



### ***This Week in Review – June 20-24, 2005***

**(1) D.C. Appeals Court Upholds Most of EPA's December 2002 NSR Reforms (June 24, 2005)** – The U.S. District Court of Appeals for the D.C. Circuit Court rejected most of the challenges made to the New Source Review (NSR) rule changes finalized by EPA in December 2002. Specifically, the court upheld the following aspects of the rule: the use of past emissions and projected future actual emissions, rather than potential emissions, in measuring emissions increases; the use of a ten-year lookback period in selecting the two-year baseline period for measuring past actual emissions; the use of a five-year lookback period in certain circumstances; the abandonment of a provision authorizing states to use source-specific allowable emissions in measuring baseline emissions; the exclusion of increases due to unrelated demand growth from the measurement of projected future actual emissions; and the Plantwide Applicability Limitations (PAL) program. The court vacated two aspects of the December 2002 rule: the Clean Unit applicability test and the exemption from NSR of Pollution Control Projects. The court was “not convinced” by industry’s argument that the NSR trigger should be focused on the hourly rate of emissions. Additionally, the court ruled that EPA acted arbitrarily and capriciously in determining that sources making changes need not keep records of their emissions if they see no “reasonable possibility” that these changes constitute modifications for NSR purposes. The court found that EPA failed to provide a reasoned explanation for how, absent such records, it can ensure compliance with NSR. The court remanded these recordkeeping provisions back to EPA for the agency to provide an acceptable explanation for its “reasonable possibility” standard or to devise an appropriately supported alternative. [For further information: Air Web – In the News and NSR Subcommittee pages]

**(2) Senate Completes Work on Energy Bill, Will Vote Tuesday (June 23, 2005)** – Following a 92 to 4 cloture vote earlier in the day, the Senate completed work on its energy bill (S. 10), paving the way for a vote, scheduled for Tuesday morning, June 28, 2005. Among the amendments discussed during this second week of debate on the bill were ones related to climate change (see related article in this *Washington Update*), funding for diesel retrofits and automobile fuel economy. On diesel retrofits, the Senate approved, by a vote of 92 to 1, an amendment from Senator George Voinovich (R-OH) authorizing \$1 billion over five years (2006-2010) to establish voluntary grant and loan programs for diesel emission reduction projects that improve air quality and protect public health; STAPPA and ALAPCO supported this provision

when Senator Voinovich announced it last week (see related article in the June 13-17, 2005 *Washington Update*). On automobile fuel economy, the Senate defeated, by a vote of 28 to 67, an amendment from Senator Richard Durbin (D-IL) to require fuel economy standards of 40 miles per gallon by 2017, and then voted, 64 to 31, in favor of an amendment from Senators Christopher Bond (R-MO) and Carl Levin (D-MI) to impose additional requirements to be considered when decisions concerning the maximum feasible average fuel economy are made. In a recent report, the Congressional Budget Office estimated that implementation of the Senate energy bill would cost \$5.1 billion in 2006 and \$35.9 billion from 2006 through 2010 (assuming appropriation of the necessary amounts). [For further information: [energy.senate.gov/public](http://energy.senate.gov/public)]

**(3) Senate Takes Up Global Warming Legislation, Supports Voluntary and Technology Incentive Programs, Rejects Mandatory Program (June 22, 2005) –**

The Senate debated several global warming-related amendments to the energy bill this week, voting to 1) approve a proposal to authorize direct loans, loan guarantees and other subsidies for technologies that reduce greenhouse gas (GHG) emissions; 2) approve a "Sense of the Senate" resolution calling for a mandatory program to slow or stop the growth of GHG emissions; and 3) reject a bill that would have required cuts in GHG emissions. By a vote of 66 to 29, the Senate approved amendments introduced by Senator Chuck Hagel (R-NE) that promote the adoption of technologies that reduce GHG intensity (GHG emissions per unit of economic output) by authorizing direct loans, loan guarantees, standby default coverage and standby interest coverage for projects that deploy technologies that reduce GHG intensity. The amendment also contains provisions intended to promote the adoption of these technologies abroad. Senator Jeff Bingaman (D-NM) introduced a "sense of the Senate" resolution that passed by voice vote; the resolution calls on Congress to enact a comprehensive and effective national program of mandatory, market-based limits on GHG emissions that slow, stop and reverse the growth of such emissions in a manner that will not significantly harm the U.S. economy and will encourage comparable action by other nations that are major trading partners and key contributors to global emissions. Finally, the Senate voted 60-38 to reject the Climate Stewardship and Innovation Act as an amendment to the energy bill. The measure, sponsored by Senators John McCain (R-AZ) and Joe Lieberman (D-CT), would have created a cap-and-trade system for GHG emissions and provided incentives for development and deployment of low- and no-GHG emitting technology, including nuclear power. [For further information: Air Web – In the News and Global Warming Committee pages]

**(4) EPA to Propose Reconsideration of Risk-Based Exemptions in Boiler MACT (June 21, 2005) –**

In response to petitions from several environmental groups, EPA will propose the reconsideration of provisions in the Industrial, Commercial and Institutional Boilers and Process Heaters MACT that allow sources to escape controls through demonstrations of low-risk. In addition to filing a lawsuit challenging the rule, the Natural Resources Defense Council and Environmental Integrity Project petitioned EPA to reconsider various provisions in the rule. EPA is granting the petition to reconsider, and is requesting public comment on the approach used to demonstrate

eligibility for the health-based exemptions and the provisions establishing a health-based compliance alternative for total selected metals. Once the proposed reconsideration is published in the *Federal Register*, a 45-day public comment period will begin. STAPPA and ALAPCO opposed the inclusion of the risk-based exemption in the Boiler MACT and have been granted *amicus* status in the environmental groups' lawsuit challenging the rule. The lawsuit is being delayed pending the conclusion of EPA's reconsideration. While EPA, in the reconsideration proposal, has rejected a request for a stay of the implementation of the risk-based exemptions, there will soon be a ruling on a separate request for a stay that the environmental groups have submitted to the court. [For further information: [www.epa.gov/ttn/oarpg/t3/fact\\_sheets/boilerrecon\\_fs.html](http://www.epa.gov/ttn/oarpg/t3/fact_sheets/boilerrecon_fs.html) or Air Web -- Air Toxics Committee page]

**(5) Louisville Adopts Air Toxics Program (June 21, 2005)** – The Louisville Metro Air Pollution Control District Board adopted a set of regulations to reduce emissions of toxic air pollution. The Strategic Toxic Air Reduction (STAR) program is a multi-year effort that calls for the reduction of 18 toxics air pollutants from 170 companies. Facilities emitting the pollutants must begin reporting information by April 2006. By 2011, the companies must reduce their emissions to meet a health goal, or prove they are using the best available technology to decrease emissions as much as possible. Additionally, certain companies must conduct modeling of 37 chemicals. By June 2007, the air agency must develop an action plan to address emissions of air toxics from non-industrial sources. Louisville undertook the development of the program because the city's health exposure risk from toxic air pollution was among the highest in the region. [For further information: [www.apcd.org](http://www.apcd.org)]

**(6) President Announces Pick for OECA Head (June 23, 2005)** – President Bush announced that he intends to nominate Granta Nakayama to be Assistant Administrator of EPA's Office of Enforcement and Compliance Assurance (OECA). Mr. Nakayama is currently a partner for Environmental Law and Product Safety at the Washington, DC law firm of Kirkland and Ellis, LLP. He is also an adjunct professor at George Mason University School of Law in Virginia, where he teaches environmental law. Prior to joining Kirkland and Ellis, Mr. Nakayama served in the Nuclear Propulsion Program for the U.S. Navy. He holds a Bachelor's and Master's degree from the Massachusetts Institute of Technology and a J.D. from George Mason University. If confirmed, Mr. Nakayama will replace the current acting OECA Assistant Administrator, Tom Skinner, who asked the President to withdraw his nomination so that he might return to his family in Illinois.

**(7) Trial Date in American Electric Power NSR Case Unaffected by Duke Power Decision (June 22, 2005)** – After hearing oral arguments on the effects of a ruling in a similar NSR case, Judge Sargus of the U.S. District Court for the Southern District of Ohio ordered that the trial date in the NSR enforcement case against American Electric Power (AEP) remain July 6, 2005. However, Judge Sargus said parties may submit supplemental briefs by June 28, 2005 to address any issues raised by the decision in *Duke Power* by the Fourth Circuit Court of Appeals, which rejected EPA's definition of emissions increase, thus ruling that Duke's actions did not trigger NSR.

EPA contends AEP violated NSR provisions by undertaking major repairs and life extensions that increased emissions.

**(8) EPA and DOJ Announce July 20 Conference Call on Implementation of Heavy-Duty Diesel Consent Decrees (June 23, 2005)** – EPA and the U.S. Department of Justice (DOJ) announced in the *Federal Register* that they will convene a public meeting via teleconference to discuss implementation of the seven consent decrees signed by the U.S. and diesel engine manufacturers and entered by the U.S. District Court for the District of Columbia in July 1999. At the time the consent decrees were entered, the U.S. committed to meet periodically with states, industry groups, environmental groups and concerned citizens to discuss implementation issues. The agenda for the July 20, 2005 conference call, to begin at 10:00 a.m. Eastern Time, will include remarks by EPA and DOJ regarding implementation of the provisions of the consent decrees, followed by an opportunity for public comments and questions. To reserve a telephone line and receive instructions on participating in the call, contact Anne Wick of EPA's Office of Enforcement and Compliance Assurance at [wick.anne@epa.gov](mailto:wick.anne@epa.gov). [For further information: 70 *Federal Register* 36408]

**(9) EPA Releases Modeling Data to Support Inclusion of Delaware and New Jersey in CAIR for PM<sub>2.5</sub> (June 22, 2005)** – EPA released a notice of data availability (NODA) announcing additional modeling data to support its proposal to include New Jersey and Delaware in the Clean Air Interstate Rule (CAIR) for PM<sub>2.5</sub> (these states are already covered by CAIR for ozone). EPA is also extending the comment period on this proposal. Comments on the NODA and EPA's proposal to include New Jersey and Delaware for PM<sub>2.5</sub> in CAIR will be due within 21 days after the notice is published in the *Federal Register*. EPA has requested that the notice be published June 27, 2005. [For further information: Air Web – Criteria Pollutants Committee page]

**(10) EPA Extends Sign-Up Period for AFO Safe Harbor Agreement (June 22, 2005)** – EPA has extended to July 29, 2005 the deadline for animal feeding operations (AFOs) to sign up to participate in its AFO Air Compliance Agreement. This agreement provides a waiver from enforcement of the Clean Air Act for past violations and any violations discovered during the pendency of the agreement for AFOs that agree to have their facilities monitored, pay a civil penalty and contribute to a monitoring fund. Only 28 farms will be selected for monitoring, but all AFOs that sign up receive the enforcement waiver. In addition, EPA has posted its responses to public comments received on the agreement. STAPPA and ALAPCO have submitted numerous sets of comments expressing major concerns with the agreement. [For further information: Air Web – Agriculture and Enforcement Committee pages]

**(11) EPA to Issue New Standards for Cement Kilns (June 23, 2005)** – EPA has issued a notice of a proposed settlement agreement with the Sierra Club that calls for the agency to issue a new MACT standard for Portland cement kilns' emissions of mercury, hydrogen chloride and total hydrocarbons and to consider establishing more stringent standards for emissions of non-mercury hazardous air pollutant metals. The

agreement would require EPA to issue new final standards by May 26, 2006. EPA will accept comments on the settlement agreement until July 25, 2005. EPA originally issued a MACT standard for cement kilns on June 14, 1999, which was challenged in court. On December 15, 2000, the court remanded portions of the rule to EPA. Since that time, EPA has not complied with the court order by re-issuing the standards. [For further information: 70 *Federal Register* 36384]

**(12) U.S. PIRG Reports on States' Role in Reducing Mobile Source Pollution (June 16, 2005)** – The U.S. Public Interest Research Group (U.S. PIRG) issued a report, entitled *Power to Protect: The Critical Role States Play in Cleaning Up Pollution from Mobile Sources*. In addition to providing background information on air pollution from mobile sources, the report outlines state responsibilities and authorities under the Clean Air Act and overviews state actions relative to cars and light trucks, diesel trucks, personal watercraft, lawn and garden equipment and forklifts and other industrial equipment. Noting that “states’ ability to protect their citizens from air pollution faces an unprecedented threat,” U.S. PIRG concludes that “[r]egulation of mobile source emissions is one critical area where states need the authority to enact air quality standards that are more stringent than federal standards. As states work to implement their plans to clean up the dirtiest cities and counties, they need all of the tools in the toolbox to achieve the goals of the Clean Air Act and protect public health, including the right to adopt California’s standards for cars, trucks, lawn and garden equipment, and other mobile sources of air pollution. This is more than a theoretical debate about states’ rights versus federal power – it’s about public health.” [For further information: [uspirg.org/reports/powerprotect.pdf](http://uspirg.org/reports/powerprotect.pdf)]

**(13) Study Shows Benefits of Utility Emission Reductions (June 20, 2005)** – A report prepared by Resources for the Future and sponsored by the New York State Energy Research and Development Authority includes estimates that the benefits associated with reducing emissions from utilities far outweigh the costs. In the document, *Reducing Emissions from the Electricity Sector: The Costs and Benefits Nationwide and for the Empire State*, the authors project benefits to the nation from controls under EPA’s rules of over \$14 billion by 2020, even after accounting for costs of technologies designed to reduce emissions of sulfur dioxide, nitrogen oxide and mercury. Further, the benefits dramatically exceed costs for all the scenarios the group examined, including a variety of policy options addressing the three pollutants. The evaluation of scenarios with tighter mercury controls indicates that the net benefits of a technology-based (i.e., MACT) approach exceed the net benefits of a cap-and-trade strategy. [For further information: [www.rff.org/rff/News/Features/Reducing-Emissions-from-the-Electricity-Sector.cfm](http://www.rff.org/rff/News/Features/Reducing-Emissions-from-the-Electricity-Sector.cfm)]

**(14) NARSTO Recommends Improving Emissions Inventories (June 21, 2005)** – NARSTO, a public-private partnership with members from government, utilities, industry and academia throughout Canada, the U.S. and Mexico, has released a new report, *Improving Emission Inventories for Effective Air Quality Management Across North America: A NARSTO Assessment*, that examines the current state of emissions inventories in North America and makes recommendations for improvement. NARSTO found that emission inventories for certain source categories and pollutants,

including gaseous emissions from electric utilities, are well characterized and reported. However, emission inventories for other source categories and pollutants, particularly nonpoint sources including transportation and fugitive emissions from industrial facilities, landfills, sewage disposal systems and feedlots, as well as sources of organic compounds, carbonaceous particulate matter, ammonia and hazardous air pollutants, are much more uncertain. To address this issue, NARSTO calls for jurisdictions to focus their inventory development efforts on these areas of greatest uncertainty and to verify the data by comparing it with independent sources of measured data. Additional recommendations include, among others, improving speciation estimates, developing and improving emission inventory tools, improving inventory compatibility and comparability throughout North America and improving user accessibility. [For further information: [www.cgenv.com/narsto](http://www.cgenv.com/narsto)]

### ***The Week Ahead***

- Briefing on the Investor Community and Climate Change, in Washington, DC – June 27, 2005
- Senate Vote on Energy Bill, in Washington, DC – June 28, 2005

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