

# CLEAN AIR ACT

## information network

### EPA Grants Limited Reconsideration of NSR Reform Rule

On July 30, 2003, EPA published a *Federal Register* notice granting in part the petitions for reconsideration filed by certain State, local government, and environmental group petitioners challenging the December 2002 final NSR rule. 68 Fed. Reg. 44,620. The notice requests comments on six specific issues arising from the final rule and makes clear that EPA does not intend to consider comments submitted on any other issues in this proceeding. On July 25, EPA had filed a short notice with the D.C. Circuit informing the Court of its action and attaching a draft *Federal Register* notice.

The *Federal Register* notice granting reconsideration provides for a public comment period ending on August 29. A public hearing on the notice will take place on August 14. EPA states that it intends to take final action on the issues set forth in the July 30 notice as well as all other issues raised by the petitions for reconsideration within 90 days of the publication date of the *Federal Register* notice, i.e., by about October 28. In the notice, the Agency also denied petitioners' requests that it stay the effectiveness of the final rule pending further action on the reconsideration petitions.

The six issues upon which EPA is seeking comments are summarized below. The Agency indicates that it presently intends to retain each of the provisions on which comments are requested, but that it will consider whatever comments are submitted.

- **Supplemental Environmental Analysis** – EPA states that it will take public comment on the Supplemental Environmental Analysis that it had previously prepared

and released when the rule was issued. The Analysis discusses the environmental benefits of the program changes made by the final rule, but it was not part of the administrative record, had not been subject to comments, and was not relied upon by EPA to justify the final rule itself.

- **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. 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. The Agency states that it still believes that this is the most appropriate way to address such newly constructed units.
- **Synthetic minor limits under the PAL provisions** – Under the final rule, synthetic minor limits taken to avoid NSR can be eliminated once the PAL is in effect. In addition, such synthetic minor limits are not reinstated when the PAL expires. The Agency continues to support this approach.
- **Reporting and recordkeeping requirements under the actual-to-projected-actual approach** – Under the final rule, non-utility sources 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 supports these provisions in the notice.

- **Treatment of replacement units under the actual-to-projected-actual method** – The final rule allows use of the actual-to-projected-actual method for replacement units at both utility sources and non-utility sources. However, the 1992 WEPCO rule did not allow the use of an actual-to-actual method for replacement of utility units. EPA indicates its continued support for this provision.
- **Clean Units and change in attainment status** – Under the final rule, if a unit qualifies as a Clean Unit, its status does not change if it is located in an attainment area that subsequently is redesignated as a non-attainment area. EPA states that it still believes that this approach is appropriate. "

## District Court Issues Decision Concluding That Ohio Edison Violated NSR Requirements

In a 109-page decision, a district court judge in Ohio has concluded that Ohio Edison Company violated new source review (NSR) permitting requirements in connection with 11 different projects that it undertook between 1984 and 1998 at its Sammis plant. *United States v. Ohio Edison Co.*, No. 2:99-CV-1181 (August 7, 2003). The court's opinion contains a number of rulings upholding EPA's recent interpretations of the Act and its regulations and rejecting the company's attempt to rely on earlier, contrary interpretations.

In an introductory section of his opinion, the judge characterized EPA's enforcement of the Act's NSR provisions as "disastrous" and states that there was an "abysmal breakdown" in the administrative process following the enactment of the 1977 amendments containing the NSR provisions. The judge described the statutory NSR

provisions as clear and criticized EPA and the States for not enforcing them more rigorously in the preceding decades. Among other things, he concluded that Congress intended that the NSR provisions would become applicable to all pre-existing plants.

### Scope of the Routine Maintenance, Repair, and Replacement Exclusion

The judge concluded that the routine maintenance, repair, and replacement (RMRR) exclusion must be read narrowly. His conclusion was based in large part on his reading of the decision in *Wisconsin Electric Power Co. (WEPCo) v. Reilly*, 893 F.2d 901 (7th Cir. 1990). According to the judge, the *WEPCo* decision correctly established that the term "physical change" should be broadly construed to mean essentially "any physical change," including any proposed equipment replacements. As a result, the judge believed that it is reasonable to construe the RMRR exclusion narrowly. The judge stated that "[r]outine maintenance, repair and replacement occurs regularly, involves no permanent improvements, is typically limited in expense, is usually performed in large plants by in-house employees, and is treated for accounting purposes as an expense." Moreover, the judge said that the *WEPCo* decision held that EPA is entitled to great deference in determining what is "routine" and upheld EPA's use of the four-factor test (nature and extent, purpose, frequency, and cost) in making such determinations.

### Application of the Four-Factor Test to Ohio Edison's Projects

The judge concluded that application of the four-factor test clearly demonstrated that the 11 projects were not "routine." With regard to the nature and extent of the projects in question, the judge found that they were all "large scale" projects involving replacements of numerous pieces of equipment. He also believed that it was significant that the projects all involved some work by outside contractors and that the costs were largely treated as capital expenditures by the company.

The judge found that the primary purposes of the projects were to reduce outages and to extend the life of the units involved. According to the judge, this factor strongly suggested that the projects were not routine.

The judge concluded that the relevant inquiry with regard to “frequency” is how frequently the activity has been conducted at the unit in question, not whether it is frequently undertaken within the relevant industry.

With regard to costs, the judge noted that the total cost of the 11 projects was approximately \$136 million and that most of the expenses were capitalized.

### **Amount of Emission Increases**

In determining the amount of the emission increases from each project, the judge relied heavily on the *WEPCo* decision. In a ruling favorable to industry’s position, he recognized that the *WEPCo* court had held that the “actual-to-potential” test cannot lawfully be used for an existing unit that “has begun normal operations.” According to the judge, “[i]t is clear that Sammis was operational at the time the activities were proposed. Thus, any use of the actual to potential to emit test is not legally supportable.”

With regard to the appropriate emissions baseline, the judge ruled that for those projects that took place prior to promulgation of the 1992 *WEPCo* rule, the source must use the 24-month period “immediately preceding” commencement of the project (even though the regulations do not contain such language). He also rejected Ohio Edison’s argument that for projects commenced after the *WEPCo* rule, the source could rely on the 2-year period with the highest emissions within the 5-year period preceding the project. According to the judge, EPA must specifically determine that the 2-year period is representative of normal source operations.

The judge rejected Ohio Edison’s position that it could rely on evidence of post-change actual

emissions to show that a project did not cause a significant net emissions increase. According to the judge, the source must make a projection of future actual emissions *before* undertaking any non-exempt project. In determining the amount of emission increases from each project, the judge relied on the testimony of an expert witness for the government who used an “actual-to-projected-future-actual” approach to calculate emissions increases. The judge also rejected the company’s argument that pre-change hourly emissions rates should be compared to post-change hourly emissions rates to determine whether an actual emissions increase would occur. In addition, the judge ruled that the regulatory exclusion for increases in “hours of operation” only applies if the increase is not accompanied by a physical change.

### **Fair Notice Defense**

Under the fair notice doctrine, a regulated party is not liable for an alleged violation if the agency in question has not provided reasonable notice regarding its interpretation of a statutory or regulatory provision. The judge found that Ohio Edison had fair notice of EPA’s narrow interpretation of the RMRR exclusion, despite Ohio Edison’s arguments that EPA had been largely silent for many years and that the Agency’s later statements were largely contradictory and unclear. According to the judge, “the plain language of the CAA, read together with the routine maintenance exemption, make it clear that the exemption must have a narrow interpretation so as not to swallow the general rule requiring CAA compliance when a modification is made.”

In conclusion, the judge found that all 11 projects undertaken by Ohio Edison triggered NSR requirements and that the company was liable for violations in each instance. A trial for the remedy phase is scheduled for March 2004. In the remedy phase, the judge indicated that “the Court may consider air quality, public health, economic impact, and employment consequences. The Court may also consider the less than consistent efforts of the EPA to apply and enforce the Clean Air Act.” “

## Court of Appeals Rules That It Lacks Jurisdiction to Review Orders Issued to TVA Because Clean Air Act Is Unconstitutional

On June 24, 2003, the U.S. Court of Appeals for the Eleventh Circuit issued a decision in the new source review (NSR) enforcement litigation involving the Tennessee Valley Authority (TVA). *Tennessee Valley Authority v. Whitman*, No. 00-15936 (11th Cir.). A three-judge panel ruled that the Court lacks jurisdiction to review certain administrative compliance orders (ACOs) issued to TVA by EPA because the ACOs are not reviewable final agency actions under the Clean Air Act. Notably, the Court's ruling that the ACOs are not final agency actions was based on its conclusion that the Act's statutory scheme regarding the issuance and review of ACOs is unconstitutional. Because the Court ruled solely on jurisdictional and constitutional grounds, it did not express any opinion regarding the merits of EPA's allegations that TVA's projects were not covered by the regulatory exclusion for activities that constitute "routine maintenance, repair, and replacement."

Beginning in November 1999, EPA issued ACOs to TVA in which EPA found that TVA had undertaken numerous replacement projects in the past without complying with NSR requirements. After TVA disputed the validity of the ACOs, EPA conducted a special administrative proceeding to review the orders. In September 2000, EPA's Environmental Appeals Board issued a 162-page decision upholding the ACOs in most respects. TVA subsequently challenged that decision and the ACOs in the Eleventh Circuit.

In its decision, the Court ruled that the statutory scheme for the issuance of ACOs is unconstitutional. It concluded that the Clean Air Act accords ACOs the "status of law," e.g., the recipient of an ACO can be liable for civil or criminal penalties for violating an ACO. The Court further concluded, however, that this violates the Due Process Clause of the Constitution because

there is no opportunity for a hearing or to otherwise present evidence before an ACO is issued. In addition, the Court concluded that the statutory scheme unconstitutionally prevents federal courts from exercising their full judicial review powers. Accordingly, the Court stated that "[t]he Clean Air Act is unconstitutional to the extent that mere noncompliance with the terms of an ACO can be the sole basis for the imposition of severe civil and criminal penalties." Because it found that the ACOs issued to TVA were invalid as a constitutional matter, the Court ruled that the ACOs had no effect and were therefore not final agency actions.

Finally, the Court specifically stated that, if EPA wishes to pursue the alleged NSR violations, it must bring an action against TVA in district court. (EPA had not brought a district court action against TVA because it had believed that it could not sue another federal agency in the federal courts – a position which the Eleventh Circuit rejected.) Until EPA establishes the existence of NSR violations, "TVA is free to ignore the ACO[s] without risking the imposition of penalties for noncompliance with [their] terms."

On August 7, EPA filed a petition for rehearing requesting that the entire Eleventh Circuit grant a rehearing in the case and reverse the decision of the three-judge panel. "

## Sierra Club Challenges New General Provisions/Section 112(j) Rule and Reactivates Prior Challenge to Regulations

The Sierra Club is taking a number of actions in an effort to overturn portions of EPA's May 30, 2003 rule amending the General Provisions and Section 112(j) regulations. 68 Fed. Reg. 32,586.<sup>1/</sup> The challenges focus primarily on the provisions dealing

---

<sup>1/</sup> The May 30 rule and the history of the litigation involving the General Provisions/Section 112(j) Rule are discussed in more detail in the May 2003 *Washington Report* at WR-473.

with “public access” to startup, shutdown, and malfunction (SSM) plans. However, the Sierra Club will apparently also seek to challenge the revised deadlines for submitting Section 112(j) Part 2 permit applications set forth in the May 30 rule.

On July 29, 2003, the Sierra Club filed a petition for review of the May 30 rule in the D.C. Circuit. On July 30, the Sierra Club moved to vacate the order holding in abeyance its petition for review challenging EPA’s April 5, 2002 rule amending the General Provisions and Section 112(j) regulations. The Court granted that motion on August 6 and consolidated the Sierra Club’s petition challenging the April 5, 2002 rule with the new petition challenging the May 30, 2003 rule. In addition, the Sierra Club has requested that the Agency stay the revised Section 112(j) deadlines in the May 30 rule pending judicial review. Finally, the Natural Resources Defense Council, represented by the same counsel, has filed a petition for reconsideration of the May 30 rule with the EPA Administrator.

In the documents filed, the Sierra Club argues that the provisions of the May 30 rule addressing “public access” to SSM plans are unlawful and inconsistent with the settlement agreement entered into between the Sierra Club and EPA to resolve the Sierra Club’s challenge to the April 5, 2002 rule. (Under the settlement agreement, the Sierra Club may challenge the final rule if it is not the “same in substance” as the proposed rule that EPA agreed to issue.) In the settlement agreement, EPA had promised to propose revisions that would require sources to routinely submit all SSM plans and revisions to the permitting authority and would require permitting authorities to make any such plans available to any citizen upon request. In the May 30 final rule, EPA recognized that requiring the routine submission of all SSM plans would be unduly burdensome, would interfere with integration of the plans into facilities’ process and operating procedures, and would make it more difficult to protect confidential business information. Accordingly, the May 30 final rule provides that the permitting authority is authorized to require that any SSM plan be “promptly”

submitted to it when requested and that the permitting authority will provide relevant portions of an SSM plan to a citizen if the citizen’s request is “specific and reasonable.”

The Sierra Club’s filings also indicate that it will challenge the provisions in the May 30 rule setting forth new deadlines for the submission of Section 112(j) Part 2 permit applications. The Sierra Club asserts that these deadlines, which it had agreed should be inserted in the settlement agreement, are unlawful because EPA lacks authority to extend such statutory deadlines.

It is unclear when EPA will act on the petition for reconsideration or the stay request. The Sierra Club’s counsel has indicated that a motion to stay the May 30 rule will likely be filed in the D.C. Circuit by August 28. ”

## EPA Issues Revisions to Title V Compliance Certification Requirements

On June 27, 2003, EPA published a final rule amending the compliance certification requirements in Parts 70 and 71 of the Title V program. 68 Fed. Reg. 38,518. The final rule is intended to carry out the D.C. Circuit’s decision in *NRDC v. EPA*, 194 F.3d 130 (D.C. Cir. 1999) (challenges to the Compliance Assurance Monitoring (CAM) rule). In that decision, the Court remanded the compliance certification provisions to EPA because they did not require that a source’s compliance certification state whether compliance was “continuous or intermittent” but only that a source indicate whether the compliance methods used by the source for determining its compliance status provide continuous or intermittent data. On March 1, 2001, EPA published a direct final rule revising the certification compliance provisions but later withdrew the direct final rule in light of adverse comments.

The June 27 final rule inserts regulatory language that requires responsible officials to indicate in the certification whether compliance

with each permit term and condition that is the basis of the certification was continuous or intermittent during the period covered by the certification. In response to industry comments, the final rule deletes, as unnecessary, language from the prior rule that required the responsible official to state whether the methods being used to determine compliance provide continuous or intermittent data. The final rule preamble also states that a "responsible official is always free to include any written explanation and other material information that helps clarify the responsible official's conclusion regarding the compliance status."

EPA also attempts in the June 27 preamble to clarify statements made in the March 1, 2001 preamble regarding the circumstances when a responsible official can certify either that compliance is "continuous" or that it is "intermittent." The preamble indicates that sources can certify continuous compliance under certain circumstances if they only have intermittent data. However, parts of the discussion are not clear and should be clarified in the future. "