



This Week in Review – October 10-14, 2005

(1) **EPA Releases Proposed Emissions Test for NSR Modifications at Electric Generating Units (October 13, 2005)** – EPA has released its anticipated response to the Fourth Circuit Court of Appeals ruling in the *Duke Energy* New Source Review (NSR) case. In accord with that decision, the agency proposes that emissions increases from electric generating units (EGUs) making modifications should be based on whether there has been an increase in the hourly rate of emissions, rather than an increase in actual annual emissions. What triggers a “modification” under NSR has been litigated in several of the “NSR Initiative” cases filed by EPA in 1999 against coal-fired utilities that allegedly made modifications without installing pollution control equipment or obtaining PSD or nonattainment NSR permits. EPA now proposes – and requests comment on – three options to determine if changes should be subject to NSR. Under the first option, NSR would be triggered when there is an increase in maximum achievable hourly emissions, the same test as that used in the New Source Performance Standards (NSPS) program. EPA states, “[w]e would compare the maximum hourly emissions achievable at that unit during the past five years (considering installed controls) to the maximum hourly emissions achievable at that unit after the change...based on emissions at actual operating capacity.” The second option would measure emissions increases by comparing the maximum hourly emissions projected to be achieved at a unit after the change to the highest hourly rate at which the unit actually emitted a pollutant at any time during the five-year period immediately before the change. The third, or output-based test, would establish an NSR emissions increase test based on mass of emissions per unit of energy output rather than an hourly emissions rate. Although the Fourth Circuit embraced the NSPS test in *Duke Energy*, other courts have not. In *New York v. EPA*, the D.C. Circuit stated that it “was not convinced” by the reasoning of the Fourth Circuit requiring the definition of “modification” to be identical in the NSR and NSPS programs. More recently, the Southern District Court in Indiana also pointedly disagreed with the *Duke Energy* ruling, ruling on summary judgment that increases in actual annual emissions were the right test, but later acceding to the utility request that the decision be appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit has not issued a decision on whether to accept the appeal. Meanwhile, environmental groups and EPA’s Office of Enforcement and Compliance Assurance believe that, under the proposed rule, NSR would never be triggered by EGU modifications. OECA and environmental groups further believe that the rule is

largely unenforceable as written and that its promulgation would adversely impact the NSR enforcement cases. A statement released by the New York Attorney General's Office concludes, "If this proposal is adopted, state Attorneys General will challenge it in court." [For further information: Air Web – NSR and Enforcement Committee pages]

(2) U.S. Court of Appeals Vacates EPA's "Umbrella" Monitoring Rule (October 7, 2005) – The U. S. Court of Appeals for the District of Columbia vacated EPA's "umbrella" monitoring rule, agreeing with the Environmental Integrity Project (EIP) that the final rule should have been subject to separate notice and comment rulemaking under the Administrative Procedures Act because it was not a logical outgrowth of the interim proposed rule. EPA's proposed rule, published on September 17, 2002, embodied the decisions reached by the agency in separate challenges to two Title V permits, *In the Matter of Pacificorp* and *In the Matter of Fort James Camas Mill*. In summary form and read together, those cases stand for the conclusion that when there is no monitoring required in a permit, the periodic monitoring requirements of Part 70 will apply, but that when there is some monitoring in a permit, but it is considered by the permitting authority to be insufficient to assure compliance, then the separate Part 70 provisions for "monitoring sufficient to assure compliance" will apply. EPA's final umbrella monitoring rule stated that the provision for sufficiency monitoring "do[es] not establish a separate regulatory standard." In the Court's words, the final rule "prohibited [states] from adding new monitoring requirements...if the Title V permit already contains some (albeit insufficient) monitoring under the periodic monitoring rule." The D.C. Circuit concluded, "we have refused to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities." Rejecting EPA's characterization of the final rule as a "mere 'interpretation,'" the Court vacated it, concluding that "[t]his flip flop complies with the [Administrative Procedures Act] only if preceded by adequate notice and opportunity for public comment." [For further information: Air Web – Enforcement and Permitting Committee pages]

(3) EPA Settles with ExxonMobil Refineries in Five States (October 11, 2005) – EPA has reached settlement with ExxonMobil's seven U.S. petroleum refineries in Baton Rouge, Louisiana; Baytown, Texas; Beaumont, Texas; Billings, Montana; Chalmette, Louisiana; Joliet, Illinois; and Torrance, California. Over the last several years, EPA has been pursuing its Refinery Initiative in an effort to reduce refinery emissions nationwide. According to EPA, this settlement, which is the seventeenth to have been reached jointly by EPA and the Department of Justice, brings nearly 77 percent of domestic refining capacity under consent decrees. No litigation has been involved in any of the settlements. The terms of the ExxonMobil settlement, arrived at through negotiation of two separate consent decrees, require the company to install innovative control technologies to reduce NO_x emissions by 11,000 tons per year and SO₂ by over 42,000 tons per year. In addition, the consent decrees require the company to upgrade leak detection and repair practices, minimize flaring and reduce emissions from its sulfur recovery plants. ExxonMobil estimates that the cost of complying with the pollution control requirements will total \$571 million. Additionally, \$8.7 million in civil penalties will be shared by the parties to the

settlement, which include the states of Illinois, Louisiana and Montana; and \$9.7 million in Supplemental Environmental Projects will fund projects in communities located around the refineries. The consent decree is subject to a 30-day comment period. [For further information: www.usdoj.gov/enrd/open.html]

(4) Rhode Island to Adopt California's Motor Vehicle Greenhouse Standards (October 13, 2005) – Rhode Island Governor Donald L. Carcieri proposed to amend the state's air pollution control regulations to reduce greenhouse gas emissions from motor vehicles. Said Governor Carcieri, "In announcing our intention to adopt California's greenhouse gas emissions standards, we are affirming our commitment to improving air quality and reducing greenhouse gases in the Ocean State. When fully implemented, these standards will reduce greenhouse gas emissions from vehicles by 30 percent, and do so while saving money for purchasers of new vehicles." The amendments, which the Governor expects will be adopted by the end of this year, would apply to new vehicles sold in Rhode Island beginning with model year 2009. Rhode Island joins Connecticut, Maine, Massachusetts, New Jersey, New York and Vermont in adopting California's standards. [For further information: www.ri.gov/GOVERNOR/]

(5) STAPPA and ALAPCO Comment on Gasoline Distribution Residual Risk (October 11, 2005) – STAPPA and ALAPCO submitted comments on EPA's proposed decision related to the Residual Risk Standard for Gasoline Distribution Facilities, which was published in the *Federal Register* on August 10, 2005. EPA had decided that residual risk controls on those sources are not necessary. STAPPA and ALAPCO expressed concern about the methodology EPA used in arriving at that decision, especially due to the precedent-setting nature of the agency's process. Specifically, STAPPA and ALAPCO opposed EPA's use of estimates of exposure to census-block centroids to assess cancer risks to the population, rather than the more traditional property-line concentration. Additionally, the associations questioned EPA's use of actual reported emissions, rather than potential emissions, in evaluating residual risk. [For further information: Air Web – In the News and Air Toxics Committee pages]

(6) EPA, DOE Release Model Year 2006 Fuel Economy Guide (October 12, 2005) – In their new fuel economy guide, EPA and the Department of Energy report that gasoline-electric hybrids and diesel-powered automobiles are the most fuel-efficient vehicles, with the Honda Insight leading the pack with a gasoline mileage rating of 60 miles per gallon (mpg) for city driving and 66 mpg on the highway. The least fuel-efficient vehicles are several large pickup trucks and passenger vehicles, with the Dodge RAM 1500 pickup truck as the least fuel-efficient with only 9 mpg for city driving and 12 mpg on the highway. Trucks with a gross vehicle weight of 8,500 pounds or greater are exempt from federal fuel economy requirements. The fuel economy guide is made available each year to help customers make better-informed decisions when purchasing new vehicles. [For more information: www.fueleconomy.gov/feg/feg2000.htm]

(7) EPA Issues Final MACT for Hazardous Waste Combustors (October 12, 2005) – EPA has published final Maximum Achievable Control Technology (MACT) standards to limit emissions of hazardous air pollutants from hazardous waste combustors. Affected facilities are those that burn hazardous waste and include incinerators, cement kilns, lightweight aggregate kilns, industrial/commercial/institutional boilers and process heaters and hydrochloric acid production furnaces. According to EPA estimates, there are 145 facilities operating 265 devices that are affected by this rule. The regulation is designed to reduce emissions of lead, mercury, arsenic, dioxin and furans, hydrogen chloride and chlorine gas, and particulate matter. EPA originally published a Hazardous Waste Combustors MACT on September 30, 1999 (covering just incinerators and cement kilns), which environmental groups and industry challenged. In July 2001, the court vacated the rule and allowed EPA to issue interim standards, which have been in effect since February 2002. EPA proposed new standards on April 20, 2004, which included additional types of incinerators. [For further information: 70 *Federal Register* 57822]

(8) EPA Extends Comment Period to Solicit Information on Calculating VOC Reductions From AIM Coating Regulations (October 13, 2005) – EPA is extending the comment period for submission of information for determining how to calculate the reductions in volatile organic compounds (VOC) emissions achieved in ozone nonattainment and maintenance areas from the implementation of rules that limit the VOC content of architectural industrial maintenance (AIM) coatings. The comment period is extended to December 16, 2005. Anyone wishing to meet with EPA should contact the agency by November 28, 2005. [For further information: 70 *Federal Register* 59680 and 70 *Federal Register* 516940]

The Week Ahead

- Renewable Energy in America: Policies for Phase II, in Washington, DC – October 17-18, 2005
- Senate Environment and Public Works Committee Hearing on S. 1772, the “Gas Petroleum Refiner Improvement and Community Empowerment Act,” in Washington, DC – October 18, 2005
- Meeting of the Air Quality Management Subcommittee of EPA’s Clean Air Act Advisory Committee, in San Diego, California – October 18-19, 2005

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