide a "safe harbor" for a certain level of investment to be excluded from NSR. Four basic options have been considered: (1) an exclusion for any changes that are expensed; (2) a "safe harbor" under the

routine maintenance, repair, and replacement exclusion under which routine activities that are capitalized and do not exceed a certain level would be deemed to be automatically excluded from review; (3) an exclusion similar to the "capital expenditure" exclusion under NSPS under which any expenditures that do not exceed a specified trigger amount would be exempt from review; and (4) an exclusion for changes involving "de minimis" expenditures.

Future Steps in the NSR Reform Process

It is expected that the NSR reform package will be publicly released in conjunction with EPA's 90-day NSR report. That report is to be issued in response to the May 17, 2001 recommendation of the National Energy Policy Development (NEPD) Group, chaired by Vice President Cheney, that EPA review NSR regulations and report within 90 days to the President concerning the impact of the regulations "on investment in new utility and refinery generation capacity, energy efficiency, and environmental protection." Although EPA's report was originally due in August, the Agency indicated that it would need an additional month in which to complete it. Because of the events of September 11, that date was pushed back even further. The 90-day NSR report is now expected to be released in December 2001 or January 2002.

Initially, EPA planned to release the NSR report simultaneously with the Agency's proposed multipollutant legislation, which would require deep cuts in emissions of three pollutants % NOx, SO_2, and mercury % from utility or large industrial boilers. The proposed legislation would also purportedly lead to the elimination or substantial alteration of certain requirements in the NSR program and other Clean Air Act programs covering those sources. However, Administrator Whitman recently announced that the two measures are now "on separate tracks" and will be released independently. It is expected that the multipollutant bill will be released sometime in early 2002.

In addition, the NDEP Group called for the Department of Justice (DOJ) to prepare a separate report analyzing the extent to which current NSR enforcement actions "are consistent with the Clean Air Act and its regulations." The DOJ report is expected to be released in December or January as well. ″

Federal Court Rules That Citizen Suit Challenging SIP Provisions and State Permit Must Be Dismissed

In a November 26 decision, a federal district court dismissed a Clean Air Act citizen suit against the Tennessee Valley Authority (TVA) because the citizen suit plaintiff sought, in effect, to challenge the validity of SIP provisions and relevant permit terms. *National Parks Conservation Ass'n v. Tennessee Valley Authority*, Civ. No. 3:00-CV-547 (E.D. Tenn.). The court also ruled that, in any event, the case should be dismissed because the plaintiff had failed to satisfy applicable citizen suit notice requirements. The decision is significant in that it strongly confirms the principle that a federal enforcement action cannot be used to collaterally attack the terms of a facially valid state permit.

The complaint of the National Parks Conservation Association (NPCA) in this action alleged that two of TVA's coal-fired electric generating facilities had violated opacity requirements in the Tennessee SIP more than 6,500 times between 1996 and 2000. In alleging

the violations, the NPCA relied upon data generated by continuous emissions monitors (COMs) installed at the facilities. However, the complaint did not specify the precise dates on which the alleged violations occurred.

Tennessee's approved SIP provides for a general opacity standard of 20% but authorizes opacity levels to exceed 20% once per hour for any reason. In addition, opacity levels may exceed 20% during "routine start up and shut down conditions" and during malfunction conditions. Under the SIP, visual monitoring is to be performed "by a certified evaluator" using EPA Method 9. The SIP also expressly provides for alternative opacity standards. The state and the regulated party may agree to establish a more restrictive emission limit and to require the use of COMs. Where a more restrictive standard is used, the standard is to be incorporated into a state operating permit issued pursuant to the SIP.

TVA agreed to use COMs at the two facilities in question. The state operating permits for the facilities provide that emissions may exceed the 20% opacity level 2% of the time during each calendar quarter and that exceedances during startup, shutdown, or malfunction conditions are also excused.

Failure to Satisfy Citizen Suit Notice Requirements

The court stated that strict compliance with citizen suit notice requirements is a jurisdictional requirement for maintaining a citizen suit under the Clean Air Act. The court then concluded that the 60-day notice letter sent to TVA, the State, and EPA was deficient in two principal respects: (1) it failed to specify the dates of the alleged violations and to identify the facilities at which the alleged violations occurred as required by EPA's regulations; and (2) it did not provide adequate notice of the NPCA's legal theory in the subsequent citizen suit, i.e., that the State had unlawfully issued permits to TVA. Because the court concluded that the notice requirements had not been satisfied, it ruled that it had no jurisdiction over the citizen suit.

Failure to Allege Proper Citizen Suit Claims

The district court also ruled, in the alternative, that the NPCA's complaint failed to allege proper citizen suit claims under the Clean Air Act. The court found that the NPCA had not identified a single exceedance during the relevant time period that was not allowed under the terms of TVA's permits from the State. According to the court, "plaintiff's lawsuit is in effect a collateral attack on a facially valid permit issued by the state enforcement agency." After analyzing the statutory language and relevant case law, the court concluded that citizen suits cannot be used to collaterally attack facially valid state permits.

Moreover, the court rejected the NPCA's argument that the permits were not facially valid because Tennessee did not seek EPA's approval of the 2% de minimis exception for each quarter. The court ruled that the SIP expressly allowed the State to impose more restrictive opacity requirements without obtaining specific EPA approval. According to the court, "monitoring the smokestack emissions continuously with equipment capable of reliably measuring the opacity will identify many more exceedances than will be identified by an operator ‹eyeballing' the smokestack emissions once a day, or less." Therefore, the court found that it was reasonable for the State to have concluded that the use of COMs was more restrictive than otherwise required by the SIP opacity provisions and that EPA approval was not required. ″

EPA Issues Clarification of Its "Excess Emissions" Policy for SIP Provisions

On December 5, 2001, EPA issued a memorandum clarifying its policy regarding SIP provisions which address compliance during startup, shutdown, or malfunction (SSM) conditions.[1/] The clarification memorandum addressed various statements contained in a September 20, 1999 memorandum discussing EPA's "excess emissions" policy. *State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,* from Steven A. Herman and Robert Perciasepe, Assistant Administrators, to EPA Regional Administrators (the "September 20, 1999 Guidance").

In the September 20, 1999 Guidance, EPA stated that it was reaffirming its prior (1982-1983) policy statements on excess emissions and explaining what types of excess emissions provisions States may incorporate into their SIPs. Among other things, the September 20, 1999 Guidance stated that "[g]enerally, since SIPs must provide for attainment and maintenance of the national ambient air quality standards and the achievement of PSD increments, all periods of excess emissions must be considered violations. Accordingly, any provision that allows for an automatic exemption for excess emissions is prohibited." The Guidance further stated that States may exercise "enforcement discretion" in addressing excess emissions during SSM conditions and/or provide for narrow "affirmative defenses" in enforcement actions involving such excess emissions.

The clarification memorandum was issued to settle litigation brought by industry parties challenging the September 20, 1999 Guidance. Both the Clean Air Implementation Project and NEDA/CARP had filed petitions for review of EPA's action in issuing the September 20, 1999 Guidance. *Clean Air Implementation Project v. EPA*, Nos. 99-1470 *et al.* (D.C. Cir.). Rather than litigating the validity of the September 20 Guidance, the industry parties and EPA entered into a settlement agreement that obligated EPA to issue certain clarifications to the Guidance.

The December 5 memorandum clarifies the September 20, 1999 Guidance in at least three important respects. First, it makes clear that the Guidance was intended to apply only to EPA's approval or disapproval of SIP provisions in *future rulemaking proceedings*. The clarification memorandum states that the Guidance "was not intended to alter the status of any existing malfunction, startup or shutdown provision in a SIP that has been approved by EPA." Second, the clarification memorandum states that "the Guidance was not intended to affect existing permit terms or conditions regarding malfunction, startups and shutdowns that reflect approved SIP provisions, including opacity provisions, or to alter the emergency defense provisions at 40 C.F.R. § 70.6(g)." Finally, the memorandum explains that "EPA did not intend the September 20, 1999 Guidance to be legally dispositive with respect to any particular proceedings in which a violation is alleged to have occurred." Although the industry petitioners remain in disagreement with EPA regarding its general policy concerning excess emissions during SSM conditions, they believe that the December 5 memorandum will make clear that the scope of the September 20, 1999 Guidance is limited and substantially reduce the likelihood that the Guidance will be misapplied by EPA or state officials. ″

1/ The December 5 clarification memorandum can be found on the Network's website under "Recent Updates" and "Enforcement."

EPA Issues Draft Guidance on Permitting of Cogeneration Facilities

On October 15, EPA made available for public comment a draft guidance document addressing the permitting of cogeneration facilities under EPA's new source review (NSR) and Title V programs. 66 Fed. Reg. 52,403 (Oct. 15, 2001). Cogeneration facilities or combined heat and power (CHP) facilities produce both heat and power for industrial and/or utility use.

The draft guidance seeks to clarify EPA's interpretation of how its NSR and Title V requirements apply when determining what constitutes the stationary source that must apply for a permit when a CHP facility is constructed, owned, or operated by a party other than the owner of the primary or host facility. It addresses the circumstances under which such a CHP facility should be considered a source separate from the host facility for permitting purposes. The draft guidance was issued largely in response to the National Energy Policy Report released by the Bush Administration on May 17, 2001. The Report called upon EPA to promote cogeneration through flexible permitting and "to encourage the development of well-designed [cogeneration] units that are both highly efficient and have low emissions."

In issuing the draft guidance, EPA has indicated that it is seeking to streamline NSR and Title V permitting requirements for separately owned CHP facilities and thereby to encourage the construction of such facilities in conjunction with industrial plants. If CHP facilities can be permitted separately from the host facility, emissions from the host facility need not be considered in determining whether NSR requirements would be triggered. Moreover, the guidance provides that the CHP facility may use credits from the shutdown of existing boilers for netting purposes in determining NSR applicability. As a result of these interpretations, EPA apparently believes that many CHP facilities can be constructed without triggering NSR.

For a CHP facility to be considered a separate source for permitting purposes, the draft guidance provides that the CHP facility should be under separate ownership and meet certain energy-efficiency requirements. In addition, if the CHP is netting out of major NSR, its potential or allowable emissions rate must be lower than the actual emissions rate of any boilers from which it obtains emissions credits.

Indications are that industry representatives generally believe that the draft guidance constitutes a useful first step in addressing certain permitting obstacles to the construction of CHP facilities. However, many industry representatives believe that EPA should do more to encourage the construction of CHP facilities and that it must undertake needed NSR reforms to eliminate significant problems in permitting CHP facilities, as well as other industrial and electric power facilities. Environmental groups have strongly criticized the draft guidance and have contended that, even if post-project emissions are lower, the draft guidance should not allow CHP facilities to avoid installing BACT.

Although the original comment period on the draft guidance ended on November 14, EPA recently decided to provide an additional comment period that will end on December 12. 66 Fed. Reg. 59,249 (Nov. 27, 2001). ″

EPA Amends Definition of "Major Source" in Title V Permitting Regulations

In a November 27 final rule, EPA has amended the definition of "major source" so that sources in certain categories need not include fugitive emissions of pollutants in determining whether they

are a "major source" and therefore subject to Title V requirements. 66 Fed. Reg. 59,161 (Nov. 27, 2001). The effect of the rule is that fugitive emissions are not counted in making Title V "major source" determinations for sources in categories that are subject to section 111 or section 112 standards promulgated after August 7, 1980. The action finalizes a proposal published in 1994.

Under EPA's 1992 Part 70 regulations, sources have been required to count fugitive emissions of pollutants in determining "major source" status only if they belong to one of the 26 listed source categories listed in paragraph 2 of the "major source" definition or to a source category regulated by section 111 or section 112 standard "but only with respect to those pollutants that have been regulated for that category." (Fugitive emissions are generally those emissions that are not from smokestacks, process vents, or storage tanks.) Under the amended regulations, sources not in the 26 listed categories must count fugitive emissions only if they belong to a source category regulated by a section 111 or section 112 standard *promulgated prior to August 7, 1980*. In addition, the language "but only with respect to those pollutants that have been regulated for that category" has been deleted.

The need for this amendment arose when EPA's 1992 Part 70 regulations provided that all fugitive emissions must be counted for sources regulated by a section 111 or section 112 standard in determining major source status even though EPA had failed to conduct special rulemaking proceedings pursuant to section 302(j) of the Act. Section 302(j) provides that the term "major stationary source" includes sources of fugitive emissions of any pollutant "as determined by rule by the Administrator." This language has been interpreted by the courts to mean that EPA must conduct a special rulemaking proceeding for each category addressing the nature of fugitive emissions within the category before it may require that fugitive emissions from sources in the category be counted in determining major source status.

One of the petitioners challenging the 1992 regulations contended that EPA could not broadly require that fugitive emissions be counted for categories regulated by a section 111 or section 112 standard promulgated after August 7, 1980 until it had completed a section 302(j) proceeding for each category. (EPA has conducted no section 302(j) rulemaking proceedings since August 7, 1980.) In response to that challenge, EPA essentially acknowledged that it had not complied with section 302(j) rulemaking requirements and published a proposal in 1994 to provide that fugitive emissions for sources subject to section 111 or section 112 standards would be counted only if the standards had been promulgated prior to August 7, 1980.

EPA's recent action does not affect the extent to which fugitive emissions of hazardous air pollutants (HAPs) are counted in determining whether a source is a major source under Part 63 and therefore is also a major source for Part 70 purposes. The Part 63 regulations expressly provide that fugitive emissions of HAPs will be counted in all instances in making Part 63 major source determinations.

EPA apparently finalized the 1994 proposal because that action now enables EPA to grant full approval of certain state Title V permitting programs that already reflect the language of the 1994 proposal. ″

EPA Issues Proposed Response to D.C. Circuit Ruling on Ground-Level Ozone

In response to a remand from the D.C. Circuit concerning the effects of ground-level ozone, EPA has proposed not to change the 1997 8-hour ozone standard. 66 Fed. Reg. 57,268 (Nov. 14, 2001). The D.C. Circuit had remanded the 8-hour standard to EPA because it concluded that EPA, in

promulgating the standard, had failed to consider the possible beneficial effects of ground-level, i.e., tropospheric, ozone. That ruling was issued as one part of the court's 1999 decision addressing numerous petitions for review challenging the 1997 revised ozone standard and revised PM standard. *American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

The ruling addressed the arguments of certain industry petitioners that EPA, in promulgating the 8-hour standard, had failed to consider the impacts that ground-level ozone would have in protecting the public from ultraviolet (UV) radiation. The D.C. Circuit concluded that "EPA cannot ignore the possible health benefits of ozone." The court based its conclusion primarily on the language of section 108(a)(2) of the Act, which provides that EPA is to consider "all identifiable effects" of a pollutant in developing a national ambient air quality standard (NAAQS). The court directed EPA to "determine whether . . . tropospheric ozone has a beneficent effect and, if so, then to assess ozone's net adverse health effect." In remanding the issue to EPA, the court made clear that it would not dictate the approach to be used by the Agency in considering the alleged health benefits of tropospheric ozone.

EPA subsequently sought rehearing of this issue and other issues before the entire 11-member D.C. Circuit, but the full court denied the request for rehearing. EPA's petition for certiorari to the Supreme Court requesting review of the D.C. Circuit's decision did not seek review of the ruling that EPA must consider the possible beneficial effects of ground-level ozone.

In the November 14 *Federal Register* notice, EPA explained that the Agency has conducted an assessment of possible beneficial effects and "has provisionally determined" that information linking decreased ground-level ozone to increased UV radiation "is too uncertain at this time to warrant any relaxation in the level of public health protection" provided by the 8-hour standard. The Agency stated that any changes in UV radiation exposures associated with the 8-hour standard "using plausible but highly uncertain assumptions about likely changes in patterns of ground-level ozone concentrations, would likely be very small from a public health perspective." The Agency also concluded that any protective effects of ground-level ozone from UV radiation would be slight as compared to that of stratospheric ozone.

The public comment period on the proposed response to the court's remand ends on January 14, 2002. ″