WASHINGTON UPDATE

STAPPA ALAPCO

State and Territorial Air Pollution Program Administrators
Association of Local Air Pollution Control Officials

This Week in Review – January 12-16, 2004

(1) Supreme Court Hears South Coast Fleet Rule Case (January 14, 2004) – The U.S. Supreme Court heard oral argument in *Engine Manufacturers Association v. South Coast Air Quality Management District*. At issue is whether Section 209(a) of the Clean Air Act (CAA) preempts rules adopted by SCAQMD in 2000 requiring fleets (15 or more vehicles) purchased or operated under contract with municipalities within the South Coast district to be low- or zero-emissions vehicles from a list of vehicles approved by the California Air Resources Board. On behalf of EMA and the Western States Petroleum Association, which appealed the case to the Supreme Court following a decision by the U.S. Circuit Court of Appeals for the 9th Circuit upholding South Coast's rule, Carter Phillips argued that the rule amounts to a local standard for controlling emissions from new motor vehicles and that such a standard is prohibited by the CAA. Solicitor General Theodore Olson also argued on behalf of EMA (last summer, the Administration filed an *amicus* brief in support of industry in this case), stating that the CAA prohibits state and local regulators from setting fleet standards without addressing "the major economic disruption" of such rules. In response, former Solicitor General Seth Waxman, representing SCAQMD, argued that legislative history clearly distinguishes between fleet requirements, such as those adopted by South Coast, and a mandate requiring companies to manufacture specific types of engines; accordingly, South Coast's rule is legal under the CAA. STAPPA and ALAPCO were among nine *amici curiae* who submitted a brief to the U.S. Supreme Court in November in support of the SCAQMD, arguing that South Coast's fleet rules are not "standards" preempted by Section 209(a) and that adoption of the petitioners' broad reading of Section 209(a) would erode environmental federalism and jeopardize vital state and local government interests. The *amici curiae* also included the National League of Cities, the National Conference of State Legislatures, the National Association of Counties, the Council of State Governments, the International City/County Management Association, the U.S. Conference of Mayors and the International Municipal Lawyers Association.

(2) Appeals Court Overturns Administration's Decision to Reject More Stringent Energy Efficiency Standards for Air Conditioners and Heat Pumps (January 13, 2004) – The U.S. Circuit Court of Appeals for the 2nd Circuit ruled that the current Administration improperly rescinded energy efficiency standards for central air conditioners and heat pumps that were promulgated by the previous Administration. The Clinton Administration promulgated requirements that central air conditioners and

heat pumps improve efficiency by 30 percent by 2006; these requirements were published in the *Federal Register* on January 20, 2001. The Bush Administration suspended the effective date of the requirements on February 2, 2001, and ultimately rescinded the rule, mandating a 20-percent efficiency improvement instead, arguing that because the effective date of the previous regulation was not until February 20, 2001, it was free to withdraw the regulation before that time. The Energy Policy and Conservation Act (EPCA) prohibits the U.S. Department of Energy (DOE) from weakening any appliance efficiency standard; the question in this case was whether DOE is constrained from weakening standards after they are published, or only after the standards' effective date. The court ruled that publication of an efficiency standard is the relevant act, and thus DOE contravened EPCA when it changed the published 30-percent efficiency improvement to a 20-percent efficiency improvement requirement. [For further information: www.ca2.uscourts.gov/]

(3) STAPPA and ALAPCO Support National Enforcement and Compliance Assurance Priorities (January 12, 2004) – STAPPA and ALAPCO submitted comments to EPA supporting certain enforcement and compliance priorities for fiscal years 2005, 2006 and 2007, as set forth in the *Federal Register* on December 10, 2003. The associations supported continuation of "vigorous enforcement" of NSR/PSD requirements and, in addition, continued reduction of "public exposure to toxic air emissions by ensuring compliance …with Maximum Achievable Control Technology standards." Also supported were proposed categories for federal facility compliance, addressing "patterns of significant noncompliance," reduction of public exposure to hazardous pollutants released to the air by plastics manufacturing and ensuring compliance of liquid petroleum and natural gas facilities. STAPPA and ALAPCO also singled out a new priority for consideration, urging EPA to address concentrated animal feeding operations (CAFOs) comprehensively by taking into account air emissions as well as the water discharges that were proposed for priority action by EPA and ensuring that CAFOs comply with the Clean Air Act as well as the Clean Water Act. [For further information: Air Web – Enforcement Committee page]

(4) Environmental Group Praises States' Leadership on Reducing Air Pollution (January 13, 2004) – The Environmental Integrity Project (EIP) released a report highlighting states' actions to reduce air pollution from electric utilities and other industrial sources, in particular power plants, refineries and other manufacturing operations built before 1977 that were exempted by the Clean Air Act from pollution control requirements unless they underwent a "major modification." In the report, EIP notes that seven states have adopted laws or regulations limiting emissions from at least some of these sources: Connecticut, Illinois, Massachusetts, New Hampshire, New York, North Carolina and Texas. EIP also discusses NSR enforcement cases brought by states, noting the significant emission reductions projected to occur from resolving these cases. The report lists other strategies states can take and have taken for addressing emissions from grandfathered facilities, including: 1) adopting more stringent state NSR standards, 2) incorporating more stringent emission limitations in SIPs, 3) linking permits to demonstrating NSR compliance and 4) applying more stringent emission reporting requirements to these facilities. [For

further information: www.environmentalintegrity.org/pubs/report_-_race_to_the_top.pdf]

(5) EPA Releases Guidance on Credits for Truck and Locomotive Anti-Idling Measures (January 14, 2004) – EPA released guidance for quantifying and taking SIP, conformity and NSR credit for emission reductions related to diesel truck and locomotive anti-idling measures. Specifically, the three guidance documents address 1) SIP and transportation conformity credits for long-duration truck anti-idling, 2) SIP credits for long-duration switchyard locomotive anti-idling and 3) NSR offsets for long-duration switchyard locomotive and long-duration truck anti-idling. Examples of how a state or locality may choose to use the emission reductions resulting from implementing an anti-idling reduction technology include 1) meeting reasonable-further-progress or rate-of-progress requirements; 2) meeting emission reduction requirements in an attainment or maintenance SIP; 3) meeting emission reduction requirements in a transportation conformity determination; or 4) using the emission reductions for NSR offset purposes. Because these are final guidance documents, they are not subject to notice and comment procedures and are effective immediately. [For further information: Air Web – In the News, Criteria Pollutants, Global Warming, Mobile Sources and Fuels and Permitting Committee pages]

(6) EPA Issues Direct Final Rule to Amend Small Nonroad Engine Program (January 12, 2004) – EPA published in the *Federal Register* a direct final rule (DFR) to amend an existing rule – adopted in April 2000 – that phases in emission standards for lawn and garden equipment (less than 19 kW) over a four-year period, beginning in 2004. The amendment applies to Class V handheld spark-ignition engines (i.e., commercial lawn and garden equipment, such as commercial tree trimmers). According to EPA, because the 2000 rule was based on the existence of future technology that did not come to fruition, manufacturers claim they are unable to meet the new Class V engine standards on the established compliance schedule. Rather than weaken the emission standards or extend the compliance date, the agency reached an agreement with engine makers to 1) eliminate the credit discount under the Averaging, Banking and Trading program and 2) allow engine makers to not meet the required Class V engine standard in any given year of the phase-in period, provided that any shortfall in emissions is made up (through the purchase of credits or over-controlling in another year or for another class of engine) within four years. Any payback of emissions would be penalty-free in the first year, but there would be a 10-percent penalty for payback in both the second and third years and a 20-percent penalty for payback in the fourth year. EPA estimates that these changes will result in a total loss of emission reductions of about 4,000 to 5,000 tons, as compared to the original rule. Last spring, when EPA was engaged in discussions with engine makers on this issue, the agency briefed a workgroup of STAPPA and ALAPCO members on this plan of action. At that time, the workgroup advised the Mobile Sources and Fuels Committee of its recommendation (and the Committee concurred) that the associations neither support nor oppose the forthcoming DFR. These amendments will take effect on March 12, 2004 unless a public hearing is requested by January 27, 2004 or adverse comments (on a parallel proposed rule, also published on January

12, 2004) are received by EPA by February 11, 2004. [For further information: Air Web – Mobile Sources and Fuels Committee page – 69 FR 1825 and 69 FR 1836]

(7) New Jersey Adopts California LEV Program (January 14, 2004) – New Jersey Governor James McGreevey signed legislation making his state the fifth to adopt California's Low Emission Vehicle (LEV) standards. New Jersey's new law requires the Department of Environmental Protection (DEP) to begin implementing phase II of the California LEV program in 2009, requiring significant reductions in tailpipe and evaporative emissions of hydrocarbons and NO_x from all passenger cars, light-duty trucks and sport utility vehicles. New Jersey anticipates that this action will reduce air toxins by as much as 20 percent beyond federal emission standards, and that the stricter emission standards and the promotion of cleaner vehicles will reduce smog in New Jersey by 19 percent by the year 2020. Under the new standards, auto manufacturers will be required to produce approximately 40,000 gas-electric hybrid cars and 128,000 super-clean gasoline cars for New Jersey. Companies that are already producing these types of vehicles will receive credits from New Jersey DEP for cars manufactured between 1999 and 2009. The new law will create a 15-member commission of auto manufacturers and dealers, lawmakers and environmentalists to determine if it is feasible for New Jersey to meet the zero-emission requirement under the California program and if the incentives for production of partial zero-emission vehicles are sufficient. The commission is also charged with studying and reviewing any advice prepared by the independent expert review panel established for the California Air Resources Board, and any changes proposed or adopted for the California LEV program. [For more information: www.state.nj.us/dep]

(8) EPA Releases CEMs Rule (January 12, 2004) – EPA finalized a rule specifying test procedures for major sources to evaluate the accuracy and performance of continuous emissions monitoring systems (CEMs) for particulate matter. Known as Performance Specification 11 and Quality Assurance Procedure 2, the new procedure is not expected to impose any new costs on facilities. CEMs collect gas samples and provide rolling averages of stack emissions approximately every minute. Comments on the proposed rule by industry groups questioned whether CEMs could meet reliably the requirements of the specifications and test procedures, but EPA's final rule was modified to account for some of the performance issues that had been raised. [For further information: 69 *Federal Register* 1786]

(9) New York Issues Policy for Assessing and Mitigating Potential Project Emissions of $PM_{2.5}$ (January 12, 2004) – New York issued a policy requiring that when a project operator applies for a permit or permit modification, there be a review of the potential for significant adverse impacts resulting from emissions of $PM_{2.5}$ during the operation of the project. In addition to providing guidance on how to determine whether a particular source's emissions (or emissions from sources associated with a specific project) will have a potentially significant adverse impact, the policy outlines possible ways to minimize those impacts. The policy will apply until the $PM_{2.5}$ National Ambient Air Quality Standards are fully implemented in New York. [For further information: www.dec.state.ny.us/website/dar/cp_33.pdf]

(10) U.S. Supreme Court Leaves Intact Decision Allowing Attorneys' Fees (January 12, 2004) – In a decision that may affect public interest groups' decisions on whether to file suit against EPA, the Supreme Court has left intact a case in which the U.S. Court of Appeals for the District of Columbia Circuit upheld granting attorneys' fees to the Sierra Club and others. The environmental groups had sued EPA for giving an open-ended extension to 30 states of EPA's interim approvals of their Title V operating permits. When the groups prevailed on the merits, obtaining a limit on such interim approvals of two years and barring renewal, they argued that their lawsuit supported an award of attorneys' fees under Section 307(f) of the Clean Air Act, which provides that "the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." The D.C. Circuit Court of Appeals agreed that so-called "catalyst" fees, which sparked a regulatory change by EPA, were permitted under the Act. [For further information: *EPA v. Sierra Club*, U.S., No. 03-509, 1/12/04)

(11) Ten Companies Adopt GHG Reduction Goals (January 13, 2004) – Ten companies participating in EPA's Climate Leaders program agreed to specific greenhouse gas (GHG) emissions reduction goals. In addition, 13 new companies joined EPA's Climate Leaders program, a voluntary program that works with companies to measure GHG emissions and set aggressive, long-term emissions reduction goals. Five of the companies adopted goals to reduce emissions in a future year below emissions in a previous baseline year(s) (for example, Cinergy agreed to reduce its total GHG emissions by 5 percent from 2000 to 2010). The other five companies adopted goals to reduce emissions per unit of production or revenue (for example, PSEG pledged to reduce GHG emissions by 18 percent per kilowatt-hour from 2000 to 2008). [For further information: www.epa.gov/climateleaders/goals.html]

(12) 2003 Tied as Second Warmest Year on Record (January 15, 2004) – Last year tied with 2002 as the second warmest year in recorded history, according to the National Oceanic and Atmospheric Administration's National Climatic Data Center. The year 1998 remains the warmest on record; the ten warmest years on record have all occurred since 1990. The climate in the United States in 2003 was wetter and cooler than average in the East and warmer and drier than average in the West, while drought conditions persisted, or worsened, throughout much of the central and western regions. [For further information: www.ncdc.noaa.gov/oa/climate/ research/2003/ann/ann03.html]

(13) EPA Releases Guidance on Supplemental Environmental Projects (January 8, 2004) – EPA released three guidance documents on supplemental environmental projects (SEPs). The agency intends to encourage companies that have been determined to be in violation of environmental laws to undertake environmentally beneficial projects in the context of settlement of enforcement actions. The guidance documents are *Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects; Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects and the Aggregation of SEP*

Funds; and *Recommended Ideas for Supplemental Environmental Projects.* Violators may agree to emissions reductions or other actions constituting SEPs in return for EPA's reduction of the penalty amount. [For the guidance documents, see: www.epa.gov/compliance/civil/programs/seps/index.html]

The Week Ahead

- Martin Luther King, Jr. Day Holiday – January 19, 2004
- Second Session of the 108th Congress Convenes – January 20, 2004
- STAPPA/ALAPCO Membership Conference Call on 2007 Heavy-Duty Diesel Highway Rule – January 23, 2004

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