

# CLEAN AIR ACT

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## EPA Issues NSR Report and Announces NSR Reform Measures

On June 13, 2002, EPA submitted to the President its long-awaited report on the impacts of the new source review (NSR) program on energy production. The Agency simultaneously announced the NSR reform measures that it plans to finalize or propose later this year. The reform package contains essentially all of the measures that EPA had been expected to put forward.

### **The NSR Report to the President**

In May 2001, the National Energy Policy Development Group, chaired by Vice President Cheney, recommended that EPA, in consultation with the Department of Energy and other federal agencies, “review New Source Review regulations, including administrative interpretations and implementation, and report to the President within 90 days on the impact of the regulations on investment in new utility and refinery generation capacity, energy efficiency, and environmental protection.” Although the report was originally due in August 2001, it was delayed because of the time needed to achieve consensus within the federal government and a decision to release it at the same time as the NSR reform measures. We summarize the report’s findings below.

**Construction of New Sources** – EPA finds that the NSR program has not significantly impeded investment in new power plants or

refineries. According to EPA’s report, the lack of construction of greenfield refineries has generally been due to economic reasons and environmental restrictions unrelated to NSR.

### **Modification of Existing Sources** –

In contrast to the construction of greenfield sources, EPA concludes that, with regard to existing power plants or refineries, “the NSR program has impeded or resulted in the cancellation of projects which would maintain and improve reliability, efficiency and safety of existing energy capacity.” The report finds that the implementation of the NSR program has resulted in lost capacity, as well as lost opportunities to increase capacity without increasing emissions.

### **Energy Efficiency Projects** –

In addition to the NSR program’s impact on power plants and refineries, the report examines the effects of the program on energy efficiency projects in manufacturing and other industries. The report finds that there is evidence that the current program is having an adverse impact by discouraging projects that might improve energy efficiency or might increase capacity and reliability without actually increasing emissions. It states that in some cases the NSR program may be discouraging projects that decrease emissions because of the “actual-to-potential” test used in those industries.

### ***Environmental Protection Benefits***

– The report concludes that the NSR program does result in significant environmental and public health benefits. However, it recognizes that quantifying the program's benefits is difficult because of the variety of Clean Air Act programs that address emissions and because there has never been tracking of emissions reductions thought to be attributable solely to NSR. The Agency also concludes that for some industry sectors emissions reductions benefits could be achieved much more efficiently and less expensively through the implementation of a multi-pollutant national cap and trade program.

### **The NSR Reform Package**

The NSR reform package announced by EPA consists of two types of measures – those measures that can be promulgated as final rules based on EPA's 1996 NSR reform proposal and those other measures that will first be proposed and made subject to public comment before they will be finalized. EPA plans to promulgate the following measures in final form later this year:

#### ***“Actual-to-Projected Future Actual”***

**Methodology** – EPA intends to finalize its 1996 proposal to extend to all industrial sectors the use of an “actual-to-projected future actual” method for calculating emissions increases at existing units. Sources would calculate emissions increases for a physical change or change in the method of operation at an existing unit by comparing representative pre-change actual emissions with projected post-change actual emissions. This approach would replace EPA's current practice of interpreting its regulations to require use of an “actual-to-potential” test for essentially any change to an existing unit.

EPA also explained that, as part of the “actual-to-projected future actual” method, it will continue to use the causation test incorporated into the WEPCO rule. Thus, post-change emissions will not include emissions from a change that could have been accommodated within the representative baseline period or emissions that are attributable to an increase in utilization unrelated to the particular change.

**Actual Emissions Baseline** – For sources other than electric utility steam generating units, the actual emissions baseline will be the highest consecutive 24-month period within the immediately preceding ten years.

**Plantwide Applicability Limits (PALs)** – EPA intends to finalize its 1996 proposal for PALs by allowing sources to make changes to their facilities without obtaining a major NSR permit, provided their emissions do not exceed the plantwide cap. A source could apply for and obtain a PAL, which would be valid for ten years, based upon its actual emissions baseline. Once a PAL is established, the source may make any change without undergoing major NSR provided that the emissions do not increase above the PAL level. Upon renewal of the PAL, the emissions levels in the PAL may be reevaluated by the permitting authority to determine the need for an adjustment based on air quality needs, technology advances, or control cost effectiveness.

**Clean Unit Exclusion** – EPA plans to finalize its 1996 proposal to establish a “clean unit exclusion.” A unit would be considered to qualify for the exclusion from NSR if it underwent a review process that resulted in its achieving BACT or LAER

control levels or comparable State minor source BACT. Sources that installed MACT or RACT could also qualify for the exclusion, provided that the results are determined to be comparable to BACT or LAER. The exclusion would last for 10 or 15 years. Such a clean unit would trigger NSR only if its permitted allowable emissions increased.

### ***Pollution Control and Prevention***

**Projects** – In accordance with the 1996 proposal, EPA will include in its regulations an exclusion for pollution control or pollution prevention projects. For a number of years, EPA and States have based such an exclusion upon EPA guidance memoranda. In the final rule, EPA will exclude from NSR the addition, replacement, or use at an existing emissions unit of any system, process, control, or device whose overall net impact on the environment is beneficial, subject to certain conditions. Such an excluded project cannot result in an emissions increase that will cause a violation of a NAAQS or a PSD increment or result in an adverse impact on Class I areas.

The following measures will be included in a forthcoming proposed rule and subjected to notice and comment rulemaking requirements:

***Exclusion for Routine Maintenance, Repair, and Replacement (RMRR)*** – EPA explains that it intends to provide much more specific criteria for determining whether projects qualify for the RMRR exclusion. In particular, EPA will propose a “safe harbor test” for assessing whether projects are routine. Under this test, if the costs of maintenance expenses, capital repair, and replacement projects fall below a defined cost threshold, the activities would be covered by the RMRR exclusion. This safe harbor approach would be

based in large part on the capital expenditures exclusion contained in the NSPS program. Under this proposed approach, an annual cost threshold, to be averaged over a five-year period and based on a specific percentage of the capital replacement value of the affected source (ranging from 1.5% to 15% as under the NSPS provision), would be determined on an industry-by-industry basis. If the annualized costs do not exceed this threshold, the activities would automatically be covered by the RMRR exclusion. If the costs exceeded the threshold, the activities would have to be reviewed further to determine whether they are “routine” based on additional criteria.

In addition to the safe harbor, EPA plans to propose language to clarify the scope of the RMRR exclusion. For example, the Agency intends to propose that the replacement of existing equipment with equipment that serves the same function and does not alter the unit’s basic design parameters would generally be considered “routine.” The rulemaking would also provide criteria for determining whether activities undertaken to facilitate, restore, or improve efficiency, reliability, or safety within normal facility operations qualify for the exclusion. Furthermore, EPA will consider provisions specifically identifying the types of projects that would be considered “routine” in particular industries.

***Debottlenecking*** – Through informal interpretations of the PSD/NSR regulations that are contradictory and confusing, EPA has stated that, in determining whether NSR requirements are triggered by a change to an emissions unit, sources must also consider emissions from unchanged units “upstream” or “downstream” from the changed unit. EPA plans to revise its regulations to clarify that, in determining whether there has been a

significant net emissions increase, sources generally should look only at the unit that is undergoing the change. Emissions from “upstream” or “downstream” units should be considered only when the permitted limit of such a unit would be exceeded or increased as a result of the change in question.

**Aggregation of Projects** – EPA’s current policy of aggregating projects under certain circumstances to determine whether NSR requirements are triggered is ill-defined and is inconsistent from region to region. EPA would undertake rulemaking to provide that a project would be considered separate and independent from any other project at a facility unless (1) the project is dependent upon another project to be economically or technically viable or (2) the project is intentionally split from other projects to avoid NSR.

EPA officials have indicated that they intend to publish final NSR reform regulations, as well as other proposed NSR measures, by September 2002. ”

## D.C. Circuit Issues Important Ruling on Standing to Sue in Challenges to Rulemaking Actions

On June 18, the D.C. Circuit issued a decision that will likely have an impact on a broad range of judicial challenges to federal agency rulemaking actions, including EPA’s rulemaking actions under the Clean Air Act. *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002). The court found that the petitioners had not established that they had standing under Article III of the Constitution

to challenge the regulation in question – a hazardous waste listing decision under RCRA. In so ruling, the court emphasized that a petitioner that is not regulated by a rule must make a detailed showing to establish its standing to bring suit to challenge that rule. The court also created a set of procedural requirements to be met in future cases involving standing issues.

As a result of the decision, petitioners seeking to challenge EPA rulemaking actions under the Act – whether industry or environmental petitioners – will frequently face a greater burden in establishing that they have standing to bring suit.

## Background

The case involved petitions for review filed by the Sierra Club and the Environmental Technology Council challenging a RCRA regulation that listed certain wastewater sludges as “hazardous.” Those sludges are produced only by 14 chemical plants in Louisiana and Texas. The petitioners contended that the rule listing the sludges did not contain sufficiently stringent conditions regarding disposal of the sludges.

The Sierra Club did not address the issue of standing in its opening brief, but EPA raised the issue in its answering brief. In its reply brief, the Sierra Club alleged that some of its members “live, work, and recreate” in communities adversely affected by sludges from some of the chemical plants in question. Furthermore, following the filing of the reply brief, counsel for the Sierra Club submitted to the court representations concerning the standing of individual members.

## The Court's Ruling

According to the court, the key issue confronting the Sierra Club was whether at least one of its members satisfied the Article III requirements for standing, i.e., whether a member would suffer a concrete injury resulting from the regulation that would be remedied by a favorable decision. The court ruled that, unless a petitioner's standing in a rulemaking challenge is "self-evident," i.e., the petitioner is "an object of the action," the petitioner must initially address the issue of standing and "supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review." According to the court, the petitioner may meet its burden by citing record evidence relevant to its standing claim or by attaching affidavits that are relevant. The court expressly rejected the Sierra Club's contentions that nothing in the appellate court rules requires it to submit affidavits to establish standing in a court of appeals and that representations of counsel concerning standing have traditionally been regarded as sufficient.

Moreover, the court indicated that in all future cases where standing is not "self-evident," the petitioner must address its standing in its opening brief (assuming that the issue has not already been addressed through a motion to dismiss and responses). According to the court, "[r]equiring the petitioner to establish its standing at the outset of its case is the most fair and orderly process by which to determine whether the petitioner has standing to invoke the jurisdiction of the court." The court stated that petitioners would no longer be allowed to wait and address standing for the first time in their reply briefs in response to an agency's claims that the petitioner lacks standing.

In this case, the court rejected as inadequate the Sierra Club's showing that at least one of its members would be harmed by the regulation. The Sierra Club, after being granted an additional opportunity to offer proof of its standing, submitted a statement of counsel containing representations regarding the standing of members along with lists containing 28 mailing addresses and maps. The court gave no weight to counsel's representations because they involved matters beyond the scope of his knowledge and thus did not constitute evidence. Although the lists purported to be addresses of members near the relevant plants in Louisiana and Texas, the court found that the Sierra Club had provided no evidence that the members lived at the addresses when the petition for review was filed and continue to live at those addresses. In summary, the court found that the Sierra Club had failed to show that there was a "substantial probability" that a single member would be adversely affected by the listing regulation in question.

Finally, the court found that the other petitioner, the Environmental Technology Council, lacked "prudential standing" to challenge the regulation, i.e., the ETC's interests were not in the "zone of interests" that Congress intended to protect in enacting the relevant RCRA provisions. The court determined that, although the ETC had not attempted to articulate the basis for its standing, its interests presumably involved promoting more stringent control requirements and thereby furthering the business interests of its members. Citing D.C. Circuit precedents involving the ETC's predecessor, the court ruled that such interests did not fall within the zone of interests protected by the statute. "

## D.C. Circuit Upholds EPA's Decision Not to Delist Methanol as a Hazardous Air Pollutant

On June 28, 2002, a three-judge panel of the D.C. Circuit denied a petition for review challenging EPA's decision not to remove methanol from the list of "hazardous air pollutants" under section 112(b) of the Act. *American Forest and Paper Association v. EPA*, No. 01-1296 (D.C. Cir.). In upholding EPA's decision, the court gave broad deference to EPA's interpretation of the relevant statutory provisions and to EPA's judgment regarding the scientific and technical issues involved.

The case arose when the Association filed a petition with EPA in 1996 requesting that it delist methanol as a HAP pursuant to section 112(b)(3)(C). That provision states that EPA is to "delete a substance from the list [of HAPs] upon a showing by the petitioner or on the Administrator's own determination that there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the [sic] human health or adverse environmental effects."

In support of its administrative petition, the Association relied on certain studies on the human health effects of methanol exposure and proposed a "safe exposure level" – a level below which it is expected that there would be no adverse human health effects from lifetime inhalation exposures. In May 2001, EPA issued a notice denying the petition and indicating that it disagreed with the Association's analysis of the

relevant studies in certain respects. The Association subsequently sought review of EPA's action in the D.C. Circuit.

The Association raised three principal arguments in support of its challenge to EPA's decision not to delist methanol. First, the Association contended that EPA had misread the statute as allowing it to deny a petition based merely on speculation that adverse effects would occur. But the court stated that EPA's reading of the statutory criteria for delisting was entitled to great deference by a reviewing court and that its interpretation here "easily passes muster." According to the court, EPA reasonably read the statute as placing a burden upon a petitioner of affirmatively demonstrating that emissions of the substance in question may not be reasonably anticipated to cause adverse effects – not merely that EPA cannot determine that the substance will cause adverse effects.

Second, the Association attacked EPA's analysis of the relevant studies and its calculations as being arbitrary and capricious for a number of reasons. For example, the Association maintained that EPA arbitrarily attributed the adverse effects associated with one study with methanol exposure even though the study did not conclude that methanol exposure had caused those effects. With regard to the Association's arbitrary and capricious arguments, the court emphasized that an "extreme degree of deference" is due EPA when it is "evaluating scientific data within its technical expertise." The court concluded that in each instance raised by the Association the Agency had sufficiently established that its judgements were reasonable and supported by the record.

Finally, the Association claimed that EPA had violated the express statutory directive that it “may not deny a petition solely on the basis of inadequate resources or time for review.” However, based on its review of the record, the court concluded that EPA had addressed the Association’s petition thoroughly and that it had repeatedly requested additional submissions from the Association before determining that the petition was complete. Thus, the court concluded that the Agency had reasonably found that the Association had not met its burden under the statute. ”

## Supreme Court Denies Review in New Jersey Environmental Justice Case

**T**he U.S. Supreme Court has issued an order denying a citizens group’s petition seeking review of an appellate court decision that had rejected the group’s environmental justice claims. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, No. 01 -1547 (S.Ct. June 24, 2002 ). In accordance with its normal practice, the Supreme Court did not explain the basis for its denial.

The effect of the Supreme Court’s order is to let stand the decision of the U.S. Court of Appeals for the Third Circuit holding that the citizens group could not bring suit to enforce EPA’s “disparate impact” regulations. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3rd Cir. 2001).<sup>1/</sup> Those regulations prohibit recipients of federal funds from taking

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1/ That decision is discussed in the January 2002 *Washington Report* at WR-407.

actions that have the effect, whether intentional or not, of discriminating on the basis of race, color, or national origin. In its decision, the Third Circuit ruled that private groups or individuals could not rely on either the 1964 Civil Rights Act or Section 1983 (a civil rights provision enacted after the Civil War) as a basis for enforcing EPA’s disparate impact regulations.

Although the Supreme Court’s action in denying review presumably brings to a close this group’s efforts to enforce EPA’s disparate impact regulations, the legal issue concerning private enforcement of the regulations could arise again in another case outside of the Third Circuit. The Third Circuit’s decision is a binding precedent only in that judicial circuit. Groups or individuals in one of the other 11 circuits could attempt to obtain a contrary decision from a federal court in that circuit. ”

## Administrator Denies Petition for Objection to Georgia Title V Permit

The EPA Administrator has issued a decision denying the Sierra Club's petition for an objection to a Title V permit issued by the Georgia Environmental Protection Division (EPD). *In the Matter of Caldwell Tanks Alliance, LLC*, Petition No. IV-2001-1 (April 1, 2002).<sup>2/</sup> The facility in question manufactures water storage/supply tanks.

In its petition, the Sierra Club made the following contentions: (1) the permit fails to require the submission of reports of required monitoring at least every six months as required by the Part 70 regulations; (2) the permit impermissibly limits those persons who may enforce violations of the permit to "citizens of the United States"; (3) the Georgia EPD's public notice of the permit was inadequate because it did not state that the permit is enforceable by members of the public; and (4) the permit fails to include requirements that assure that no visible emissions will result from a shot blasting and baghouse operation that is classified as an "insignificant activity." The Administrator's decision, which incorporated by reference a decision issued by Region IV, denied the challenges in all respects. We summarize the rulings below.

### Reports of Required Monitoring

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<sup>2/</sup> The decision is set forth in the Network's web site under Title V Operating Permits – Policy and Guidance Documents – Decisions on Petitions for Objections.

The Sierra Club maintained that the permit impermissibly fails to contain a requirement for "submittal of reports of any required monitoring at least every 6 months" as provided for in 40 C.F.R. 70.6(a)(3)(iii)(A). It further argued that, although the permit requires the reporting of excess emissions, exceedances, and excursions, this is insufficient to satisfy the regulatory requirement to report all "required monitoring."

In EPA's permit objection decision, the Agency explained that many permitting authorities include the language from section 70.6(a)(3)(iii)(A) in their permits but do not elaborate on what monitoring is required for purposes of the semi-annual report. The decision stated that, in contrast, the Georgia EPD's permit states in considerable detail what elements should be set forth in the semi-annual report, e.g., a summary of excess emissions, exceedances, and excursions and a description of monitor downtime. According to EPA, inclusion of the regulatory language relied upon by the Sierra Club would not improve the detailed provisions already contained in the permit. Because EPA concluded that the Georgia EPD had reasonably interpreted the regulatory provision, it ruled that the Sierra Club's claim had no merit.

### Enforcement Authority

The Sierra Club complained that the permit unlawfully limits those persons who can take action to enforce the permit to "citizens of the United States," rather than stating that any "person" can bring such an enforcement action. According to the Sierra Club, the statute provides no support for such a limitation.

EPA agreed with the Sierra Club that limiting the persons who can enforce the permit to “citizens of the United States” conflicts with the Act and the Part 70 regulations. However, because the Georgia EDP had already removed the phrase “of the United States” from the permit, EPA concluded that there was no reason to grant the petition on this ground.

### **Public Notice Regarding Enforcement of Permit**

The Sierra Club asserted that EPA’s public notice concerning the permit was inadequate because the notice states only that the permit is enforceable by EPA and the EPD rather than that it is enforceable by any person.

EPA determined that, although the public notice did not state that the permit is enforceable by any person, the notice was still adequate. The Agency concluded that, because the public notice requirements in Part 70 do not mandate that the notice indicate who may enforce the permit, the wording of the notice did not compromise the effectiveness of the permit itself.

### **Treatment of Shot Blasting and Baghouse Operation as Insignificant Activity**

The Sierra Club maintained that, in order for the shot blasting and baghouse operation to be treated as an “insignificant activity” under Georgia law, it must not cause visible emissions. According to the Sierra Club, the permit must be amended to expressly prohibit any visible emissions from that operation. The Sierra Club also argued that the permit must contain monitoring and reporting provisions in connection with the “no visible emissions” requirement.

In response, EPA stated that, although Georgia’s Part 70 regulations provide that shot blasting operations must produce no visible emissions in order to qualify as an insignificant activity, that provision is not itself an “applicable requirement” under Part 70. EPA pointed out that Georgia’s Part 70 regulations are not incorporated into its SIP and therefore do not satisfy the definition of “applicable requirement.” The relevant SIP provision that is an “applicable requirement” states that the visible emission limit for such an operation is 40 percent. EPA concluded that the operation is properly listed as an insignificant activity based on the facility’s certification that the operation will not result in visible emissions.