

CLEAN AIR ACT

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EPA Considers Legislative Proposal to Impose Stringent New Emission Limitations on Power Plants and Large Industrial Boilers

EPA is preparing proposed legislation that would require deep cuts in emissions of three pollutants – NO_x, SO₂, and mercury – and would also purportedly lead to the elimination or substantial alteration of key Clean Air Act programs currently regulating sources that would be covered by the proposed legislation. This multipollutant draft proposal would apply to electric generating units (EGUs) as well as fossil fuel-fired industrial boilers and turbines with nameplate capacity greater than 250 million BTU/hr. The draft plan would establish nationwide emissions caps and mandatory emission reduction requirements for both of these source categories. It is estimated that over 1000 industrial boilers and turbines would be affected by such legislation.

In exchange for tough new emission reduction measures, the proposal as currently drafted would ultimately eliminate a number of existing regulatory requirements governing emissions from sources covered by the proposal. Most significantly, the draft would eliminate the current, controversial modification scheme under the New Source Review program. In addition, the proposal might eliminate or change certain requirements under the Title IV Acid Rain program; the New Source Performance

Standards for SO₂, NO_x, PM, and CO; the interstate transport program regulating NO_x as an ozone precursor; the Regional Haze program; and

future standards for hazardous air pollutants from boilers and turbines.

For large industrial boilers and turbines, EPA's draft would impose a reduction in NO_x emissions of 60% below uncontrolled levels by 2008 (equivalent to a 400,000 ton nationwide NO_x cap), a reduction in SO₂ emissions of 50% below 1999 levels by 2010 (equivalent to a 1 million ton cap), and a 40%-70% reduction in mercury emissions by 2012 (through regulation of the mercury content of fuels, or potentially, a source-specific limit for mercury and accompanying cap equivalent to 5 million tons). For power plants, the EPA straw proposal would impose a NO_x cap of 1.25 million tons by 2012, a cap of 2 million tons on SO₂ emissions by 2010, and a 7.5 million ton mercury cap by 2008, along with a 70% reduction in mercury emissions from each facility by 2012.

Implementation of the new multipollutant program would generally occur on a phased schedule during the 2006-2012 timeframe, and would include market-based cap and trade programs. Under these programs, affected sources are allocated

pollutant allowances to emit up to specified levels, with total emissions from all affected sources not to exceed the applicable nationwide emissions cap for a given pollutant. As necessary, affected sources would then either have to install controls or purchase allowances so that emissions do not exceed the number of allowances held by the source, as in current market-based trading regimes under EPA's Acid Rain program and the NO_x SIP call. Anticipated controls include selective catalytic reduction for NO_x, scrubbers for SO₂, and activated carbon injection for mercury.

Although EPA's straw proposal has apparently received support from the President's Council on Environmental Quality (CEQ), the proposal has met with significant opposition from many quarters.

- C Many non-utility industrial groups maintain that the proposal should not cover industrial boilers primarily because there are substantial differences between industrial boilers and utility boilers and the proposed reductions would be far too stringent for industrial boilers to meet.
- C Electric utilities contend that the targeted emission cuts would be too stringent for EGUs and object to the ambitious implementation schedule.
- C The Department of Energy has raised concerns that the proposal, if adopted as currently written, would be an obstacle to coal-fired generation, which is part of the Bush Administration's plan for long-term energy development. DOE has also questioned the economic and technical feasibility of achieving the emission cuts.
- C Environmentalists object to the EPA draft proposal because it does not call for reductions in emissions of carbon dioxide, which is believed to contribute to global warming. They have also questioned

EPA's reliance on emission trading to reduce emissions, asserting that this approach jeopardizes air quality and public health in the vicinity of older plants that purchase allowances on the market in lieu of installing state-of-the-art emission controls.

Senator Jeffords (I-Vt.), Chairman of the Senate Environment and Public Works Committee, recently indicated that he plans to mark up his version of a multipollutant bill in November. In addition to requiring substantial reductions in emissions of SO₂, NO_x, and mercury, his bill would also require reductions in carbon dioxide emissions. Senator Jeffords's goal is for the committee to complete work on the bill by the end of the year. '

D.C. Circuit Grants Indefinite Extension of Compliance Deadline for Section 126 Ozone Rule

On August 24, the D.C. Circuit granted a motion filed by electric utility petitioners seeking to extend indefinitely the compliance date for EPA's Section 126 Rule as it applies to electric generating units (EGUs). *Appalachian Power Co. v. EPA*, No. 99-1200 (D.C. Cir.). In the Section 126 Rule, EPA had granted the petitions of certain northeastern states to impose stringent NO_x controls on designated EGUs and industrial boilers in 22 states. One likely effect of the court's order will be to extend the compliance date for EGUs until at least May 2004. The promulgated compliance date was May 2003.

The D.C. Circuit's order comes in the aftermath of its May 15, 2001 decision, in which the court upheld most aspects of the Section 126 Rule but remanded certain provisions to EPA. *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C.

Cir. 2001).^{1/} In particular, the court concluded that EPA had failed to justify the growth factors it used to project the utilization of EGUs in 2007, which provided the basis for determining what emissions reductions must be achieved by EGUs. The court remanded the EGU growth factors to EPA but did not vacate them nor provide any deadline for responding to the remand.

In their motion, the electric utility petitioners requested that the court vacate the EGU growth factors or, alternatively, extend the three-year compliance date (May 2003) for meeting the rule's requirements. The petitioners contended, among other things, that until EPA completes the remand proceedings and sources know precisely what their obligations will be under the rule, sources could not intelligently plan for taking necessary steps to achieve compliance.

The court's August 24 order consists of only three short paragraphs and does not explain the reasoning for granting the motion. The order provides in relevant part that "as of May 15, 2001, the date of this court's decision, the three-year compliance period for emissions limitations applicable to EGUs under the § 126 rule is tolled, pending EPA's resolution of the remand of EGU growth factors ordered by this court." The court's order also clarified that the rule is vacated for separate reasons insofar as it applied to certain cogenerators.

Because it will presumably take EPA a few more months to respond to the court's remand on EGU growth factors, the compliance date for EGUs will likely be shifted to the next ozone season, i.e., the new compliance date would be May 2004. Because the court did not remand the growth factors for non-EGUs, i.e., industrial boilers, the court's order does not directly affect the May 2003 compliance date for industrial boilers.

1/ That decision is discussed in the May 2001 *Washington Report* at WR-363.

However, it seems likely that EPA itself will extend the compliance date for industrial boilers so that the Section 126 Rule will be implemented for all major sources at the same time. In the separate litigation involving the related NOx SIP call rule, the D.C. Circuit had already extended the overall compliance date for that rule from May 2003 to May 2004. '

District Court Concludes That Statute of Limitations Does Not Apply in an Enforcement Action Where Company Withheld Information from Permitting Authority

A federal district court has held that, because a company withheld information relevant to PSD applicability from the state permitting authority, the general federal statute of limitations in 28 U.S.C. § 2462 would not bar EPA from seeking civil penalties. *United States v. Murphy Oil USA, Inc.*, Civ. No. 00-C-0409-C (W.D. Wisc. Aug. 1, 2001). This decision followed a May 18 decision in the case in which the judge ruled that the statute of limitations would bar EPA from seeking civil penalties for alleged violations occurring at the company's refinery more than five years before EPA brought the enforcement action unless EPA could establish that the company had concealed relevant information from the state permitting authority, the Wisconsin Department of Natural Resources (WDNR).^{2/} The judge made her finding that relevant information had been withheld following a trial that took place in June.

The opinion deals primarily with various changes made to the refinery's sulfur recovery unit (SRU) during two different time periods: 1987-

2/ The statute of limitations ruling in the May 18, 2001 decision was discussed in the May 2001 *Washington Report* at WR-370.

1988 and 1991-1993. EPA brought its enforcement action in 2000. Among other things, EPA alleged that PSD requirements were triggered during both periods and that NSPS requirements were triggered in 1993.

1987- 1988 Projects

The court concluded that, because EPA conceded that the company had not withheld information concerning the 1987-1988 projects that would have led to the discovery of violations, EPA's claims for civil penalties for alleged PSD violations were barred by the five-year statute of limitations in 28 U.S.C. § 2462. With regard to the substance of EPA's claims, the court concluded that the changes (various modifications to the SRU to improve its operational efficiency) triggered PSD permitting requirements. In reaching this decision, the court applied the "actual-to-potential" test in accordance with its decision of May 18, 2001.^{3/} Although the court found that the failure to obtain a PSD permit was a violation, it concluded that the violation was a "one-time" violation, not a "continuing" violation. Because EPA did not allege that the company had withheld documents that would have enabled EPA or the WDNR to discover the violations, it ruled that the five-year statute of limitations barred EPA from seeking civil penalties for the violations. The court stated that the question of whether EPA is entitled to injunctive relief would be resolved after phase two of the trial.

1991-1993 Projects

The district judge ruled that all projects undertaken during the 1991-1993 period should be aggregated and treated as one project for PSD

purposes. She thus rejected the company's contention that the projects started in 1991 were not undertaken with the intention that a project to route the distillate unifier to the SRU would be undertaken later. According to the court, it was significant that the company started discussions with the state concerning the distillate unifier project only six months after completion of the initial projects. The court stated that, "[i]n light of the evidence that the two projects were planned and implemented almost simultaneously and modified the same process unit, I will treat them as one."

The court concluded that, based on use of the "actual-to-potential" test, the projects involving the SRU undertaken during the 1991-1993 period constituted a "major modification" and required that the company obtain a PSD permit. In addition, the court concluded that, when the company applied for a minor NSR permit in 1992, it did not provide to the WDNR certain consultants' reports prepared for the company that discussed, among other things, the appropriate emissions baseline for the two years preceding the projects – information that was relevant in applying the "actual-to-potential" test. The judge then found that, if the information had been provided to the WDNR, the WDNR would not have issued the minor NSR permit to the company and it would have concluded that the NSPS had been triggered. As a result, the court held that EPA's enforcement claims were not barred by the statute of limitations or by the state permit shield provision in the minor NSR permit. '

3/ In that decision, the court ruled that, because it believed that the changes to the SRU were so significant, EPA could use the "actual-to-potential" test in determining whether a "significant net emissions increase" had occurred. This ruling was discussed in the July 2001 *Washington Report* at WR-379.

EPA Issues Restrictive Determination on Applicability of "Routine Maintenance" Exclusion to Industrial Boiler Project

In a September 14, 2001 letter, EPA Region IV informed the Tennessee Department of Environment and Conservation (TDEC) that the Agency believes that a proposed tube replacement project in a recovery boiler at a pulp and paper mill would not qualify for the "routine maintenance, repair, and replacement" exclusion under the PSD program. Letter to Barry Stephens, TDEC, from Gregg M. Worley, Chief, Air Permits Section, EPA Region IV, regarding proposed project of Packaging Corporation of America (Sept. 14, 2001).^{4/} The TDEC had preliminarily determined that the "routine" exclusion would apply to the project and therefore that no PSD requirements would be triggered.

EPA's letter determination is noteworthy, among other things, because EPA concluded that the project would not be covered by the "routine" exclusion even though a number of factors supported application of the exclusion and a PSD review of the boiler had been conducted only one year before. The letter suggests that EPA regional offices and enforcement personnel are continuing to apply EPA's recent re-interpretation of the "routine" exclusion in a way that attempts to find PSD requirements applicable to almost any proposed project.

The proposed project would involve replacing all the tubes (approximately 1,273) in the generating bank of a recovery boiler in a pulp and

4/ EPA's letter can be found in the Network website in the "New Source Review" category under "New Source Review Applicability Issues."

paper mill. The project would be undertaken primarily because of the safety problems caused by the thinning and deterioration of the tubes. Tube failure in such a recovery boiler could lead to an explosion if water comes into contact with "molten smelt" in the bed of the boiler – a condition that would not occur in an electric utility boiler. A project to replace all the generating bank tubes was completed in 1991, and partial replacements of various tubes in the boiler were completed in 1979 and 1997. The recovery boiler is 40 years old. Based on the information presented, the steam generating capacity of the boiler would actually *decrease* after the project, the maximum black liquor firing rate would remain unchanged, and the project would not increase production from any downstream equipment.

In response to a request from the company involved, the TDEC determined that the proposed project would not trigger PSD requirements for the following reasons:

- C the project is being undertaken primarily for safety reasons
- C "the project does not restore lost capacity in the steaming rate of the boiler or increase production in any downstream equipment"
- C the boiler was subject to a BACT analysis in 2000 as part of a project that required a PSD permit
- C "tube replacement projects have been a regular part of the maintenance of this boiler"
- C the conclusion that the proposed project would be covered by the "routine" exclusion is consistent with a recent statement by an EPA OECA official that the exclusion should apply to a project that "replaces components within the box, rather than the box itself "

The TDEC subsequently wrote a letter to EPA Region IV requesting “concurrence” in the TDEC’s application of the PSD permitting rules to the proposed project.

In its September 14 letter, EPA Region IV advised the TDEC that it should find that the proposed project is “not routine.” The Region based its conclusion on an application of the so-called “four-factor” test as interpreted and set forth in EPA’s applicability determination involving the Detroit Edison facility.^{5/} The letter provided the following analysis of the factors:

Nature and Extent – EPA stated that the replacement of all the generating bank tubes differs in scale from the “more typical” tube maintenance projects undertaken in the past in connection with this boiler. EPA also believed that it was significant that the project would cause the boiler to be shut down for 20 days.

Purpose – Although EPA acknowledged the need to perform safety-related repairs, it stated that such safety projects are not automatically “routine” projects. Instead, EPA concluded that the tube replacement project would constitute a “life extension” of a boiler that is older than most existing boilers in the industry. In considering this factor, EPA did not take account of the fact that the project would not increase the capacity of the boiler or increase any emissions from downstream equipment.

Frequency – EPA noted that during the boiler’s history a complete tube replacement had “occurred only once” and concluded that “an entire replacement of generating bank tubes is not a frequent occurrence.” EPA did not analyze whether such tube replacement projects are

5/ That determination is discussed in detail in the May 2000 *Washington Report* at WR-301.

commonly undertaken in the pulp and paper industry.

Cost – EPA stated that the estimated cost of the proposed project would be \$924,500. Although this cost is “less than one percent of the cost of a new comparable recovery boiler, an additional cost of nearly one million dollars is high enough to be within the range of costs for projects that have been considered non-routine by EPA in other contexts.”

EPA’s letter seems to highlight the fact that the multifactor test set forth in the Detroit Edison determination allows EPA to conclude that almost any maintenance, repair, or replacement project is “not routine.” In other words, because of the vagueness of the test and the essentially unbridled discretion it gives EPA in weighing the factors, the Agency can selectively focus on those factors which it believes point toward the project being non-routine while ignoring or downplaying those factors that point in the opposite direction.

We also note that the facts in this case strongly support use of an “allowable-to-allowable” approach in determining whether PSD requirements should be triggered. It is unclear whether EPA will insist that, if the TDEC ultimately agrees with EPA that the proposed project is not “routine,” the TDEC must apply the “actual-to-potential” test in determining whether there will be a “significant net emissions increase.” Use of the “actual-to-potential” test may well result in a determination that a PSD review must be undertaken even though the project does not increase the capacity of the boiler or increase production from downstream equipment. On the other hand, an “allowable-to-allowable” test would recognize these facts as well as the fact that the boiler recently underwent a PSD review which limited its emissions.

District Court Rules That Citizen Suit Becomes Moot

When Defendant Obtains Necessary Permit

A federal district judge has concluded that citizen suits brought to compel two cities to obtain Clean Water Act permits became moot when the cities received those permits. *Mississippi River Revival, Inc. v. Minneapolis*, Nos. 99-1596 and 99-1597 (D. Minn. May 2, 2001). Among other things, the court ruled that a citizen suit claim for civil penalties becomes moot when a change in circumstances indicates that a defendant is reasonably unlikely to commit further violations. In so ruling, the court relied on the Supreme Court's decisions in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), and *Friends of the Earth, Inc. v. Laidlaw Env'tl Services (TOC), Inc.*, 528 U.S. 167 (2000). Although the citizen suits involved the Clean Water Act, the court's rationale should be equally applicable to Clean Air Act citizen suits as well.

The cases arose when environmental groups brought citizen suits against the Cities of Minneapolis and St. Paul ("the Cities") alleging that the Cities had discharged pollutants without obtaining required Clean Water Act permits. The Cities had actually applied for those permits in 1992, but the state permitting agency had not taken final action on the applications. In December 2000, while the parties were in the process of filing summary judgment motions, the state permitting agency issued final permits to both of the Cities. As a result, the Cities argued that all of the citizen suit plaintiffs' claims had become moot.

The district court concluded that the only possible basis for establishing that the cases are not moot would be the claims seeking the imposition of civil penalties. Citing the *Steel Co.* decision, the court stated that a case becomes moot if the court

can no longer grant relief that will redress an injury claimed by the plaintiff. The court noted that plaintiffs in these cases conceded that the claims for injunctive relief were moot. It ruled that a declaration that the Cities had violated the Clean Water Act would not redress any injuries to the citizen groups and, relying on *Steel Co.*, that a claim for attorneys fees, by itself, is insufficient to establish a justiciable case.

With regard to the claims for civil penalties, the court noted that, because all Clean Water Act civil penalties must be paid to the U.S. Treasury, plaintiffs' claimed injuries would be redressed only if they can show that payment of civil penalties would deter the Cities from committing future violations. The court rejected a line of cases holding that, because a defendant is liable for civil penalties upon committing a violation, subsequent events cannot cause a civil penalty claim to become moot. The court further concluded that decisions holding that a defendant's voluntary cessation of illegal conduct will not moot a citizen suit plaintiff's civil penalty claim are inapplicable here. The court concluded that the Cities had finally received their permits *as the result of independent action by the state permitting agency* – not because the Cities had voluntarily ceased illegal conduct – and that the Cities are reasonably unlikely to violate those permits in the future. As a result, the court ruled that civil penalties would have no deterrent effect and that the Cities had met the burden described in the *Laidlaw* decision for establishing that citizen suits are moot. ‘