



This Week in Review – September 12-16, 2005

(1) Senate Rejects Resolution Opposing EPA Mercury Rule (September 13, 2005) – The Senate voted 51-47 against S.J. Resolution 20 – a resolution to disapprove EPA’s rule that delists power plants as a source of hazardous air pollutants under Section 112 of the Clean Air Act. The delisting rule was the first of the two regulations that EPA issued as part of its cap-and-trade strategy to address mercury emissions from power plants. On June 29, 2005, Senator Patrick Leahy (D-VT), along with 31 other senators, introduced S.J. Res. 20 under the Congressional Review Act, which is a little-used provision that allows Congress to overturn a regulation after it has been submitted to Congress. Following this week’s vote, Senator Leahy stated, “This was a debate that powerful special interests had been able to prevent, until now. We let some healthy sunshine into the Senate to expose a flawed rule that puts special interests over the health of the American people. Those with the biggest stake in this are some of our most vulnerable, America’s children and pregnant women. We have garnered more support than anyone thought possible just a few months ago when we began this effort. We can do better than this rule does on a whole range of clean air and clean water enforcement issues, and because of this strong showing, now there is new hope that we will do better next time.” A companion resolution has also been introduced in the House, although no action has been taken on that version.

(2) STAPPA, ALAPCO and OAQPS Leaders Meet (September 14-15 2005) – The STAPPA and ALAPCO Boards of Directors and Committee Chairs spent a day and a half in North Carolina meeting with senior management of EPA’s Office of Air Quality Planning and Standards (OAQPS). Discussions during the meeting with OAQPS Director Steve Page; Deputy Director Greg Green; Division Directors Bill Harnett (Information Transfer and Program Integration Division Director), Kay Holt (Planning, Resources and Regional Management Staff Division Director), Penny Lassiter (Emission Standards Division Associate Director), Peter Tsigotis (Emissions, Modeling and Analysis Division Director) and Lydia Wegman (Air Quality Strategies and Standards Division Director); and other OAQPS managers and staff, focused on current and upcoming issues of key importance and how STAPPA, ALAPCO and OAQPS can work together on these issues.

(3) STAPPA and ALAPCO Comment on Plywood MACT Reconsideration (September 12, 2005) – STAPPA and ALAPCO submitted comments to EPA in

response to the agency's reconsideration of the Maximum Achievable Control Technology (MACT) for Plywood and Composite Wood Products. The standard was issued on July 30, 2004 and contained risk-based exemptions that STAPPA and ALAPCO had opposed during the comment period (the exemptions would allow sources to escape MACT requirements if they make a demonstration of low risk). Several environmental groups sued EPA in opposition to the rule (with STAPPA and ALAPCO signing on as *amicus curiae*, or "friends of the court," in support of the environmental groups' suit) and also petitioned EPA to reconsider the rule. In response, EPA issued a notice of reconsideration and a proposed rule on July 29, 2005 (70 *Federal Register* 43826 and 44012, respectively) and requested comment. In the comment letter, STAPPA and ALAPCO reiterate their opposition to the risk-based exemptions, stating that they are, among other things, counter to the Clean Air Act's technology-based MACT program and would impose a burden on state and local air agencies. Additionally, the associations express concerns about the manner in which EPA plans to implement the exemptions. [For further information: Air Web – In the News and Air Toxics Committee pages]

(4) STAPPA and ALAPCO Comment on Reconsideration of Startup, Shutdown, Malfunction Plans (September 12, 2005) -- STAPPA and ALAPCO submitted comments to EPA opposing elimination of the requirement to implement Startup, Shutdown and Malfunction (SSM) Plans and also opposing limiting public access to these plans. In the comments, the associations urge that this reconsideration not be finalized for several reasons, including the illogic in requiring development, but not implementation, of plans; the necessity for compliance inspectors to have SSM plans as benchmarks for evaluating compliance with the general duty provisions; the benefit of maintaining a system that currently works reasonably well for many programs; and the importance of supplementing, rather than diminishing, regulations relating to emissions from malfunctions, or "upsets." STAPPA and ALAPCO also pointed out that, without SSM plans that must be executed, the general duty provisions would be vague, subjective, and unenforceable. In addition, the associations note that EPA itself has acknowledged that emissions from "upsets" are a national problem that must be addressed. Stating that state and local agencies should not be required to request facilities' plans in accord with Section 114 of the Clean Air Act, STAPPA and ALAPCO conclude, "[w]e strongly encourage EPA to revisit the conclusion that there should be, in effect, little – or sharply curtailed – public access to these plans." [For further information: Air Web – Air Toxics, Enforcement and Permitting Committee pages]

(5) Cinergy Attempts Appeal to the Seventh Circuit on NSR "Modification" Decision (September 12, 2006) – Cinergy Corp. is seeking certification from the U.S. District Court for the Southern District of Indiana that will allow it to immediately appeal to the Seventh Circuit Court of Appeals the issue of what constitutes a modification under New Source Review (NSR) provisions – rather than waiting until disposition of the issue at trial. One of the original "NSR Enforcement Initiative" cases filed in 1999, EPA alleged that process units at the facility's coal-burning power plants had been modified without permits or installation of pollution control equipment. On August 29, 2005, the Court, ruling on summary judgment motions, disagreed with Cinergy and with the U.S. Court of Appeals for the Fourth Circuit in the *Duke Energy*

case, specifically rejecting the *Duke* holding that a modification occurs only if there is an increase in the hourly rate of emissions. The Court stated, "if a physical change will result in a unit increasing its operating hours, the projected actual operating hours would include the increase." Cinergy is now seeking from the Seventh Circuit a ruling that the District Court erred in this interpretation. In a related action reported recently by the *Washington Post* and confirmed by agency officials, EPA is developing a rule that will adopt the hourly rate of emissions test for NSR modifications approved by the Fourth Circuit in *Duke* (see related article in August 29-September 2, 2005 *Washington Update*). [For further information: https://ecf.insd.uscourts.gov/cgi-bin/login.pl?987090926548344-L_238_0-1]

(6) EPA Extends Fuel Sulfur Waivers for Half Nation (September 13, 2005) – "Because of a continuing tight market for highway diesel fuel in some parts of the country," EPA issued a second temporary waiver of highway diesel fuel sulfur requirements for states that continue to experience the effects of fuel production and distribution disruptions caused by Hurricane Katrina. Under this action, nonroad diesel fuel may be used in highway diesel vehicles through October 5, 2005. Affected states include Alabama, Arkansas, Delaware, the District of Columbia, Connecticut, Florida, Georgia, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia and West Virginia. EPA also waived federal enforceability of state summertime gasoline requirements in California (until October 31), eastern Texas (until October 1) and Phoenix, Arizona (until September 30). EPA's earlier national waiver of summertime gasoline requirements expired September 15, 2005, as did the agency's waiver of fuel sulfur requirements, except in those aforementioned areas for which EPA has issued a second temporary waiver. [For further information: www.epa.gov/katrina/waivers.html]

(7) District Court Dismisses Global Warming Lawsuit Against Five Electric Utilities (September 15, 2005) – A judge with the U.S. District Court for the Southern District of New York has dismissed a lawsuit filed by several states and environmental groups against five large electric utilities seeking reductions in the utilities' greenhouse gas (GHG) emissions, saying that the case presents political questions best resolved by political branches of the government and not the judiciary. In her opinion, the judge writes that "[b]ecause resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, 'an initial policy determination of a kind clearly for non-judicial discretion' is required" (quoting a U.S. Supreme Court case regarding the test of whether non-justiciable political questions are presented in a case). According to press reports, the state of New York will appeal the decision. The other states involved in the matter are California, Connecticut, Iowa, New Jersey, Rhode Island, Vermont and Wisconsin; the city of New York is also a plaintiff. [For further information: www.nysd.uscourts.gov/rulings/04cv5669_04cv5670_091505.pdf]

(8) House Members Introduce Bill to Increase CAFE Standards (September 14, 2005) – In the wake of Hurricane Katrina and high gasoline prices, Representatives

Sherwood Boehlert (R-NY) and Edward Markey (D-MA) introduced legislation that would increase the fuel economy standard for cars and light-duty trucks to an average of 33 miles per gallon (mpg) by 2016. The current corporate average fuel economy (CAFE) standard is 27.5 mpg for cars and 21 mpg for light trucks, including sport utility vehicles. "Without a doubt, the biggest beneficiaries of this bill will be the American consumers. They are sick and tired of paying skyrocketing prices for gasoline. They want relief. This bill will provide it," remarked Representative Boehlert during the press conference to announce the legislation. Under the proposed standard, the Department of Transportation would create a "size-based" system providing auto manufacturers flexibility in requiring different fuel economy standards for different vehicle classes as long as the average is 33 mpg. [For more information: www.house.gov/markey/Issues/iss_energy_pr050914.pdf]

(9) EPA Issues MACT Standards for Hazardous Waste Combustors (September 16, 2005) – EPA issued final emission standards for hazardous waste combustors, including incinerators, lightweight aggregate kilns, boilers and process heaters, and hydrochloric acid production furnaces. The rule sets forth the Maximum Achievable Control Technology (MACT) standard that the combustors must meet in order to reduce emissions of lead, mercury, particulates, arsenic, dioxin, furans, hydrogen chloride and chlorine gas. According to EPA, the MACT requirements will apply to 145 facilities operating 265 existing hazardous waste burning devices. The rule becomes effective 60 days after *Federal Register* publication. [For further information: www.epa.gov/epaoswer/hazwaste/combust/finalmact/index.htm]

(10) EPA Sued by Environmental Group for Failure to Review Nitrogen Dioxide Standard (September 12, 2005) – The Center for Biological Diversity filed a lawsuit against EPA for failing to review and revise its nitrogen dioxide standard in accord with Section 109(d)(1) of the Clean Air Act, which provides that EPA shall undertake a thorough review of the standards promulgated under Section 108 and the National Ambient Air Quality Standards every five years. The Center, noting that the standard for nitrogen dioxide has not been revised in 20 years, pointed to studies of the effects of nitrogen dioxide on human health and the environment that have been released since promulgation of the standard. Specifically, the Center cited a study that found a correlation between Sudden Infant Death Syndrome and nitrogen dioxide, as well as studies that link asthma, bronchitis and respiratory tract symptoms to exposure to the pollutant. [For further information: Air Web – Enforcement Committee page]

(11) Study Finds Increasing Number of Companies Aware of Global Warming Risks (September 15, 2005) – The Carbon Disclosure Project reported that an increasing number of U.S. corporations take into account the risks and opportunities afforded by global warming. More than 90 percent of the Fortune 500 companies that responded to the Carbon Disclosure Project flagged global warming as posing commercial risk and/or opportunity to their business. Sixty-three percent of respondents are taking steps to assess their climate risk and institute strategies to reduce their greenhouse gas (GHG) emissions. However, only 51 percent of respondents have implemented emission reduction programs, only 45 percent have emission reduction targets and only 13 percent reported a reduction in GHG

emissions since the Project's last report in May 2004. [For further information: www.cdproject.net]

(12) U.S., Canada to Reduce Cross-Boarder Freight Emissions (September 14, 2005) – EPA entered a partnership with Natural Resources Canada (NRCan) to save up to 440 million gallons of fuel and reduce carbon dioxide emissions by 5 million tons per year from the freight industry. Voluntary emission reduction projects include reduced idling, expanded use of clean technologies and driver training and awareness. The partnership will incorporate EPA's SmartWay Transport Partnership and NRCan's FleetSmart. SmartWay emphasizes the deployment of innovative technologies. FleetSmart specializes in driver education and training. [For more information: www.epa.gov/smartway]

(13) EPA Interim Guidance on VOC Reactivity Published in the *Federal Register* (September 13, 2005) – EPA has published in the *Federal Register* interim guidance encouraging states to consider VOC reactivity in developing VOC control measures for 8-hour ozone SIPs. The guidance, which is effective immediately, was described in the September 2, 2005 *Washington Update*. [For further information: Air Web – Criteria Pollutants Committee page]

(14) U.S. Department of Agriculture Awards Nearly \$21 Million for Energy Efficiency and Renewable Energy Projects (September 15, 2005) – Secretary of Agriculture Mike Johanns awarded \$20.8 million to 150 applicants in 32 states, with \$19.2 million of that amount for renewable energy projects and \$1.6 million for energy efficiency projects related to agriculture. The technologies funded include anaerobic digesters, biomass and bioenergy, geothermal, solar and wind. [For further information: www.rurdev.usda.gov]

The Week Ahead

- Senate Energy and Natural Resources Committee Hearing on Current State of Climate Change Scientific Research and the Economics of Strategies to Manage Climate Change, in Washington, DC – September 20, 2005

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