



This Week in Review – August 1-5, 2005

(1) EPA Issues Proposed CAIR FIP and Response to North Carolina Section 126 Petition (August 1, 2005) -- EPA issued its proposed Federal Implementation Plan (FIP) for the Clean Air Interstate Rule (CAIR), to take effect in CAIR states in case those states fail to submit adequate CAIR SIPs. As part of this action, EPA also proposed to deny North Carolina's Section 126 petition requesting that power plants in certain upwind states reduce their contribution to North Carolina's fine particle pollution. EPA is basing the proposed denial on issuance of the CAIR FIP; EPA believes that emissions reductions required by the proposed FIP will satisfy North Carolina's petition. EPA is denying North Carolina's petition with respect to 8-hour ozone on the basis that EPA's modeling shows all of North Carolina's counties in attainment for 8-hour ozone in the 2010 CAIR base case. According to EPA's statements in the preamble, the Section 126 and FIP actions would not constrain states in their selection of control strategies to comply with CAIR. EPA intends to withdraw Section 126 or FIP requirements in a state if that state submits, and EPA approves, a SIP meeting the requirements of CAIR. Because EPA proposes to finalize the CAIR FIP by March 15, 2006, but yet CAIR SIPs are not due from states until September 11, 2006, the federal CAIR trading programs would be promulgated in advance of the state SIP submission deadline. EPA states in the preamble, however, that it does not intend to record nitrogen oxide allocations in sources' allowance accounts (or take any other steps to implement the Section 126 or FIP requirements that could impact a state's ability to regulate its sources in a different manner) until December 1, 2007. This would allow EPA time to take rulemaking action to approve timely, compliant SIPs and withdraw the Section 126 or FIP requirements. EPA will accept public comment for 60 days following publication of this proposal in the *Federal Register*. EPA will hold public hearings on this proposal on September 14, 2005 at EPA's offices in Research Triangle Park, North Carolina and September 15, 2005 at EPA's offices in Washington, DC. [For further information: Air Web – In the News and Criteria Pollutants Committee pages]

(2) GAO Report Finds that EPA Has Not Adequately Addressed Environmental Justice Issues in Air Rules (August 4, 2005) – A GAO report concludes that EPA has not sufficiently addressed environmental justice issues in developing air quality rules. The report, drafted at the request of Rep. Hilda L. Solis (D-CA), is titled, *Environmental Justice: EPA Should Devote More Attention to Environmental Justice When Developing Clean Air Rules*. Analyzing three out of 19 air quality rules that

were finalized by EPA between 200 and 2004, the report states that “[w]hile EPA guidance on rulemaking states that workgroups should consider environmental justice early in this process, GAO found that a lack of guidance and training for workgroup members on identifying environmental justice issues may have limited their ability to identify such issues.”

[For further information: <http://www.gao.gov/new.items/d05289.pdf>]

(3) D.C. Circuit Court of Appeals Refuses to Stay Mercury Rule (August 4, 2005)

– The Circuit Court of Appeals for the District of Columbia denied the motion to stay EPA’s mercury rule that was filed by the environmental petitioners and refused as well to hear the case on an expedited basis. The Court’s order states, “[p]etitioner has not satisfied the stringent standards required for a stay pending court review.” The Chesapeake Bay Foundation, the Clean Air Task Force, the Natural Resources Defense Council, Earthjustice, and Waterkeepers’ Alliance challenged EPA’s mercury rule in March 2005, alleging that it ignored the Clean Air Act requirements of section 112, which requires facilities that emit toxic air pollutants to control them by installation of maximum achievable control technology (MACT). EPA opposed the stay sought by the environmental groups, arguing that, if it were granted, mercury would be unregulated and implementation of the cap and trade program for the toxic pollutant would not be possible. The fourteen states that sued EPA on the rule did not join in the request for the stay.

(4) EPA Seeks Rehearing of Fourth Circuit *Duke Energy* Decision (August 1, 2005)

– EPA, represented by the Department of Justice, has requested reconsideration of the adverse decision by the Fourth Circuit Court of Appeals in the *Duke Energy* New Source Review (NSR) enforcement case. On June 15, 2005, a three-judge panel upheld the District Court’s decision that Duke Energy was not subject to requirements for NSR permitting and installation of Best Available Control Technology (BACT), holding that the correct definition of “modification” is that NSR does not apply unless emissions increases resulting from changes in equipment and operating procedures result in an increase in the hourly rate of emissions. Duke Energy Corp. had argued successfully that the definition of “modification” should be the same under the Clean Air Act for both the Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) programs. Thus, equipment or operational changes resulting in increases in a facility’s total tons of emissions per year may not be subject to NSR in Maryland, Virginia, West Virginia, North Carolina and South Carolina – the states in the Circuit. EPA now hopes that the full 13-member court will overturn the decision of the three-judge panel, making NSR applicable to greater numbers of equipment and operational modifications in the Fourth Circuit states. In its petition for reconsideration, EPA argued that the Fourth Circuit lacked jurisdiction to make the ruling, and that only the DC Circuit Court of Appeals has jurisdiction to hear challenges to nationally applicable regulations. The DC Circuit ruled on June 24, 2005, that, unlike the Fourth Circuit, it was “not convinced” by the industry arguments that a modification entailed only increases in the hourly rate of emissions. Rather, the court ruled, EPA can interpret “modification” as an increase in actual annual emissions. The Southern Environmental Law Center,

the North Carolina PIRG Citizen Lobby and Education Fund, and Environmental Defense have also requested a rehearing from the Fourth Circuit.

(5) President Signs FY 2006 Appropriations Bill for EPA (August 4, 2005) – President Bush signed the FY 2006 appropriations bill for Interior and Related Agencies (H.R. 2361), which includes EPA's budget. Both the House and Senate adopted the conference committee's compromise version late last week. The final law (PL 109-54) calls for \$7.73 billion for EPA, which is a decrease of \$295 million from FY 2005 levels. It also includes \$223.55 million for state and local air agencies under Sections 103 and 105 of the Clean Air Act, which is \$350,000 more than the amount appropriated in FY 2005 and equal to the President's request for FY 2006. The air grant total includes shifting \$5 million out of the funds for the Regional Planning Organizations into other state and local air grant activities. The law provides \$7 million for the Clean School Bus USA program, which calls for retrofit and replacement projects that reduce diesel emissions. All of these totals will likely be affected by an across-the-board rescission of ½ percent. The reduction to the Sections 103/105 grants would be approximately \$1.12 million (for a total of \$222.43 million). Details on the final calculations should be available within the next few weeks. The appropriations law includes a rider inserted by Senator Christopher Bond (R-MO) calling for a study before EPA can issue a rule on small nonroad engines. [For further information: thomas.loc.gov/home/approp/app06.html]

(6) Senate Passes Transportation Bill, Forwards to President for Signature (July 29, 2009) – The U.S. Senate followed the House of Representatives in passing the transportation bill completed last week by a congressional conference committee (see related article in July 25-29, 2005 *Washington Update*). By a vote of 91 to 4 the Senate cleared the way for H.R. 3 – the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) – to proceed to the President for signature. [For further information: thomas.loc.gov and www.house.gov/rules/109textTEALU.htm]

(7) Senate Confirms Nakayama as Assistant Administrator for Enforcement (July 29, 2005) – The Senate has confirmed Granta Nakayama as EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance. Prior to his confirmation, Nakayama was in private legal practice. Senate confirmation came at the end of a week during which Nakayama's nomination was blocked from floor consideration by at least one anonymous "hold."

(8) South Coast Resumes Enforcement of Clean Fleet Rules (August 1, 2005) – The South Coast Air Quality Management District (SCAQMD) reinstated a number of its clean fleet rules such that its school bus, transit bus, refuse collection, airport ground-access and street sweeper rules will apply not only to public fleets, but also to privately owned fleets under contract to or operated under an exclusive license with state or local public agencies, including the State of California, counties, cities and special districts. SCAQMD suspended enforcement of these rules as they applied to all privately owned fleets in May 2004, following a U.S. Supreme Court ruling in which the question of whether some of SCAQMD's fleet rules could be characterized as

internal state decisions, and therefore not preempted by Section 209 of the federal Clean Air Act, was remanded to the federal District Court. On May 6, 2005, a federal District Court Judge found that, as applied to state and local governments, SCAQMD's clean fleet rules are valid procurement requirements and not within the scope of preemption under the Clean Air Act. [For further information: www.aqmd.gov/news1/index.html]

(9) North Carolina State University Releases Report on Technologies for Reducing Emissions from CAFOs (August 1, 2005) – North Carolina State University released the results of an analysis of eight technologies that could reduce pollution from concentrated animal feeding operations (CAFOs). This analysis was conducted pursuant to settlement agreements the North Carolina Attorney General entered into with large swine producers that provides funding to investigate Environmentally Superior Technologies (ESTs). According to the report, three of the technologies studied are capable of meeting the agreements' technical performance standards that define an EST. Those technologies are 1) "Super Soil Systems" centralized composting system, 2) gasification for elimination of swine waste solids with recovery of value-added products system and 3) "BEST" – fluidized bed combustion of solids system. This report follows another study that analyzed an initial eight candidate ESTs and concluded that two of these met the criteria: 1) the solids separation/nitrification-denitrification/soluble phosphorus removal system ("Super Soils" technology) and 2) the high solids anaerobic digester system ("ORBIT" technology). The criteria the EST must meet are 1) address the discharge of animal waste to surface waters and groundwater; emission of ammonia; emission of odor; release of disease-transmitting vectors and airborne pathogens; and nutrient and heavy metal contamination of soil and groundwater; and 2) be operationally and economically feasible, as well as permissible by the appropriate regulatory agency. [For further information: Air Web – Agriculture Committee page]

(10) San Joaquin Valley Releases VOC Emission Factor for Dairies (August 1, 2005) – San Joaquin Valley (California) released its new emission factor for VOCs from dairies: 19.3 pounds of VOC per head per year. This factor is based upon review of 15 dairy research studies. The previous emission factor of 12.8 pounds was based on research conducted in the 1930s. Dairies are the largest source of VOC emissions in San Joaquin Valley. According to a press release from San Joaquin Valley, about 230 area dairies already have applied for air permits and the new factor will result in another 150 to 250 dairies needing permits. [For further information: Air Web – Agriculture Committee page]

(11) EPA Extends Sign-Up Period for CAFO Safe Harbor Agreement to August 12, 2005 (August 1, 2005) – EPA has extended, for the third time, the deadline for farms interested in signing up to participate in EPA's Air Quality Compliance Agreement for Animal Feeding Operations (AFOs). The new deadline is August 12, 2005. [For further information: Air Web – Agriculture Committee page]

(12) Analysis of Upset Emissions in Texas Released by Public Citizen (August 3, 2005) – Public Citizen, an environmental group, released a report titled *Industrial Upset Pollution: Who Pays the Price? An Analysis of the Health and Financial Impacts of Unpermitted Industrial Emissions*. The report examines the impacts of unpermitted air emissions on human health in Texas and on healthcare costs to the state's taxpayers. Air emissions from start-up, shutdown and maintenance operations at oil refineries and chemical plants were the particular subject of the study. According to Public Citizen, "air emissions from upset events are often more harmful to the local communities than emissions from routine operations at facilities because upsets release large amounts of concentrated toxic pollutants in short periods."

[For further information: www.citizen.org/documents/Industrial%20Upset%20Pollution_Who%20pays%20the%20price_2%20Aug%202005.pdf]

(13) EPA's Proposal for a Trading Alternative to BART Published in the *Federal Register*; Hearing Scheduled for August 17 (August 1, 2005) – EPA published in the *Federal Register* its proposed revisions to its Regional Haze Rule governing alternative trading programs. The proposal is more fully described in the July 18-22, 2005 edition of the *Washington Update*. Comments are due to EPA on or before September 17, 2005. EPA will hold a public hearing on the proposal in Denver, Colorado, on August 17, 2005. [For further information: Air Web – Criteria Pollutants Committee page]

(14) Revocation Notice for 1-hour Ozone Standard Published in the *Federal Register* (August 3, 2005) – EPA's rule codifying the revocation of the 1-hour ozone standard for those areas with effective 8-hour ozone designations was published in the *Federal Register*. The July 25-29, 2005 edition of *Washington Update* contains more information about this action. [For further information: Air Web – Criteria Pollutants Committee page]

(15) STAPPA and ALAPCO Comment on Volume 3 of EPA Risk Assessment Library (August 5, 2005) – STAPPA and ALAPCO submitted comments to EPA on Volume 3 of the agency's Air Toxics Risk Assessment Library. Volume 3 focuses on community-scale assessments and will be added to the previously published Volume 1 (air toxics risk assessment and management) and Volume 2 (single-facility risk assessment). The library is designed for federal, state and local officials, as well as industry and public groups interested in risk assessment. STAPPA and ALAPCO's comments consist largely of corrections, clarifications and suggestions for making the document more understandable and consistent. EPA plans to issue the document in final form in September 2005, following an official peer review. [For further information: Air Web – In the News and Air Toxics Committee pages]

(16) EPA Proposes Amendments to Air Toxics General Provisions (July 29, 2005) – EPA proposed amendments to the General Provisions to the National Emission Standards for Hazardous Air Pollutants related to startup, shutdown and malfunction (SSM) plans. The amendments are in response to a July 29, 2003 petition by the Natural Resources Defense Council (NRDC) to reconsider parts of the May 30, 2003 amendments to the General Provisions. The 2003 amendments stated

that the public could request a copy of a source's SSM plan if the request was "specific and reasonable". NRDC objected to that criteria and argued that the public should have unrestricted access to SSM plans. In its July 29, 2005 *Federal Register* notice, EPA announces its reconsideration of the SSM provisions of the General Provisions, proposes amendments and requests public comment. The comment deadline is September 12, 2005. [For further information: 70 *Federal Register* 43992]

The Week Ahead

- Congress in Recess

STAPPA/ALAPCO
444 North Capitol Street, NW, Suite 307
Washington, DC 20001
Tel: (202) 624-7864/Fax: (202) 624-7863
4cleanair@4cleanair.org