

STAPPA / ALAPCO

STATE AND TERRITORIAL
AIR POLLUTION PROGRAM
ADMINISTRATORS

ASSOCIATION OF
LOCAL AIR POLLUTION
CONTROL OFFICIALS

S. WILLIAM BECKER
EXECUTIVE DIRECTOR

August 28, 2003

The Honorable Marianne L. Horinko
Acting Administrator
U.S. Environmental Protection Agency
EPA West (Air Docket)
1200 Pennsylvania Avenue, NW
Room: B108, Mail Code 6102T
Washington, DC 20460

RE: E-Docket ID No. OAR-2001-0004 (Legacy Docket ID No. A-90-37)

Dear Acting Administrator Horinko:

The State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) submit these comments on the U.S. Environmental Protection Agency's (EPA's) reconsideration of the December 31, 2002 New Source Review final rules, as announced in the *Federal Register* on July 30, 2003 (68 FR 44620).

State and local air pollution control agencies share with EPA responsibility for protecting the public from the detrimental impacts of air pollution. For more than three decades, states and localities across the country have relied upon the NSR program to assist us in achieving clean air goals. As we have expressed in numerous forums over the past year and a half, STAPPA and ALAPCO have serious concerns with EPA's final revisions to the NSR program and believe the adopted changes will significantly weaken the effectiveness of our long-standing NSR programs. STAPPA and ALAPCO were particularly disappointed that EPA chose to finalize rule revisions without affording our members or the public adequate opportunity for comment on numerous rule provisions published for the first time in the December 31, 2002 final action. Therefore, we welcome EPA's July 30, 2003 decision to reconsider certain aspects of the final rules.

We are concerned, however, that EPA is not providing adequate time for the review of these important issues and for the preparation of comprehensive and thorough comment. These six areas of reconsideration affect every major part of the December 31, 2002 final action. Furthermore, we believe that there are other significant issues relative to the final rules, in addition to the six to which EPA has limited its reconsideration, that were also adopted without adequate opportunity for public comment, including but not limited to the extension of the demand growth

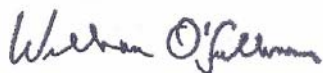
exclusion and the adoption of the regulatory revisions as part of the base federal program instead of as optional provisions for state and local agencies to consider. In addition, because the NSR program is complex and the various aspects and provisions of the rules are closely interrelated, limiting reconsideration to a narrow set of provisions does not allow for a full examination and evaluation of those provisions in relation to the program as a whole.

As you are aware, STAPPA and ALAPCO previously submitted a request for an extension of the public comment period on the reconsideration. For the reasons stated above, we reiterate our request that EPA extend the comment period. In addition, we request that EPA expand the reconsideration to include those other aspects of the final rules for which adequate public participation has not been provided. Further, we stress that reconsideration of these provisions requires a full review of all aspects of the rules to the extent the various program elements are interrelated.

As expressed in our oral testimony at the public hearing on August 14, 2003, STAPPA and ALAPCO are troubled by EPA's stated intention to complete the reconsideration process "quickly" and by conclusory statements throughout the reconsideration notice, which raise concern that EPA may not give full consideration to public comment on these issues. We hope that EPA is sincere in seeking meaningful public participation and will engage in the reconsideration process with an open mind, responsive to public concerns and in an effort to improve the NSR program. Yet our associations remain apprehensive that EPA is providing this brief comment period merely as a formality, for the purpose of meeting a legal obligation rather than in an effort to foster a meaningful exchange.

Attached are STAPPA and ALAPCO's specific comments on the six aspects of the final rules that EPA has currently agreed to reconsider. In addition to making revisions to improve these six aspects of the final rule, we reiterate our request that EPA reconsider and revise other aspects of the final rule, consistent with our comments submitted during the rulemaking process and pursuant to our discussions over the last several months.

Sincerely,



William O'Sullivan
STAPPA Chair
NSR Subcommittee



John A. Paul
ALAPCO Chair
NSR Subcommittee

Attachment

ATTACHMENT

STAPPA and ALAPCO's Specific Comments on the Six Aspects of the Final NSR Rules (December 31, 2002, 67 FR 80186) under Reconsideration by EPA

August 28, 2003

Discussion of the Six Issues under Reconsideration

1. Analysis of the Environmental Impact of Final Rules

With respect to EPA's Environmental Impact Analysis, STAPPA and ALAPCO find that the "Supplemental Analysis" fails to account for numerous consequences of the final rules and relies upon many assumptions that are invalid with regard to the regulatory language actually adopted. We believe that, overall, EPA's analysis does not accurately portray the potential environmental disbenefits of the final rule provisions. Furthermore, we find that the many qualitative statements of policy and the loose predictions of anticipated benefits from the rules are inadequate to serve as the required consideration of health and environmental impacts. Based on our experience as state and local air administrators working over many years to adopt State Implementation Plan (SIP) standards and gain EPA approval of state and local air programs, the qualitative statements of predicted benefits presented by EPA in the Supplemental Analysis, unsupported by quantitative analyses and based on a mischaracterization of the rules as adopted, are not up to the standard EPA typically applies in evaluating the adequacy of state or local SIP submittals or demonstrations of rule effectiveness.

One example of a statement by EPA that mischaracterizes the final rule is, "The avoidance of a permitting process does not mean that emissions increase. This is particularly true for some of the improvements which require pollution control measures as a prerequisite to reduced NSR permitting burden, e.g. PALs...." We note, however, that pollution control measures are not, in fact, a prerequisite to obtaining the NSR flexibility provided by a PAL. The Supplemental Analysis further mischaracterizes the PAL provisions of the final rules by indicating that adoption of these provisions is expected to result in a net environmental benefit based on an evaluation of six flexible permits. Yet, the six flexible permits evaluated were not established using the PAL provisions EPA adopted. In projecting emission reductions resulting from the PAL provisions (by extrapolation from the six flexible permits mentioned), the Supplemental Analysis presumes that the baseline selected is representative of the source's current operations. In reality, however, the final rules make no provision to assure this will be so. Without this assurance, projections in the Supplemental Analysis of emission reductions resulting from implementation of a PAL are invalid, because the reductions are measured from a baseline that will likely be significantly inflated from current emission levels.

An example of the failure of the Supplemental Analysis to consider potential negative environmental impacts is found in EPA's statement that the Clean Unit provisions will be environmentally neutral for most sources and will result in early or greater control for some

sources. Here, EPA's analysis ignores the emissions reductions that will be foregone as a result of the Clean Unit provisions, due to the avoidance of Best Available Control Technology (BACT) or Lowest Achievable Emissions Rate (LAER) controls for emissions units that have not achieved Clean Unit status, when those emissions units see an increase in emissions from a project involving one or more Clean Units. This negative consequence occurs because the Clean Unit emission increases are treated as zero, which can inappropriately result in the project's emission increase being less than significant, and all affected emissions units therefore avoiding control. The unfortunate result is that emissions reductions that would have been achieved for other uncontrolled or poorly controlled emissions units at the time they are physically modified will be foregone under the rule because of the provision that deems emission increases at Clean Units to be zero.

STAPPA and ALAPCO are also concerned that EPA has underestimated the economic impact of the rules. EPA indicates that the rules will not have an annual effect on the economy of \$100 million or more. STAPPA and ALAPCO request that EPA assure that the true costs of rule implementation are accounted for and quantitatively estimated. For example, training of state and local agency staff and of the regulated community for such a complex program creates an on-going expense, particularly given the typical high turnover rate of environmental agency employees. Many of the specific provisions of the adopted revisions are also labor intensive, such as the establishment of a PAL permit and associated monitoring. We encourage EPA to develop as thorough an accounting of these implementation costs as possible, and to consider costs incurred by the regulated community as well as state, local and federal government agencies.

In summary, STAPPA and ALAPCO urge EPA to earnestly reassess both the economic and the environmental impact of the final rules, and to carefully identify and correct those areas where the analysis fails to accurately represent the adopted rule language, mischaracterizes the adopted provisions or is unsubstantiated by a quantitative analysis. We also urge EPA to carefully consider the more detailed comments on the environmental impact of the rules submitted by member state and local air agencies and the public.

2. PALs – Using PTE for Emissions Units Constructed after the Selected Baseline Period

EPA's final rules allow a source to select any consecutive 24-month period during the preceding 10 years as the baseline period for establishing a plantwide applicability limit (PAL), using the average actual emissions from the source during that period as the starting point for the PAL baseline and making certain required adjustments. Particularly troublesome, the final rules would require the permitting authority to increase the baseline level by adding the full potential to emit (PTE) for any emissions unit constructed after the baseline period selected by the source.

STAPPA and ALAPCO believe that increasing the PAL by incorporating the PTE of these units is a flawed approach. The fundamental premise of an actuals PAL is that the PAL level is based upon the actual emissions of the source. Using the PTE for all emissions units constructed after the selected baseline period without regard for the actual emissions history of those units is contrary to that fundamental premise.

As EPA notes, the PAL should reflect the set of emissions units in operation at the time of PAL permit issuance. However, there is no limit under the final rule on the number of units or

level of emissions that may be added after the selected baseline period; in fact, there is no requirement that the selected baseline period meet any test of representativeness reflecting the current source configuration or operations. Instead, EPA has assembled in the final rule a combination of factors that collectively serve as an incentive for the source to inflate the PAL baseline in a manner that is not representative of normal operations. Those factors include 1) allowing an extended period of 10 years from which to select the PAL baseline; 2) allowing the source to select any consecutive 24-month period within that decade without any demonstration that the selected period is representative of normal operations and of the current facility; and 3) requiring the addition of the PTE emissions level in lieu of actual emissions for any emissions unit added after the baseline period selected by the source. These factors encourage a source to select a PAL baseline that maximizes emissions, by, for instance, setting the baseline prior to installation of significant new emissions units, instead of selecting the baseline that best represents the current facility configuration and operation.

In reconsidering how to treat emissions units added after the PAL baseline, EPA should consider all of these factors holistically. Specifically, STAPPA and ALAPCO suggest that EPA make the following revisions to the rules:

- 1) Require that the PAL baseline period be representative of the source's current configuration and operation. Representativeness should be demonstrated by the PAL applicant and approved through a determination by the permitting authority with an opportunity for comment by the public;
- 2) For existing emissions units added after the baseline period, require the use of the average annual actual emissions for any representative two-year period for which the unit was in operation; and
- 3) For emissions units that have been in operation less than two years (i.e., new emissions units), the PAL baseline adjustment should be zero and the new emissions unit should be brought in under the PAL.

3. PALs – Elimination of Synthetic Minor Limits

EPA's final rules allow the elimination of enforceable emission limitations taken to avoid the applicability of major NSR for any source operating under a PAL. EPA justifies the elimination of these synthetic minor limits by asserting that, because both the PAL and the synthetic minor limits serve to keep a source from triggering major NSR, the PAL is a functional and effective substitute for any synthetic minor limits being eliminated. EPA further asserts that removal of unit-specific synthetic minor limits is essential to allow for the operational flexibility that the PAL is intended to provide. STAPPA and ALAPCO disagree with these assertions.

STAPPA and ALAPCO believe EPA's final rules should be revised such that synthetic minor limits taken voluntarily by a source to avoid major NSR in the past cannot be eliminated when a PAL is established, unless the NSR requirements that would have applied are met.

First, while we agree that both the PAL and the synthetic minor limits serve to keep a source from triggering major NSR, EPA's justification ignores the important distinction that the PAL serves this purpose for prospective changes only, while the previously established limits

serve this purpose with regard to past project(s) at the source. To remove the unit-specific limits and thereby allow the units to emit at any level within the PAL essentially resets the baseline period for the past project(s) to the baseline period selected for the PAL. In addition, although EPA states that, in most cases, emissions from units with synthetic minor limits would be incorporated into the PAL at a level below those limits, STAPPA and ALAPCO are concerned that actual emissions from these units would instead be incorporated as they occurred during the PAL baseline period selected by the source, which could be before the synthetic minor limits were in place and at levels well above the limit assumed to avoid major NSR requirements. In this scenario, the PAL would not serve to keep the source's emissions at a level equivalent to that which would represent a less-than-significant emissions increase with regard to the past project(s). Furthermore, allowing emissions to be redistributed among emissions units at different locations within the source and with differing dispersion characteristics could create adverse air quality impacts that the synthetic minor limits served to prevent. Considering these important concerns, the source-wide PAL is not a functional equivalent to or an acceptable substitute for the unit-specific synthetic minor limits.

In addition, STAPPA and ALAPCO find EPA's claim that retention of the synthetic minor limits would unduly compromise operational flexibility to be unfounded. Where synthetic minor limits apply, the source has assumed the limits voluntarily in lieu of complying with major NSR requirements. Thus, the owner or operator had ample opportunity to consider the operational needs of the source and one can assume that operational flexibility is not unduly compromised by the limits voluntarily accepted. Furthermore, the source always has the option of removing the synthetic minor limits by complying with the requirements of major NSR that otherwise would have applied. Thus, if an owner or operator applying for a PAL determines that operations become overly constrained by a synthetic minor limit assumed in the past, that source could exercise the option of meeting NSR requirements at the time the PAL is established, and in that way gain additional operational flexibility for the units. Removing the established limits without requiring the NSR protections that were previously avoided, however, cannot assure equivalent protection of the environment. Complying with the PAL is not equivalent to complying with major NSR for the past project because the affected emissions units would not be at the BACT or LAER level of control (and would not be incorporated into the PAL at the BACT or LAER level of control) and the air quality impact of the past change would not be evaluated.

Further, EPA's assertion that a PAL is intended to provide broad operational flexibility ignores the fact that numerous other unit-specific limits will continue to apply under a PAL. For example, affected emissions units must continue to meet all applicable New Source Performance Standards, Maximum Achievable Control Technology standards, SIP-established Reasonably Available Control Technology limits and source-specific limits for previous BACT determinations. Thus, EPA's statements mischaracterize the operational flexibility a PAL provides for source operations. While it is possible a PAL will provide more of a "bright line" test for NSR applicability and will allow a source to avoid the requirements of the major NSR program more readily, the PAL does not provide broad flexibility to operate all emissions units without source-specific limits. Therefore, retention of synthetic minor limits would not undermine the purpose of the PAL and would not unreasonably hinder operational flexibility.

In summary, STAPPA and ALAPCO believe that synthetic minor limits taken voluntarily to avoid NSR should not be removed when those emissions units are incorporated into the PAL,

unless the level of control that would have been required by the change previously made at the source is met. Furthermore, the permitting authority must have the opportunity to review any air quality impacts that would result.

4. Actual-to-Projected-Actual Test – Reasonable Possibility

EPA's final rules do not require any preconstruction notification by the owner or operator prior to undertaking a change for which the source has elected to use the actual-to-projected actual test, and do not provide any requirement or opportunity for the permitting authority to review the applicability determination either prior to construction or after the fact. Furthermore, the rules do not require that the source create or maintain any record of the project or of the post-change actual emissions unless there is a "reasonable possibility" that the project will result in a significant emissions increase. In those cases where the source does maintain records, reporting of the post-change emissions to the permitting authority is required only if the actual emissions are different from the preconstruction projection and a significant emissions increase occurs (after excluding real emissions increases that the owner or operator determines are not attributable to the change).

STAPPA and ALAPCO believe that EPA's rules do not require adequate recordkeeping, monitoring and reporting to assure compliance with the NSR permitting requirements of the Clean Air Act. We are particularly concerned that EPA's rules establish absolutely no objective criteria for determining which changes are subject to recordkeeping and reporting requirements, but instead rely completely on the discretion of the source in deciding which changes have a "reasonable possibility" of resulting in a significant emissions increase and thus are subject to compliance monitoring. And, we are greatly concerned that the exercise of this discretion by the owner or operator is not subject to review or approval by the permitting authority. Such an approach lacks certainty, is not enforceable as a practical matter and does not benefit the regulatory agency, the source or the public.

STAPPA and ALAPCO believe that the owner or operator is obligated to create and retain sufficient records of all changes that may increase emissions at the source to demonstrate compliance with NSR permitting requirements, including adequate records to demonstrate that a physical change or change in the method of operation that results in an increase in emissions does not constitute a major modification.

STAPPA and ALAPCO recommend that the final rules be revised to clearly establish the types of changes that would require reporting of the preconstruction applicability determination and post-change emissions impacts. We recommend that the reporting requirements apply to:

- 1) any change for which the project emissions increase would be significant using the actual to potential test and
- 2) any change that adds a significant or major emissions unit.

Furthermore, STAPPA and ALAPCO request that reporting requirements applicable to such changes include:

- 1) preconstruction reporting to document the source's analysis of the baseline and projected actual emissions and

- 2) annual reporting to document the source's future actual emissions as compared to the projected actual emissions and the baseline, with justification for any emissions excluded as not related to the particular project.

5. Actual-to-Projected-Actual Test – Replacement Units

Under the final rules, the actual-to-projected-actual test is not available for new emissions units. This is appropriate because new emissions units do not have an operational history to establish an emissions baseline or from which to project future actual emissions. Therefore, under EPA's final rules, new emissions units must use their potential to emit as the projected emissions increase in considering NSR applicability. STAPPA and ALAPCO concur that this is the most appropriate method for treating new emissions units in the applicability determination.

With regard to new emissions units that are put in operation at a source to replace an existing emissions unit, STAPPA and ALAPCO believe the same approach as described above remains necessary and appropriate. We further note that the final rule language is consistent with this approach and appropriately makes no exception for new emissions units that are constructed or installed to serve as a replacement for an existing emissions unit.

It is important to recognize that the future operation of the new emissions unit cannot be presumed to be the same as the past operation of the unit being replaced, and that the future actual emissions of the new unit cannot be presumed to be the same as the past actual emissions of the shut down unit; in many cases, the new unit is intended to surpass the operations of the older unit. Furthermore, the operational history of the existing unit is not necessarily a sound basis for projecting the future emissions of the new unit, because the units may not be similar enough to support such a presumption.

As an example, if an owner or operator proposes to shut down and dismantle an existing boiler and to install a new boiler in its place, the new boiler will not necessarily operate at the same capacity, follow the same operational schedule or have the same burner configuration or design as the old boiler. In many cases, the new unit is intended to effect changes in all of these parameters, although both may serve the same basic function (e.g., to supply steam to the manufacturing process).

Therefore, to clarify the final rule and eliminate any confusion regarding the required applicability test for new emissions units, STAPPA and ALAPCO recommend that the rule be revised to add the following language:

"Any new emissions unit that is constructed or installed for the purpose of replacing an existing emissions unit shall be considered a new emissions unit at the time of replacement and until two years from the date the new emissions unit commenced operation."

Finally with respect to the actual-to-projected-actual test, we are particularly concerned with one critical element of the final rules that EPA has not included in this limited reconsideration - the demand growth exclusion. STAPPA and ALAPCO continue to object to the demand growth exclusion, which allows actual emissions increases to be excluded when considering post-change emissions increases, as inappropriate and unworkable. This exclusion could adversely affect the

majority of NSR applicability determinations and is likely to make enforcement of the rules very difficult in the future. Accordingly, we request that EPA revise the rule so that real increases in actual emissions are not excluded from review. It is important to recognize that, while revisions to the rules to clarify and improve the reasonable possibility standard and the treatment of replacement units are necessary, these improvements alone are not sufficient to render the actual-to-projected-actual test adequately protective of air quality.

6. Clean Unit – Retention of Clean Unit Status upon Area Redesignation

With respect to EPA's adopted Clean Unit exclusion, STAPPA and ALAPCO have several concerns. One of these concerns is that under EPA's final rules, Clean Units located in attainment areas retain their Clean Unit status if the area is redesignated to nonattainment. We urge EPA to reconsider this provision of the rules and to require that emissions units be equipped with LAER in order to be granted or retain Clean Unit status in a nonattainment area.

In the reconsideration notice, EPA claims that the Clean Unit provisions provide an incentive for sources to install controls that are not otherwise required under state or federal law, and asserts that rescinding Clean Unit status when an area is redesignated from attainment to nonattainment would undermine that incentive and thereby eliminate air quality benefits the rules provide.

First, STAPPA and ALAPCO strongly believe that the Clean Unit test as adopted does not provide any meaningful incentive for a source to install better emissions control technologies when there is no state, local or federal regulation requiring this level of control. The Clean Unit exclusion provides an opportunity for sources to avoid major NSR for a 10-year period if the unit has already installed or will install good controls. Particularly given the other changes in the final rules that will greatly diminish the likelihood of any project triggering NSR, we do not anticipate that many sources would invest capital in control technology in order to achieve Clean Unit status. Instead, we believe that sources are most likely to obtain Clean Unit status where such controls have been or will be required under NSR or another state or federal program. Rather than providing an incentive for emission reductions that would not otherwise have occurred, the Clean Unit provisions as adopted would in most cases simply eliminate additional or duplicative control technology reviews for emissions units where good controls have already been required. Thus, requiring a re-evaluation of Clean Unit status when an area is redesignated to nonattainment would not eliminate any incentive to install controls and would not diminish air quality benefits.

With regard to allowing the Clean Unit exemption to continue, EPA fails to acknowledge that, if an area goes from attainment to nonattainment status, the control programs already in place are presumptively not adequate to maintain the NAAQS and further emissions reductions are needed. In this situation, it is inappropriate to exclude from the applicability test future emissions increases from emissions units that have demonstrated only a BACT-equivalent level of control. Such emissions increases would not meet the required NSR standard for the nonattainment area. Therefore it is only logical that for any future changes at the source involving the emissions units designated as Clean Units based on BACT, all emissions increases would be considered in the applicability test after redesignation, and LAER and offsets would be required where appropriate.

Such an approach would not, as EPA suggests, render past permitting decisions *per se* invalid or retroactively changed. All past actions and permitting decisions would remain intact. Rather, only future changes involving the Clean Unit would be affected, and permitting decisions would appropriately be made in the context of the new designation status.

Finally, STAPPA and ALAPCO take exception to EPA's statement in the notice, "As long as an emissions unit maintains its status as a Clean Unit, it has not increased emissions." This statement is misleading. While the final rules require that Clean Units be treated in the applicability test *as if* no emissions increase would occur, it remains a real possibility that actual emissions increases will occur at units with Clean Unit status. Indeed, that is the point of obtaining Clean Unit status (i.e., Clean Unit status would be superfluous for any emissions unit where no emissions increase occurs).