

**Testimony of
Lloyd L. Eagan
on behalf of the
State and Territorial Air Pollution Program Administrators
and the
Association of Local Air Pollution Control Officials
on the Proposed Rule to Revise the
Routine Maintenance, Repair and Replacement Exclusion Provisions
of the New Source Review Program
before the
U.S. Environmental Protection Agency**

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Romulus, Michigan**

Good afternoon. My name is Lloyd Eagan and I am the President of STAPPA – the State and Territorial Air Pollution Program Administrators. I am here today to speak on behalf of STAPPA and ALAPCO – the Association of Local Air Pollution Control Officials. STAPPA and ALAPCO are the two national associations of air pollution control agencies in 54 states and territories and more than 165 major metropolitan areas across the country. I appreciate this opportunity to present STAPPA and ALAPCO's comments on the U.S. Environmental Protection Agency's (EPA's) proposed revisions to the Routine Maintenance, Repair and Replacement (RMRR) exclusion provisions of the New Source Review (NSR) program.

STAPPA and ALAPCO are deeply troubled by the NSR revisions recently finalized by EPA, which we have concluded will seriously weaken the NSR program. As considerable as our concerns are regarding those revisions, our concerns over the RMRR

proposal, and the detrimental impacts it will have on air quality, are even greater. In short, we believe this proposal will eviscerate our nation's NSR program, which has already been compromised, and severely undermine the ability of states and localities to achieve and sustain clean air goals. EPA has claimed that the proposed RMRR rule will improve the NSR program while preserving its environmental benefits; quite to the contrary, our analysis of the proposal reveals the creation of two huge loopholes through which sources, under the guise of RMRR, can avoid important clean air requirements completely.

By creating two new categories of activities that would automatically be considered RMRR – and, thereby, excluded from NSR – this proposal would allow capital projects that cause significant increases in actual emissions to be undertaken without any requirements for the application of modern control technology, without any provision for emissions reductions to offset the emissions increases in nonattainment areas and without any opportunity for air agencies or the public to review air quality impacts or address any public health concerns.

In addition, rather than simplifying and clarifying the existing RMRR program, EPA's proposal creates an even more complex morass that would be extremely difficult and resource-intensive for state and local air pollution control agencies to implement and enforce and would create added uncertainty for industry. Accordingly, STAPPA and ALAPCO are today requesting that EPA rescind the RMRR proposal.

In forthcoming written comments, STAPPA and ALAPCO will provide a comprehensive explanation of our concerns and recommendations. Today, however, I would like to overview for you some of the fundamental problems with the categorical exclusions EPA has proposed, as well as our recommendations for an alternative approach.

Annual Maintenance, Repair and Replacement Allowance

The first category EPA proposes to exempt from NSR includes activities that fall within an “Annual Maintenance, Repair and Replacement Allowance.” Such an annual facility-wide allowance would be based on a defined proportion of the replacement cost of the entire facility and would apply to any changes that are performed to “facilitate, restore or improve the efficiency, reliability, availability or safety” of the source. STAPPA and ALAPCO have three primary concerns with this approach.

First, this annual allowance is, in no way, related to routine activities; in fact, clearly absent from the proposal is any suggestion that activities shielded from review under the annual allowance must be routine or consist of maintenance, repair or replacement. Rather, this annual allowance would provide a free pass for virtually every project up to the capital expenditure limit each year. This arbitrarily based exemption will allow most modifications that heretofore have been subject to NSR and the installation of modern air pollution controls to circumvent these requirements, thereby obstructing our efforts to attain and maintain health-based air quality standards.

Second, the excessively high level of this arbitrary annual exclusion allowance poses major concerns. EPA is considering basing the annual allowance on the Internal Revenue Service’s “Annual Asset Guideline Repair Allowance Percentages.” Under such an approach, a facility would be granted an allowance of up to 20 percent (depending upon the type of industry) of the replacement cost of the entire stationary source. For instance, utilities would be granted an allowance of 5 percent of their replacement cost, while refineries would be granted an allowance of 7 percent.

Let me give you an example of the magnitude of the exclusion into which this would translate. A 1000-megawatt utility with a replacement cost of \$1 billion would be allowed to make changes costing up to \$50 million a year under the pretext of routine maintenance, all of which would be totally exempt from any requirements to install modern pollution controls, irrespective of what kinds of changes they are or their impact on air quality. What’s more, EPA is considering going even further and allowing sources

to total their costs over a five-year period, which would translate into an exclusion allowance on the order of \$250 million for a source such as the 1000-MW utility I have cited.

A third concern with the annual allowance is that the approach is incredibly onerous for state and local air pollution control agencies. In order to review annual reports submitted by facilities, including the projected facility replacement costs from which the allowance is derived and the costs attributed to each particular shielded project, state and local agencies would need the expertise of accountants not typically on staff at air pollution control agencies. Agencies would be forced to divert already-scarce resources to the review of economic information unrelated to air quality.

In addition, because EPA proposes that the source must retrospectively review whether the sum costs of projects fit within the allowance at the end of the year, the system lends itself to after-the-fact discoveries of NSR violations. This places air agencies in the difficult situation of attempting to retroactively enforce NSR requirements upon a source that followed the procedures EPA established by rule, and leads to the very circumstance NSR was designed to avoid – the retrofitting of controls on existing equipment, rather than the installation of controls at the time the equipment is installed or modified.

Equipment Replacement

The second categorical exclusion from NSR proposed by EPA addresses the replacement of existing equipment. STAPPA and ALAPCO are concerned that this equipment replacement exemption – which would establish a cost threshold, below which component replacements would automatically be deemed routine – would also allow significant increases in emissions to occur without emission controls or review of air quality impacts.

Under this proposed exclusion, a source could replace existing equipment with different, but functionally equivalent equipment, provided the cost does not exceed a

fixed percentage of the cost of constructing a new process unit and the replacement does not change the maximum fuel or material input of the process unit. In the preamble to the proposed rule, EPA states that replacement of an entire process unit should not be considered RMRR. While we certainly agree that this should be the case, in reality, under this equipment replacement exclusion, an entire existing process unit could be replaced, component by component, without ever addressing actual emission increases.

Moreover, EPA has indicated that a cost threshold of 50 percent of the new unit construction cost might be adopted for equipment replacement; this 50-percent threshold is drawn from the New Source Performance Standard program definition of reconstruction, which, to our knowledge, has seldom, if ever, been exceeded. STAPPA and ALAPCO believe a 50-percent reconstruction cost threshold is inappropriately high and would, as a practical matter, allow almost anything short of a reconstruction of the entire process unit to be considered a routine replacement, thus prolonging indefinitely the operation of older, higher-emitting sources.

Conclusions and Recommendations

EPA is proposing to depart from long-held RMRR principles and, instead, categorically declare activities to be routine maintenance, repair and replacement without any regard for whether the activities are, indeed, routine or do, in fact, constitute maintenance, repair or replacement of existing equipment. In fact, EPA has actually stated that the two proposed categorical exclusions would automatically apply “without regard to any other considerations.”

Further, EPA suggests that the complexity and uncertainty of the existing RMRR exclusion and process is the impetus for the proposed rulemaking, and expresses an intent to provide greater certainty without sacrificing the current level of environmental protection and benefit derived from the program. However, the agency’s proposal fails utterly in achieving this stated intent. It neither simplifies nor clarifies the existing exclusion for RMRR, and does little, if anything, to add certainty to the NSR program. In fact, the existing case-by-case RMRR exclusion would remain completely intact –

ironically, with no clarification – and facilities would still be able to use it. This is not a proposal to improve the RMRR exclusion, it is a proposal to create two new and almost unbounded categorical exclusions from NSR. Not only would this add further confusion to a very complex program, it would degrade existing protections of public health and the environment.

Controlling air pollution is a zero-sum game. Under the RMRR categorical exclusions that EPA has proposed, important, cost-effective emission reductions from the NSR program will be sacrificed and the benefits of other existing and future programs will be negated. State and local air pollution control agencies will, therefore, be faced with two alternatives: to accept degraded air quality – an alternative we find wholly unacceptable – or to make up for the lost reductions by requiring other sectors of the economy to adopt further, and likely less cost-effective, controls – an alternative we find imprudent and unfair.

Accordingly, STAPPA and ALAPCO recommend that this proposal be rescinded. In addition to the many concerns I have cited, we also find the proposal to be unnecessary in light of EPA's final revisions to the NSR program, particularly with respect to applicability determinations. However, we recognize that clarification of routine maintenance, repair and replacement is warranted. Toward that end, we recommend that in lieu of this proposal, EPA 1) codify criteria for characterizing whether a change is routine, including criteria to safeguard against changes likely to result in an increase in emissions, 2) develop two lists for each major industrial sector, identifying the activities that would and would not be considered routine, 3) retain the case-by-case determination for those activities that are not included on either list and 4) preserve the ability of state and local air pollution control agencies to impose requirements more stringent than those of the federal government. We believe such an approach will provide greater clarity and certainty without sacrificing the critically important environmental and health benefits of the NSR program.

As I have outlined, STAPPA and ALAPCO have serious concerns with EPA's proposed revisions to the RMRR exclusions for NSR. We will explain these concerns in more detail in our forthcoming written comments, at which time we will reiterate our request that EPA rescind its proposal and, instead, take action to clarify the RMRR exclusion consistent with the recommendations we have offered.

On behalf of STAPPA and ALAPCO, thank you for this opportunity to present some of our associations' primary concerns with the RMRR proposal.