



This Week in Review – August 29-September 2, 2005

(1) EPA Issues Nationwide Waiver of Fuel Standards to Mitigate Shortages Due to Hurricane Katrina (August 31, 2005) – EPA Administrator Stephen L. Johnson exercised his statutory authority to temporarily allow supply and distribution of noncompliant fuel in the wake of hurricane Katrina. On August 30, the Administrator notified the governors of Florida, Alabama, Louisiana and Mississippi that he had determined that an extreme and unusual fuel supply circumstance exists in those states and that he was, accordingly, waiving the requirements for the sale of low-volatility “summertime” fuel in those states. The following day, the Administrator extended the temporary waiver to the rest of the country, stating “[a]s we are all well aware, we are seeing increasingly serious impacts from the hurricane in a number of fuel markets around the United States...[s]o today, I’m sending letters to the governors of the remaining 46 states and territories providing temporary relief from volatility and sulfur standards.” All parties in the fuel distribution system, including refiners, importers, distributors, carriers and retail outlets are now allowed to supply gasoline meeting a Reid Vapor Pressure standard of 9.0 psi in areas in which a lower psi is required. Furthermore, parties in the fuel distribution system may supply motor vehicle diesel fuel having a sulfur content greater than 500 ppm with visible evidence of red dye. The waiver is in effect through September 15, 2005, although retail outlets and wholesale purchaser-consumers may continue to sell noncompliant fuel until their supplies are depleted. Suppliers must file reports with EPA by December 15, 2005 specifying the purchasers and volume supplied per day of noncompliant fuel. [For further information: www.epa.gov]

(2) EPA Developing Proposal to Replace NSR Rules for Utilities, Limit Applicability (August 31, 2005) – *The Washington Post* reported that EPA is developing a proposal that would redefine a key provision of the New Source Review (NSR) regulations and, in effect, exempt most coal-fired power plants from requirements for permitting and installation of pollution control equipment when plants make equipment replacements. NSR currently applies to sources whose modifications result in significant increases in actual annual emissions. EPA’s proposal, however, adopts the approach of the Fourth Circuit Court of Appeals decision in the *Duke Energy* case, decided June 15, 2005, which concluded that NSR requirements should be triggered only when a modification results in an increase in the maximum hourly rate of emissions of a process unit. If EPA’s proposal is finalized, coal-burning power plants will be able to increase their annual

hours of operation – and their annual emissions – without installing pollution control equipment, as long as no increase in the maximum hourly rate of emissions occurs. According to *The Washington Post*, “EPA spokeswoman Eryn Witcher said the administration believes the existing power plant rule is no longer necessary because of other regulatory initiatives. She said a newer and different regulation designed to cut pollution from eastern power plants, the Clean Air Interstate Rule, would achieve greater pollution reductions than the New Source Review modernization guidelines.” While EPA has not yet released the proposal, the Natural Resources Defense Council, which has received a copy, has published an analysis of it, concluding that “none of the agency’s current [NSR] power plant enforcement cases would have been possible had this weaker approach been the law when the violations occurred.” [For further information: www.nrdc.org]

(3) EPA, Ten States and Four Counties Settle Cargill Ethanol Production Litigation (September 1, 2005) – EPA announced a multi-state settlement with Cargill, Inc., an agribusiness whose corn processing plants are significant sources of volatile organic compounds (VOCs) and carbon monoxide (CO). EPA initiated enforcement action in federal district court in Minnesota, alleging that Cargill had seriously underestimated emissions from its operations in 13 states. The action first targeted two oilseed plants owned by Cargill in 2002 and, in 2003, added the company’s nine corn mill plants. Reductions totaling approximately 30,000 tons of annual emissions are required under the settlement. Cargill’s corn producing plants must install or improve thermal oxidizers and scrubbers in order to reduce VOC emissions by 10,450 tons per year and CO emissions will drop by 10,900 tons per year. Significant reductions of NO_x, SO₂, particulates and hazardous air pollutants are also required. In addition, the company will pay a civil penalty of \$1.6 million and spend \$3.5 million on supplemental environmental projects. According to EPA, 81 percent of uncontrolled ethanol production capacity is now under settlement agreements. Ten states and four counties joined the federal government in the Cargill settlement: Alabama; Georgia; Illinois; Indiana; Iowa; Missouri; Nebraska; North Carolina; North Dakota; Ohio; Memphis/Shelby County, Tennessee; Montgomery County, Ohio; and Linn and Polk Counties, Iowa. The consent decree was lodged in federal district court in Minneapolis, Minnesota, and is subject to a 30-day comment period. [For further information: www.epa.gov/compliance/resources/cases/civil/caa/cargill.html]

(4) Fourth Circuit Refuses to Reconsider Duke Energy NSR Decision (August 30, 2005) – The Fourth Circuit Court of Appeals has denied EPA’s request for a hearing by the full panel of judges or, alternatively, a rehearing by the same panel that rendered the decision. In the Duke Energy case, one of the original 1999 NSR enforcement cases, EPA alleged that the utility had made numerous modifications that resulted in significant increases in emissions. Both the District and Circuit Courts, however, found that increases in emissions under NSR occur only when a source’s equipment modification results in an increase in the hourly rate of emissions, rather than when there is a significant annual increase in emissions. NSR requirements in the states in the Fourth Circuit – Maryland, West Virginia, Virginia, North Carolina and South Carolina – thus depart from the rest of the states,

in which NSR requirements are triggered by significant increases in annual emissions. EPA is now considering whether to appeal the decision to the United States Supreme Court.

(5) Court in Cinergy NSR Case Rejects Duke Holding, Adopts Annual Actual Emissions Test (August 29, 2005) – As one of the original 1999 NSR coal-fired utility enforcement cases proceeds to trial, the presiding federal District Court judge has, in a summary judgment, upheld EPA's interpretation of what constitutes a modification under NSR. EPA has alleged that Cinergy made modifications at several electric generating units, but had failed to obtain permits in accord with Prevention of Significant Deterioration provisions, and had not installed the required pollution control equipment. The company countered that the projects fell within the "routine maintenance" exclusion and that, at any rate, there had been no modifications because the correct interpretation of "modification" is that the equipment replacement must result in an increase in the hourly rate of emissions – which had not occurred. The District Court, however, did not accept this interpretation, ruling that a modification was triggered by an increase in actual annual emissions. Chief Judge Larry J. McKinney, who also presided over the NSR case against Southern Indiana Gas and Electric Co. in 2003, issued an order stating, "[t]he Court disagrees with both Cinergy and the *Duke Energy* court that the EPA's definition of 'actual emissions' means that 'a net emissions increase can result only from an increase in the hourly rate of emissions.'" The Cinergy trial is scheduled for February 2006. [For further information: Air Web – NSR and Enforcement Committee pages]

(6) States Seek Rehearing in GHG Emissions Court Case (August 30, 2005) – Six states and the District of Columbia requested that the full bench of the U.S. Court of Appeals for District of Columbia Circuit review their contention that EPA abrogated its duty to regulate greenhouse gas (GHG) emissions from automobiles. Earlier this summer, a three-judge panel of the court ruled 2-1 that EPA properly exercised its discretion under section 202(a)(1) of the Clean Air Act to reject a petition for rulemaking it received asking it to regulate carbon dioxide and other GHGs from new motor vehicles (see related article in the July 11-15, 2005 *Washington Update*). In the petition for rehearing, petitioners argue that EPA may not refuse to regulate GHGs simply because it opposes such regulation on policy grounds. In response to EPA's contention that global warming has not been "unequivocally established," petitioners note that EPA "never actually argues that any remaining scientific uncertainty is so great to prevent the agency from carrying out its statutorily-assigned role of determining whether such emissions are likely to cause harm." The states participating in the rehearing motion are Massachusetts, Maine, New Mexico, Oregon and Rhode Island, along with the District of Columbia. [For further information: www.ago.state.ma.us/sp.cfm?pageid=986&id=1465]

(7) Oregon Governor Announces New Steps to Address Global Warming (August 29, 2005) – Oregon Governor Ted Kulongoski announced that he was directing the state's Department of Environmental Quality (ODEQ) to begin work on administrative rules to implement greenhouse gas (GHG) emission standards for

cars, forming a Vehicle Emissions Workgroup to help identify and address issues related to this rule and establishing a workgroup to develop strategies to reduce carbon emissions from the electricity sector. Governor Kulongoski also announced his intent to veto a line in the ODEQ budget that would prevent the department from developing tailpipe GHG emission standards. These measures help implement the recommendations issued in April 2005 by the Governor's Advisory Group on Global Warming. [For further information: governor.oregon.gov/Gov/press_082905.shtml]

(8) North Carolina Legislature Passes Bill to Establish Commission on Global Warming (August 30, 2005) – North Carolina's legislature passed a bill establishing a legislative commission on global warming to "conduct an in-depth examination of issues related to global climate change." The Commission includes representatives of a broad range of stakeholders in the state, including electric utilities, other industry groups, environmental groups, university professors and researchers and the agricultural community. The Commission is charged with reviewing greenhouse gas (GHG) emissions in the state, the economic opportunities from reducing GHG emissions, the potential impacts of global warming on the state and the costs and benefits of actions taken to address global warming. The legislation provides that, if the Commission "determines that it would be appropriate and desirable for the State to establish a global warming pollutant reduction goal, the Commission may develop a recommended global warming pollutant reduction goal for the State." [For further information: Air Web – Global Warming Committee page]

(9) EPA Releases Interim Guidance on VOC Reactivity (September 1, 2005) – EPA released interim guidance encouraging states to consider VOC reactivity in developing VOC control measures for 8-hour ozone SIPs. According to EPA, the interim guidance does not change any existing rules and provides that EPA will continue its policy of granting VOC exemptions for compounds that are negligibly reactive. In the guidance, EPA encourages states – and particularly states with persistent ozone problems – to develop emissions inventories that include emission estimates for individual VOC species, as opposed to only estimating total VOC mass. With speciated emissions information, a state may develop control measures that specifically target sources of the most highly reactive VOCs. EPA also encourages states to select VOC controls on the basis of reactivity and to make VOC substitution and composition changes using reactivity-weighted emission limits. The policy will become effective upon publication in the *Federal Register*. [For further information: Air Web – In the News and Criteria Pollutants Committee pages]

(10) EPA Agrees in Settlement to Review NSPS for Petroleum Refineries (August 29, 2005) – EPA entered into a proposed consent decree to settle a lawsuit filed by Our Children's Earth Foundation and the Sierra Club alleging that EPA had failed to review and revise the New Source Performance Standards (NSPS) for petroleum refineries and equipment leaks. The consent decree sets the following schedule for EPA: 1) within 12 months of the entry into force of the consent decree, EPA must propose any appropriate revisions to the NSPS in subparts VV and GGG; 2) within 24 months of the entry into force of the consent decree, EPA must sign a

final rule containing any appropriate revisions to the NSPS in subparts VV and GGG; 3) within 18 months of the entry into force of the consent decree, EPA must propose any appropriate revisions to the NSPS in subpart J; and 4) within 30 months of the entry into force of the consent decree, EPA must sign a final rule containing any appropriate revisions to the NSPS in subpart J. The deadline for written comments to EPA on the proposed consent decree is September 28, 2005. [For further information: 70 *Federal Register* 51040]

(11) EPA Seeks Information on Calculating Emissions Reductions from Regulations Restricting VOC Content in AIM Coatings (August 31, 2005) – EPA issued an advance notice of proposed rulemaking seeking comments, data and information related to calculating the emissions reductions achieved in ozone nonattainment and maintenance areas from regulations limiting the VOC content of architectural and industrial maintenance (AIM) coatings. In the notice, EPA articulates its intent to “formulate a practicable, technically sound approach for calculating the VOC emissions achieved and creditable from the implementation of an AIM coatings rule in a given ozone nonattainment or maintenance area.” This approach could be used to account for the VOC emissions from the AIM coatings sector in compiling base year and projection emission inventories, demonstrating reasonable further progress and conducting modeling analyses as part of states’ ozone SIP planning activities. Interested parties should submit comments, data and information to EPA by October 17, 2005; any requests to meet with EPA should be made by September 30, 2005. [For further information: Air Web – Criteria Pollutants Committee page]

(12) EPA Releases Guidance on SIP Credit for Bundled Measures (August 29, 2005) – EPA released a final guidance document on how to obtain SIP credit from a group, or “bundle,” of pollution control measures or strategies considered in the aggregate. The document is intended to help states and localities that want to implement voluntary and emerging measures to reduce air pollution that may individually be too small or uncertain to include in a SIP, but could be bundled together to increase the amount of emission reductions and decrease the uncertainty associated with the reductions from each individual measure. It is the performance of the entire bundle (the sum of the emissions reductions from all the measures in the bundle) that is considered for SIP evaluation purposes, not the effectiveness of any individual measure. [For further information: Air Web – Criteria Pollutants Committee page]

(13) Ozone Air Quality Criteria Document Released for Comment (August 31, 2005) – EPA released the second external review draft of the revised air quality criteria document for ozone and related photochemical oxidants. Comments must be submitted to EPA by November 30, 2005. After the end of the comment period on the ozone criteria document, EPA will present the draft at a public meeting for review by the Clean Air Scientific Advisory Committee (CASAC). EPA is slated to prepare its first draft staff paper with recommendations for any change to the ozone standard in September; the ozone criteria document is to be completed by December 2005. EPA is required by a consent decree to propose a revised ozone

standard by March 2007 and finalize the standard by December 2007. [For further information: Air Web – Criteria Pollutants Committee page]

(14) EPA Finalizes Stay of NO_x SIP Call for Georgia (August 31, 2005) – EPA has finalized its decision to stay the application of the NO_x SIP Call to Georgia while it conducts rulemaking on a petition for reconsideration filed by the Georgia Coalition for Sound Environmental Policy (GCSEP). On April 16, 2004, EPA finalized its proposal to include northern Georgia and eastern Missouri in the NO_x SIP Call; however, on June 16, 2004, GCSEP filed a petition for reconsideration of the inclusion of Georgia in the NO_x SIP Call. In its August 31, 2005 *Federal Register* notice, EPA states that it anticipates that it will most likely propose to rescind or withdraw its findings that sources in Georgia emit NO_x in amounts that significantly contribute to nonattainment in both the former Birmingham, Alabama and Memphis, Tennessee nonattainment areas, since these areas have now been designated as 1-hour ozone attainment areas. The effect of this stay is that Georgia will have no obligation during the pendency of the stay to regulate NO_x emissions under the NO_x SIP Call Rule for purposes of addressing downwind nonattainment of the 1-hour ozone standard. [For further information: 70 *Federal Register* 51591]

(15) Steinberg Named Region 2 Administrator (August 26, 2005) – EPA Administrator Stephen L. Johnson has named Alan J. Steinberg as the new Administrator of EPA Region 2, with responsibility for managing EPA programs in New Jersey, New York, Puerto Rico, the U.S. Virgin Islands and seven Tribal Nations. Prior to this appointment, Steinberg served as the Region 2 Regional Advocate in the Small Business Administration Office of Advocacy. He also served as Executive Director of the New Jersey Meadowlands Commission under former New Jersey Governor (and former EPA Administrator) Christie Whitman. In that capacity, he was responsible for the environmental protection, orderly development and solid waste management of the New Jersey Meadowlands. Further, he formerly served as a Lieutenant in the U.S. Navy Judge Advocate General's Corps. Kathleen Callahan, who has been serving as Acting Regional Administrator since November 2004, will return to her former position as Deputy Regional Administrator.

(16) EPA Postpones Application Deadline for Innovative Approaches Grants (September 1, 2005) – Last week, at the *2005 Air Innovations Conference*, EPA announced the availability of two \$50,000 grants to facilitate state/local/tribal innovative approaches to reducing air pollution (see related article in August 22-26, 2005 *Washington Update*.) At that time, EPA announced that the deadline for submitting proposals was September 30, 2005. However, in order to be consistent with EPA Order 5700.5A1, the agency will be accepting proposals through an open competition process, which requires that the announcement be posted on www.fedgrants.gov, as well as EPA's web site. Applicants will then have 45 days from the date of posting to submit proposals. EPA anticipates that the grant announcement will be posted within the next two to three weeks. [For more information: www.fedgrants.gov or www.epa.gov]

(17) Department of Energy Awards \$16.5 Million for State Energy Efficiency and Renewable Energy Projects (August 30, 2005) – The U.S. Department of Energy (DOE) will provide over \$16.5 million for 178 energy efficiency and renewable energy projects in 42 states. Among the projects receiving funding are three that support states' efforts to quantify, verify or validate emission reductions achieved so that these reductions can be included in the states' SIPs. Other types of projects receiving funding include 1) alternative fuels and alternative-fueled vehicles as part of DOE's Clean Cities program; 2) improving efficiencies at industrial plants; 3) supporting states' actions to tighten building code standards; 4) supporting distributed energy; 5) encouraging biomass use; 6) identifying potential wind resources in states; 7) investigating the potential of micro inverters for solar technology; 8) bulk procurement of energy for federal buildings and regional energy reliability planning; and 9) supporting projects associated with DOE's Rebuild America and Building America programs. [For further information: energy.gov/engine/content.do?PUBLIC_ID=18603&BT_CODE=PR_PRESSRELEASES&TT_CODE=PRESSRELEASE]

The Week Ahead

- Labor Day – September 5, 2005
- Senate Committee on Energy and Natural Resources Hearing on Global Oil Demand/Gasoline Prices, in Washington, DC – September 6, 2005
- House Committee on Energy and Commerce Hearing on Hurricane Katrina's Effect on Gas Supply and Prices, in Washington, DC – September 7, 2005
- Environmental Council of the States 2005 Annual Meeting, in Kennebunkport, Maine – September 7-9, 2005

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