



This Week in Review – November 28-December 2, 2005

(1) **STAPPA and ALAPCO Testify on EPA's Proposed PM_{2.5} Implementation Rule (November 30, 2005)** – John Paul (Dayton, OH), ALAPCO President, testified on behalf of STAPPA and ALAPCO at a public hearing convened by EPA on the agency's proposed rule to implement the fine particle (PM_{2.5}) standard. The associations commented on several aspects of the proposal, including provisions related to Reasonably Available Control Technology (RACT) and New Source Review (NSR). With respect to RACT, the associations strongly disagree with EPA's proposal that electric generating units (EGUs) complying with the agency's Clean Air Interstate Rule (CAIR) should be exempt from meeting Clean Air Act requirements to install RACT. With respect to NSR, the associations support adoption of the basic NSR regulatory framework for Prevention of Significant Deterioration (PSD) and nonattainment NSR for direct emissions of PM_{2.5} and agree that PM_{2.5} precursors should also be subject to NSR regulation (though the associations are still discussing what sort of consideration each precursor should be given). In addition, the associations support certain flexibilities in the proposal for states and localities, including the ability of states and localities to make adjustments in offset ratios for direct and precursor emissions in nonattainment areas, as long as a net air quality benefit is achieved. The associations also support measures in the proposed rule that harmonize the significance levels for PM_{2.5} precursors with the significance levels for SO_x, NO_x and VOCs as criteria pollutants. Finally, the associations note in their testimony that if EPA adopts the proposed changes to the definition of "modification" as proposed in 70 *Federal Register* 61081, the ambient air quality impacts of PM_{2.5} emission increases from EGUs will not be evaluated and uncontrolled increases in annual emissions of direct PM_{2.5} and precursor emissions will result, impairing public health and the environment. [For further information: Air Web – In the News and Criteria Pollutants Committee pages]

(2) **EPA Does Not Appeal *Duke Energy* Decision to the Supreme Court (November 28, 2005)** – EPA let pass the November 28, 2005 deadline for appealing the *Duke Energy* decision of the Fourth Circuit Court of Appeals to the Supreme Court. EPA released a statement saying, "[w]hile we were disappointed that the Fourth Circuit did not grant the United States' petition for rehearing in this important Clean Air Act enforcement case, the United States Solicitor General has decided that this case does not present the 'compelling reasons' required under the Supreme Court's rules for filing a petition for a writ of certiorari." On October 13, 2005, EPA

proposed a rule for electric generating units that would require the other 45 states in the country to adopt the increase-in-hourly-emissions test for triggering New Source Review that was mandated by the Fourth Circuit in June for the five states in its jurisdiction. Three environmental groups that had intervened in the case have until December 28, 2005 to appeal.

(3) CRS Calls EPA's Analysis of Multi-Pollutant Bills "Limited and Incomplete" (November 23, 2005) – The Congressional Research Service (CRS) published a report, *Costs and Benefits of Clear Skies: EPA's Analysis of Multi-Pollutant Clean Air Bills*. In the report, CRS examines EPA's October 27, 2005 analysis of the costs and benefits of various versions of Clear Skies, as well as of Senator Jefford's multi-pollutant bill (S. 150) and Senator Carper's multi-pollutant bill (S. 843), concluding that "EPA's benefit analysis is limited and incomplete, which works to the disadvantage of alternatives to Clear Skies that include more stringent standards." Accordingly, CRS adjusted some of the agency's assumptions to reflect current regulations and then re-estimated costs and benefits. The key adjustment made by CRS was to the baseline, which EPA assumed would include no additional actions to control nitrogen oxides (NO_x), sulfur dioxide (SO₂), mercury (Hg) or carbon dioxide beyond those finalized by mid-2004, even though EPA recently promulgated three rules – CAIR, CAMR and CAVR – limiting NO_x, SO₂ and Hg in a similar timeframe as proposed in Clear Skies. According to CRS, "Why EPA chose not to include three finalized rules that clearly delineate EPA's current approach to addressing NO_x, SO₂ and Hg control is unclear." By using an adjusted baseline reflecting the new EPA rules, CRS concluded that Clear Skies would have "essentially no incremental cost. Its benefits are also relatively small – equal to an additional 10% of the benefits of the newly promulgated rules in 2010 and only 2% of the benefits in 2020." CRS also concludes, "That Clear Skies has the lowest cost should not be surprising. Compared to the other bills, it has less stringent requirements and later deadlines, so, particularly in the early years, there is a vast difference in the annual costs of the three approaches. In particular, the provisions with respect to Hg are weak compared with the other two bills and there are no provisions for CO₂. More importantly, as discussed in a previous CRS report, Clear Skies is principally an attempt to revamp the Clean Air Act's existing structure with something more cost-effective." [For further information: Air Web – Energy Committee page]

(4) Four States Act on Vehicle GHG Rules – Over the past two weeks, four states have significantly advanced their efforts to adopt California's clean car and light-duty truck standards. On December 1, 2005, Maine's Board of Environmental Protection voted unanimously in favor of regulations to update its existing clean car standards to include greenhouse gas (GHG) reduction standards, as well. The California standards will take effect in Maine with the 2009 model year (MY). On November 30, 2005, Washington Governor Christine Gregoire signed the state's clean car rule enacting legislation passed earlier this year adopting California's emission standards. In announcing this action, Governor Gregoire stated, "The clean car law is the most important piece of environmental legislation adopted in our state in this decade. It will improve the quality of the air we breathe, enhance public health and help prevent global warming." The standards will apply in Washington beginning with MY 2009,

provided the state of Oregon passes a similar program. Toward that end, on November 23, 2005, Oregon Governor Theodore R. Kulongoski sent a letter to Stephanie Hallock, Director of the state's Department of Environmental Quality, directing the Department to begin the process of developing rules to regulate vehicle tailpipe emissions in Oregon on a schedule to allow the state's Environmental Quality Commission to consider a proposal later this month. On November 29, 2005, Connecticut Attorney General Richard Blumenthal and Connecticut Department of Environmental Protection Commissioner Gina McCarthy announced their state's proposed rules to implement the California Low-Emission Vehicle II (LEV II) program, including GHG standards; the standards will take effect with MY 2009. To date, ten states – representing an estimated one-third of the nation's automobile sales – have adopted or moved to adopt California's LEV II program: Connecticut, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington. [For further information: www.governor.wa.gov/news, governor.oregon.gov/Gov/pdf/letters/deq112305.pdf and dep.state.ct.us/whatschap/press/2005/112905.htm]

(5) International Global Warming Meeting Kicks Off in Montreal (November 28, 2005) – An historic international high-level global warming meeting began this week – historic because it is the first such meeting held since the Kyoto Protocol entered into force in February 2005. This is the eleventh meeting of the 189 parties to the United Nations Framework Convention on Climate Change (UNFCCC) and the first meeting of the 157 parties to the Kyoto Protocol. The U.S. is a party to the UNFCCC but not to the Kyoto Protocol, and therefore the U.S. has only “observer” status in discussions on implementation of the Kyoto Protocol. One of the main objectives of this meeting – to formally adopt the decisions contained in the Marrakesh Accords (agreed to at the seventh Conference of the Parties) – has already been accomplished; the decisions were adopted on November 30, 2005. In addition, the Kyoto Protocol parties will discuss commitments for developed countries after 2012 (the Kyoto Protocol targets only address 2008 to 2012). At the meeting, the U.S. said it would not be part of “a legally binding targets and timetables agreement post-2012.” High-level ministerial meetings begin on December 7, 2005; the meeting concludes on December 9, 2005. STAPPA and ALAPCO representatives at the meeting next week will provide daily reports, which will be posted on Air Web. [For further information: unfccc.int/meetings/cop_11/items/3394.php and www.state.gov/g/oes/rls/rm/57449.htm]

(6) D.C. Circuit Court Rejects Challenges to Eight-Hour Ozone Designations (November 29, 2005) – The U.S. Court of Appeals for the D.C. Circuit rejected challenges to the 8-hour ozone designations filed by Delaware and Pennsylvania. The two states challenged EPA's rule designating 8-hour ozone areas, arguing that EPA's inconsistent consideration of downwind effects rendered the Ocean County, New Jersey, and Cecil County, Maryland, designations arbitrary and capricious. Delaware also argued that EPA should have established a much larger nonattainment area encompassing the entire Northeast corridor. The court rejected both claims, finding that EPA's decision to place Ocean and Cecil counties in the Philadelphia, Pennsylvania nonattainment area was not arbitrary and capricious. In assigning

Ocean and Cecil counties to the Philadelphia nonattainment area, the court found that EPA adhered to its policy of only changing designations when an 11-factor analysis and EPA data support it. With respect to Delaware's contention that all counties from Virginia to Maine are nonattainment areas, all are "nearby" and nothing in the statute prevents placing them in one contiguous area, the court found that, given the discretion in the Act given to EPA, and Delaware's failure to submit an 11-factor analysis, "Delaware has offered us no basis for questioning EPA's rejection of its proposal to establish a broad, interstate nonattainment area."

(7) Sierra Club Lawsuit Alleging TVA Opacity Violations Based on Credible Evidence Rule Allowed to Proceed by Eleventh Circuit (November 22, 2005) –

The U.S. Court of Appeals for the Eleventh Circuit struck down part of a District Court decision against the Tennessee Valley Authority (TVA) but upheld the lower court's conclusion that the plaintiffs' civil penalty claims were barred by sovereign immunity. The Sierra Club and the Alabama Environmental Council had sued TVA, claiming that TVA's plant in Colbert County, Alabama violated the state's 20-percent opacity limitation more than 8,900 times during the five-year period from 1997 to 2002. TVA had claimed that its violations were within the state's 2-percent *de minimis* rule, and also asserted that violations could only be established by use of Reference Method 9 (through which a state-certified observer visually gauges opacity) rather than by continuous opacity monitors (COMS). The Eleventh Circuit struck down the District Court's affirmation of the 2-percent *de minimis* rule – which had allowed the plant to exceed the 20-percent opacity limitation for up to 2 percent of its operating hours in each quarter – on the grounds that the rule had never been submitted to EPA as a modification of the SIP. With regard to the use of "the relentlessly effective COMS method" of detecting opacity violations, the Eleventh Circuit agreed with the lower court that the Alabama Code specifically provided for compliance with opacity violations to be determined by Method 9. Therefore, COMS could only be used to establish a violation after May 20, 1999, when Alabama enacted a "credible evidence" rule allowing "any [relevant] credible evidence or information" to establish violations. The case was remanded to the District Court for further proceedings. [For further information: Air Web – Enforcement and Permitting Committee pages]

(8) EPA Establishes Standards for "Other Solid Waste Incinerators" (December 1, 2005) –

EPA published final New Source Performance Standards (NSPS) and Emission Guidelines for the source category of "Other Solid Waste Incinerators," which includes very small municipal waste combustion units (those that burn less than 35 tons per day of municipal solid waste) and institutional waste incineration units (e.g., those located at schools, churches, colleges and fire or police departments). The standard includes emission limits for particulate matter, sulfur dioxide, hydrogen chloride, nitrogen oxides, carbon monoxide, lead, cadmium, mercury and dioxins/furans. The rule also includes opacity limits. EPA estimates that there are 248 existing facilities that will be affected by the emission guidelines and that no sources will be covered by the NSPS, as no new facilities are expected to be constructed. [For further information: www.epa.gov/ttn/oarpg/t3/fact_sheets/32435oswi_fs.html]

(9) Final Phase 2 Eight-Hour Ozone Implementation Rule Published in *Federal Register* (November 29, 2005) – EPA published the final phase 2 rule implementing the 8-hour ozone standard in the *Federal Register*. The final rule addresses, among other things, the following control and planning obligations as they apply to areas designated nonattainment for the 8-hour ozone standard: reasonably available control technology and measures (RACT and RACM), reasonable further progress, modeling and attainment demonstrations and New Source Review. The rule is effective January 30, 2006. [For further information: Air Web – Criteria Pollutants Committee page]

(10) STAPPA, ALAPCO, EPA Hold Successful Workshop on PM_{2.5} Issues (November 28, 2005) – STAPPA, ALAPCO and EPA met for a day-long informal workshop to talk about issues in EPA's proposed PM_{2.5} implementation rule and issues that will need to be addressed if EPA were to tighten the existing PM_{2.5} standard and/or adopt a coarse particle standard. Issues discussed included 1) three alternative approaches for Reasonably Achievable Control Technology (RACT) and whether electric utilities in compliance with the Clean Air Interstate Rule would be deemed to have satisfied RACT; 2) modeling and attainment demonstrations; 3) EPA research on speciating emissions of PM_{2.5}; 4) New Source Review and Prevention of Significant Deterioration issues in the proposal; and 5) timing, anti-backsliding, monitoring, designation dates and attainment dates if EPA were to tighten the existing PM_{2.5} standard and/or adopt a coarse particle standard. EPA will circulate notes from the meeting in the next few weeks.

(11) EPA Holds Workshop on Measuring Program Results (November 30, 2005) – EPA's Office of Air and Radiation (OAR) held a two-day workshop entitled, "Clean Air Program Results and Human Health and Ecological Condition Outcomes: Strengthening Partnerships for Performance Measurement." An outgrowth of the Office of Management and Budget's effort to increase federal programs' accountability, the meeting focused on human health and environmental indicators and performance measures that are relevant to OAR programs and tried to identify where links among activities, outputs and outcomes can be improved. Attendees included EPA staff, other federal partners (e.g., Centers for Disease Control and Prevention, the National Park Service), and state and local representatives. The meeting – the second annual workshop of its kind – included plenary and breakout sessions on past successes and future challenges in measuring clean air program results and human health and ecological conditions. EPA currently plans to hold similar workshops in the future. [For further information: www.cleanairmeasurement2005.org]

(12) Institutional Investors Urge Insurance Companies to Disclose Financial Exposure to Global Warming (December 1, 2005) – Twenty leading U.S. investors requested that 30 of the largest publicly held insurance companies in North America disclose the financial risks they face from global warming and steps they are taking to mitigate this risk. The investors, who collectively control more than \$800 billion in assets, co-signed and sent letters requesting that the climate risk reports be completed and shared with investors by August 2006. The reports should address the multiple types of risk and opportunity that insurers face in regard to climate

change, including physical loss and legal and investment risks, as well as opportunities for new markets and products in a changing economic environment. [For further information: www.ceres.org]

(13) World Resources Institute Launches U.S. Climate Analysis Indicators Tool (November 28, 2005) – The World Resources Institute has developed a beta version of a tool that contains a comprehensive and comparable database of greenhouse gas emissions data (including all major sources and sinks) and other climate-relevant indicators for the U.S. The Climate Analysis Indicators Tool-U.S. (CAIT-U.S.) includes emissions data and other energy statistics, economic indicators and policy information for U.S. state climate policy work. CAIT-U.S. also includes tools for mapping, graphing and sectoral analysis. [For further information: Air Web – Global Warming Committee page]

(14) California Releases Integrated Energy Policy Report (November 23, 2005) – The California Energy Commission announced its approval of the 2005 Energy Policy Report. The report includes more than two dozen recommended actions for meeting the state's energy needs, with the goal of providing “affordable, reliable and environmentally sound supplies of electricity, natural gas and transportation fuels.” Among the recommendations to the governor, legislature and various state agencies are ones to reduce demand through energy efficiency and alternative resources, improve energy infrastructure, reduce greenhouse gas emissions and address transportation fuel supplies and the construction of petroleum facilities. [For further information: www.energy.ca.gov/2005_energypolicy]

(15) Environmental Groups Urge California to Decrease Reliance on Imported Coal-Fired Electricity (December 1, 2005) – Three environmental groups released a report analyzing the impacts of pollution generated by coal-fired plants that export electricity to California; the groups are urging that California instead rely on clean energy alternatives and deploy energy-efficiency measures. In their report, the groups notes that there are ample opportunities in the West for energy efficiency and renewable energy: 1) taking advantage of all achievable energy-efficiency measures in California would avoid the need to construct eight new 500-megawatt (MW) coal plants; 2) fully tapping energy-efficiency opportunities in the states of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming would avoid the need to construct 26 new 500-MW coal plants; and 3) using 3 percent of the West's renewable energy potential would avoid the need for over 30 new 500-MW coal plants. The report was released by Western Resource Advocates, Environmental Defense and the Center for Energy Efficiency and Renewable Technologies. [For further information: www.environmentaldefense.org/go/californiacoal]

The Week Ahead

- First Meeting of the Parties to the Kyoto Protocol and Eleventh Session of the Conference of the Parties to the U.N. Framework Convention on Climate Change, in Montreal, Canada – November 28-December 9, 2005

- Public Meeting of the Clean Air Scientific Advisory Committee's Ozone Review Panel to Review the Second External Review Draft of the Ozone Criteria Document and the First Draft Ozone Staff Paper, in Durham, North Carolina – December 5-6, 2005
- Fourth Municipal Leaders Summit on Climate Change, in Montreal, Canada – December 5-7, 2005
- National Clean Diesel Campaign Policy Leaders Summit, in Washington, DC – December 7-8, 2005

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