



This Week in Review – October 31-November 4, 2005

(1) DOJ Opposes Seventh Circuit Court of Appeals Hearing on *Cinergy* NSR Case (November 3, 2005) –The Department of Justice opposed Cinergy Corporation's attempt to interrupt the course of the trial proceedings in the Southern District Court of Indiana with an interlocutory appeal to the Seventh Circuit. One of the original "New Source Review (NSR) Initiative" enforcement cases brought by EPA in 1999, *Cinergy* is currently slated for trial in February. The Court ruled on summary judgment in August that emissions increases for purposes of NSR should be judged on the basis of actual annual emissions. When, however, Cinergy Corporation sought an immediate – interlocutory – appeal of this issue to the Seventh Circuit, presiding judge, Larry McKinney, allowed it. Cinergy is now attempting to persuade the Seventh Circuit to accept the appeal; DOJ is arguing that it should be rejected. The government's brief argues that there is no controversy within the Seventh Circuit on the issue of what increases in emissions trigger new source review (NSR), pointing to the *Wisconsin Elec. Power Co. v. Reilly (WEPCO)* case—and, therefore, no reason for an appeal. In support of this argument,, DOJ points to the summary judgment opinion in the *Cinergy* Court, in which the Court stated, "[t]he Seventh Circuit in *WEPCO* recognized that for NSPS purposes, the EPA would determine whether a source's hourly rate increased and that for PSD purposes, the EPA would determine whether a source's total amount of emissions would increase." The brief also contends that *Duke Energy*, which held that, in the Fourth Circuit, NSR is only triggered by an increase in the hourly rate of emissions, was wrongly decided for several reasons. [For further information: Air Web – NSR Committee page]

(2) EPA Publishes Mercury Utility Reconsideration, Opening Public Comment Period (October 28, 2005) – EPA published two notices in the *Federal Register* on the agency's reconsideration of two rules related to emissions of mercury from utilities. Publication of the reconsideration notices officially began the 45-day public comment period, which will end on December 19, 2005. As described in the October 28, 2005 *Washington Update*, the rules under reconsideration, which were issued on March 15, 2005, implemented a cap-and-trade program under Section 111 of the Clean Air Act to address emissions of mercury from power plants and removed coal- and oil-fired electric steam generating units from the air toxics source category list under Section 112. EPA has announced that it will reconsider only certain aspects of each rule. EPA also plans to hold a public hearing on the two on November 17, 2005

in Research Triangle Park, NC. [For further information: 70 *Federal Register* 62199 and 62213]

(3) STAPPA and ALAPCO Comment on Performance Track Program (October 31, 2005) – STAPPA and ALAPCO provided comments on EPA's Performance Track program, which is designed to provide special recognition to facilities that undertake significant, environmentally beneficial programs. While the associations support appropriate acknowledgement of exemplary performance, they expressed several concerns with EPA's proposal. First, the program should not be further expanded without publicly noticing specific and detailed Performance Track plans, regulatory incentives, and activities to date in order that a wide range of stakeholders, including state and local air pollution agencies, have an opportunity to comment and request a public hearing. Second, the associations recommended that the bar for admission to this program be raised. For example, an applicant's compliance history could demonstrate a longer history of compliance than the current test, which allows two violations in the last three years. Finally, the associations request public notice of all planned and existing "incentives," including the "low priority for inspection," which has been interpreted by EPA to mean no inspections [by the ten states that have agreed to this incentive] unless there is information that serious problems may exist, such as criminal activity, major compliance problems in a priority area of concern to the agency, or endangerment. [For further information: Air Web – Permitting and Enforcement Committee pages]

(4) EPA's Proposed PM_{2.5} Implementation Rule Published in the *Federal Register* (November 1, 2005) – EPA published in the *Federal Register* its proposed rule for implementing the fine particulate matter (PM_{2.5}) standard promulgated in 1997. Comments on the proposal are due by January 3, 2006. EPA will hold one public hearing; while the date and location of the public hearing are not specified in the notice, EPA informed STAPPA and ALAPCO that the likely date and location for the public hearing are November 30, 2005 in Washington, DC, with a one-day meeting with the associations the day before the hearing. [For further information: Air Web – Criteria Pollutants Committee page]

(5) CARB Revises NO_x Emission Standard for Public Transit Buses (October 31, 2005) – California's Air Resources Board (CARB) decided to relax the nitrogen oxide (NO_x) limits for 2007-2009 public transit buses: instead of meeting a limitation of 0.2 grams per hour, buses in 2007 may emit no more than 1.2 grams of NO_x per hour. In 2010, transit buses will need to meet an emissions standard of 0.2 grams per hour of NO_x; this is the same time EPA will begin to enforce an equivalent federal standard. CARB reportedly made this decision after learning that the proposed limits would disqualify operators of alternative fuel buses from receiving state-funded grants and that diesel manufacturers were having difficulty meeting the standard of 0.5 grams per hour enforced last year. [For further information: www.arb.ca.gov/board/ma/2005/ma102705.html]

(6) EPA Proposes Changes to Boiler MACT Emissions Averaging (October 31, 2005) – As the result of an industry request, EPA is proposing changes to the MACT for Industrial, Commercial, and Institutional Boilers and Process Heaters and is announcing a reconsideration related to emissions averaging for commonly vented boilers. The current rule allows sources to average emissions from several boilers at the same site, but requires emissions at each boiler to be measured. Industry has asked EPA to allow facilities to test groups of boilers at their commonly vented stack, rather than measure emissions at each boiler. EPA is requesting comment on this proposal and seeking input on how the emissions averaging could be implemented at a common stack. The boiler MACT is the subject of a separate reconsideration related to the use of risk-based exemptions (which STAPPA and ALAPCO have opposed in comments on the reconsideration). EPA will accept public comments until December 15, 2005. [For further information: 70 *Federal Register* 62264]

(7) International Climate Summit Concludes With Agreement on Technology (November 2, 2005) – Senior officials from major industrialized countries and developing countries concluded a global warming meeting in London, United Kingdom with a roadmap focused on technology investment and deployment in order to reduce greenhouse gas (GHG) emissions. The “chairman’s conclusion” statement released at the end of the meeting noted the need for a transition to a low-carbon economy since GHG emissions “must slow, peak and decline and will need to be reduced to well below the levels we see today.” The statement also set out some goals for transferring low-emitting technology to developing countries. In addition, according to the statement, there are a plethora of technologies that can be deployed in the short term to reduce emissions; however, the challenge is to create the incentives for private sector investment, including through market-based instruments and carbon finance. Attendees included representatives from the “G8” countries (Canada, France, Germany, Italy, Japan, Russia, the United Kingdom and the United States) and from Australia, Brazil, China, India, Indonesia, Mexico, Nigeria, Poland, South Africa, South Korea and Spain, and by senior officials from organizations including the World Bank, UN Framework Convention on Climate Change, Intergovernmental Panel on Climate Change, International Energy Agency and the United Nations Environment Program. [For further information: www.number-10.gov.uk/output/Page8423.asp]

(8) Modeling of Long-Term Global Warming Predicts Dramatic Rise in Global Temperature and Impacts on Sea Level and Polar Regions (November 2, 2005) – Researchers at Lawrence Livermore National Laboratory (LLNL) modeled the impacts to the Earth if humans continued to use fossil fuels in a business-as-usual manner and found that this would result in a median temperature rise of 14.5 degrees Fahrenheit, a sea level rise of seven meters and the disappearance of the polar ice caps by 2300. In the polar regions alone, the temperature would spike more than 20 degrees Celsius, forcing the land in the region to change from ice and tundra to boreal forests. Today’s level of atmospheric carbon dioxide is 380 parts per million (ppm). By the year 2300, the model predicts that amount would nearly quadruple to 1,423 ppm. [For further information: www.llnl.gov/pao/news/news_releases/2005/NR-05-11-01.html]

(9) EPA Awards Grants for Local Environmental Protection Projects (November 3, 2005) – Twelve communities across the United States have been awarded grants by EPA to reduce the risk of exposure to toxic chemicals and enhance community education. The grants, which total \$2 million, were awarded under EPA's new Community Action for a Renewed Environment (CARE) program established to help communities develop partnership programs to achieve local environmental protection goals. Award recipients will address a wide variety of environmental health issues in both rural and urban areas. CARE grants are awarded on two levels. Level I grants, which are approximately \$85,000, help communities organize and create collaborative partnerships dedicated to reducing toxics in their local environments. Level II grants are approximately \$300,000 and are awarded to communities that have already established broad-based partnerships and have identified the priority toxic risks in the community. [For further information: www.epa.gov/care]

(10) Utah Is Granted Enforcement Discretion for Utah County Oxygenated Fuel Program (October 28, 2005) – EPA extended enforcement discretion granted July 29, 2004 until March 1, 2006 or such time as EPA finally takes action on a SIP revision for Utah County that eliminates the 2.7 weight (wt%) oxy fuel requirement. EPA had previously determined that the Provo metropolitan area had achieved the carbon monoxide (CO) attainment standard by the December 31, 1995 deadline, but did not re-designate the Provo metropolitan area as attainment for CO pending the agency's approval of a maintenance plan for the area. EPA's letter to the president of the Utah Petroleum Association states that it has not yet completed the SIP revision, which demonstrates that an oxygenated gasoline program is no longer necessary in Utah County, but anticipates doing so within the next three months. [For further information: http://www.epa.gov/otaq/rfg_regs.htm#waiver]

(11) EPA Grants Fuel Sulfur Waiver to Northern Mariana Islands, American Samoa, and Guam (October 31, 2005) – EPA extended its August 18, 2004 grant of enforcement discretion not to enforce the gasoline sulfur regulations under 40 C.F.R. Part 80, Subpart H in the Commonwealth of the Northern Mariana Islands, American Samoa, and the Territory of Guam. According to EPA's letter to the three jurisdictions, the exercise of enforcement discretion, which expired on October 31, 2005, "was granted as a bridge to a rule change being conducted by the EPA that would exempt [them] from the Gasoline Sulfur Regulations." EPA stated further that the enforcement discretion was granted because implementing the fuel sulfur requirements could result in gasoline supply problems due to the distribution of gasoline to Western Pacific markets from refineries located in that region. In addition, the letter stated, "the unique climatic conditions on these islands" makes the fuel sulfur regulations unnecessary for attainment of the national ambient air quality standards. The enforcement discretion will extend until the permanent exemption is finalized. [For further information: http://www.epa.gov/otaq/rfg_regs.htm#waiver]

(12) EPA Deems Two Types of HCFCs Unacceptable Alternatives to Ozone-Depleting Substances (November 4, 2005) – EPA is proposing to determine that HCFC-22 and HCFC-142b are unacceptable as substitutes for CFCs for use in the

foam sector. EPA is proposing to prohibit users of HCFC-141b to switch to HCFC-22 or HCFC-142b in commercial refrigeration, sandwich panels, slabstock and other foams end uses because ozone-friendly alternatives are technically viable and available. In addition, EPA proposes to prohibit any new use of HCFC-22 and HFC-142b as substitutes for CFCs in all foam end uses for the same reason. HCFC-22 and HFC-142b, which are ozone-depleting substances, are scheduled to be phased out of production and import in the U.S. on January 1, 2010, but EPA had allowed their use because it believed they were necessary transitions from CFCs, but since that time, alternative ozone-friendly substances have been developed. Comments are due on or before December 5, 2005; however, if a public hearing is requested by November 21, 2005, a hearing will be held on December 5, 2005 and the comment period extended until January 3, 2006. [For further information: 70 *Federal Register* 67120]

The Week Ahead

- Web-cast Training on STAPPA/ALAPCO's Clean Air and Climate Protection Software – November 7, 2005
- Senate Environment and Public Works Committee, Subcommittee on Clean Air, Climate Change and Nuclear Safety Subcommittee, Hearing to Examine Implementation of Existing Particulate Matter and Ozone NAAQS, in Washington, DC – November 10, 2005
- House Committee on Resources Task Force on Improving the National Environmental Policy Act, in Washington, DC – November 10, 2005
- Veteran's Day Holiday – November 11, 2005

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