

STAPPA / ALAPCO

STATE AND TERRITORIAL
AIR POLLUTION PROGRAM
ADMINISTRATORS

ASSOCIATION OF
LOCAL AIR POLLUTION
CONTROL OFFICIALS

S. WILLIAM BECKER
EXECUTIVE DIRECTOR

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U.S. Environmental Protection Agency
EPA West (Air Docket)
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To Whom It May Concern:

The State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO), the two national associations of air pollution control agencies in states, territories and major metropolitan areas across the country, appreciate this opportunity to present our associations' comments on the U.S. Environmental Protection Agency's (EPA's) reconsideration of its October 27, 2003 final Equipment Replacement Provision of the Routine Maintenance, Repair, and Replacement Exclusion ("the Equipment Replacement rule").

State and local air pollution control agencies share with EPA responsibility for protecting the public from the injurious effects of air pollution. Although together we have made significant progress toward achieving clean air over the last 30 years, states and localities are extremely concerned that, if implemented, the Equipment Replacement rule would seriously undermine the new source review (NSR) program of the Clean Air Act and jeopardize the progress we have made. When EPA proposed the Routine Maintenance, Repair and Replacement (RMRR) rule on December 31, 2002, members of STAPPA and ALAPCO vigorously opposed the rule, as evidenced by our oral statements at the agency's public hearings held in New York, Texas, North Carolina, Michigan, and Utah, and by our subsequent written comments. We continue to oppose the final rule. If implemented, this rule will allow many industrial and utility sources of air pollution to modify their process equipment and increase emissions of pollutants without NSR permitting, air quality analysis or installation of pollution control equipment. We feel strongly that such a result was not intended by Congress.

At the outset, the associations are concerned that, based on our past experience, this reconsideration process may be a futile exercise. Last August 14, 2003, we testified

and submitted written comments on the final December 31, 2002 NSR rule in EPA's reconsideration proceeding. At that time, we questioned whether the opportunity for public participation and comment was genuinely intended to foster a meaningful exchange of views or rather was merely held to satisfy a legal obligation. We are similarly apprehensive that the current reconsideration may be intended only to satisfy legal obligations and, like last summer's testimony, will lead to no rule changes. In fact, the notice of this current reconsideration states, "[w]ithout prejudging the information that will be provided, we note that, to date, petitioners have not provided information which persuades us that our final decisions are erroneous or inappropriate." It appears, therefore, that the bar for persuasion has once again been set dauntingly high. Nonetheless, we hope that our testimony will, as EPA has indicated, be considered without prejudice.

The Equipment Replacement Rule Eliminates NSR Requirements for Most Modifications of Stationary Sources

Sources that have made modifications have historically been required by the permitting authority to apply for an NSR permit and, depending on whether they are in an attainment or nonattainment area, applicants must perform an air quality analysis and install either the best available control technology (BACT), or meet the lowest achievable emissions reductions (LAER). The Equipment Replacement rule eliminates these requirements in many – perhaps most – cases by exempting from NSR those sources replacing equipment that is valued at 20 percent or less than the value of the total process unit even if the actual emissions would increase. We believe that this huge exemption virtually eliminates the NSR program for modifications of existing sources and will result in increased emissions and poorer area quality in many areas.

The *Ohio Edison* case provides an example. In that case, the utility was held liable for making 11 modifications of process equipment without complying with NSR requirements. Although the remedy phase of the trial has not yet been concluded, it is currently anticipated that the utility will be required to install pollution controls that will substantially reduce air pollution emissions. Under the Equipment Replacement rule, however, all except one of the 11 projects would have fallen under the 20-percent cost level and would have been exempt from NSR requirements. No installation of pollution control equipment would have been required. No emissions reductions would have been necessary. In sum, the practical effect of applying the Equipment Replacement exclusion to the facts of the *Ohio Edison* case leads STAPPA and ALAPCO to conclude that this rule decimates the fundamental Clean Air Act requirement that emissions be minimized when modifications are made.

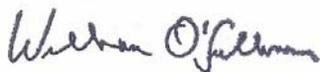
Lists of Activities Can Be Compiled Setting Forth Routine Maintenance Activities, with "Gray Areas" Determined on a Case-by-Case Basis

The *Preamble* to the rule discusses the RMRR exception to the NSR "major modification" requirement, noting that the exception has been determined "on a case-by-case basis using a multi-factor test." EPA states further that "the case-by-case

determinations have been criticized for giving the exclusion a narrow scope that disallows replacement of significant plant components with identical or functionally equivalent components.” Our associations believe, however, that the case-by-case basis has been an effective tool for evaluating equipment replacement activities against the yardstick of four factors: the nature and extent of the activities as well as their purpose, frequency and cost. It is, therefore, relevant and appropriate to consider whether activities are performed frequently or not, whether they are treated for accounting purposes as capital costs, and, using a commonsense approach, whether the activities are extensive. In sum, the associations agree with the District Court in the *Ohio Edison* case that when facilities undertake replacement activities that are not frequent, that come at a great cost, that extend the life of the unit and that require the unit to be taken out of service for a number of months, such activities can hardly be considered “routine” and should be accompanied by the installation of state of the art controls if they would otherwise have significantly increased air emissions.

Nonetheless, we also believe that a better way could be devised to make “routine maintenance” determinations. EPA has requested suggestions on “any new...approach that supports or rejects a 20 percent cost threshold for the ERP.” Although the associations reject the cost-based concept of the ERP, we could support clarifying routine maintenance, repair and replacement. 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 case-by-case determination by the permitting authority 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.

In conclusion, STAPPA and ALAPCO remain committed to working with EPA to resolve the serious issues raised by the Equipment Replacement rule. We hope that EPA will take full advantage of this reconsideration process to reexamine the final rule and remain open to recommendations for change. If you have any questions or wish to discuss our comments further, please feel free to contact us.



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