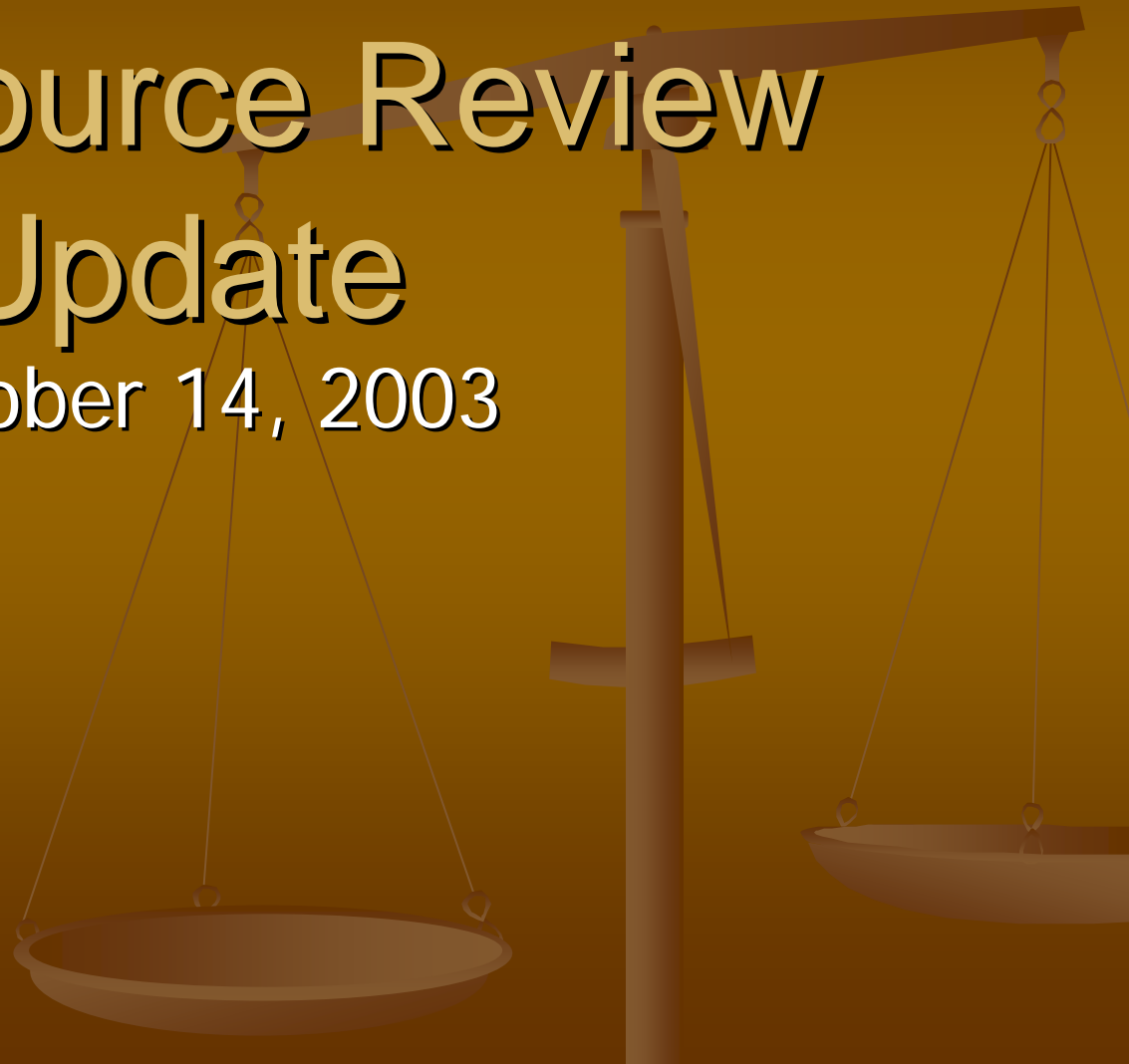


New Source Review

Update

October 14, 2003



Key Dates



- ✓ NSR Report to President issued and recommendations for reforms to NSR regulations announced in June 2002
- ✓ Final rule issued in FR on 12/31/02 for five elements proposed in 1996
- ✓ Final rule for RMRR signed on August 27, 2003
- ✓ Chicago Cubs clinched Division Title on September 27, 2003
- ✓ Chicago Cubs win first playoff series since 1908 on October 5, 2003
- ✓ Proposals to come on aggregation, de-bottlenecking, and allowable PALs

NSR Reform Provisions

◆ Final Changes in December 2003:

- Baseline Actual Emissions
- Actual-to-Projected-Actual Applicability Test
- Plantwide Applicability Limitations (PALs)
- Clean Unit Test
- Pollution Control Project (PCP) Exclusion
- Routine Maintenance, Repair and Replacement (RMRR)
 - ◆ Equipment Replacement Provision
 - ◆ No action on allowance approach

◆ Final Changes as of August 2003:

- Routine Maintenance – Equipment Replacement Provision

◆ Upcoming Proposals:

- Debottlenecking Policy
- Project Aggregation Policy
- Allowables PALs

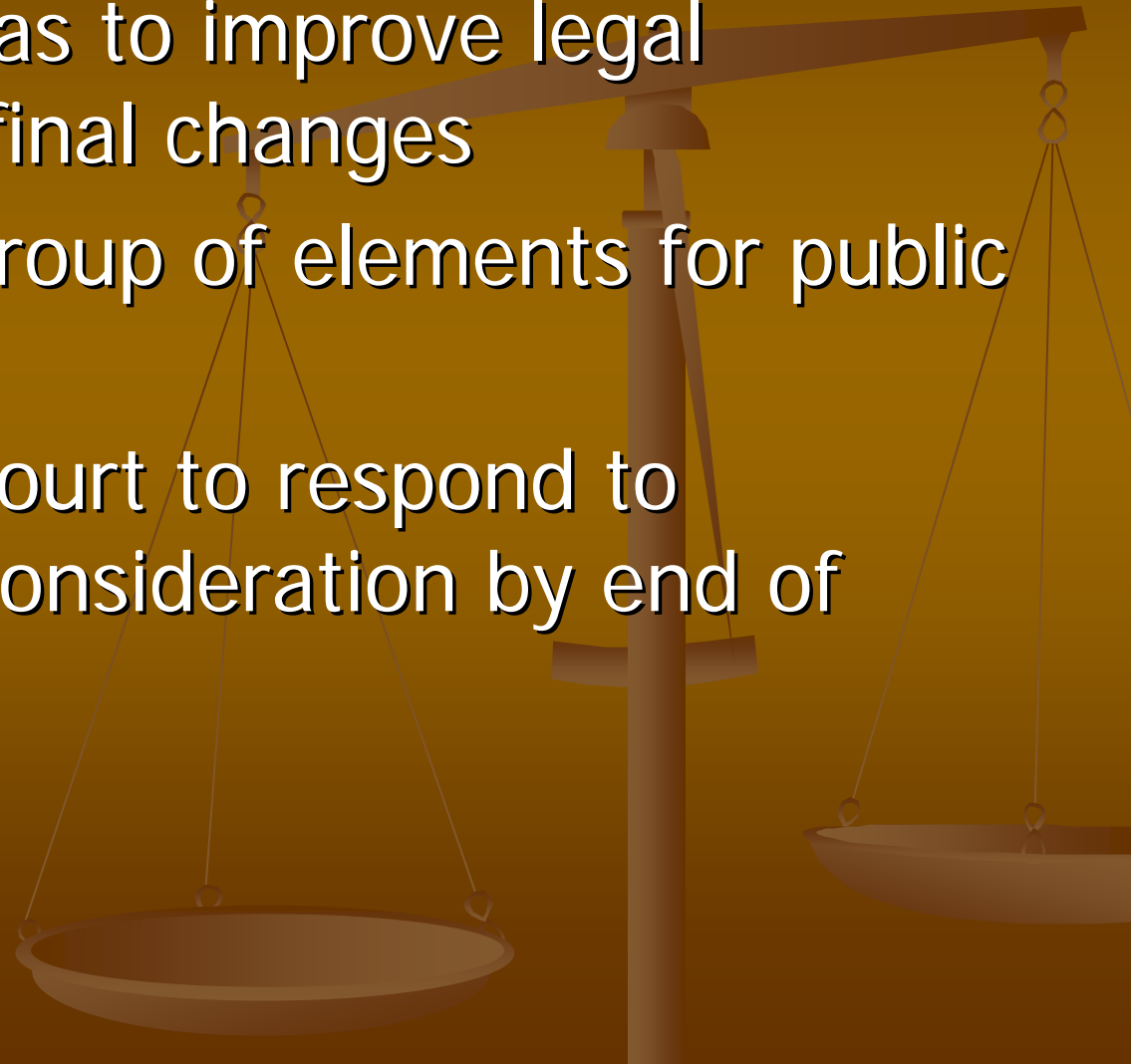


Implementation by States

- For delegated States, **new rules became effective March 3, 2003 (60 days** from publication in the Federal Register.) (California, District of Columbia, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, South Dakota, and Washington)
- For SIP-approved States, **rule changes due within 3 years** from publication in the Federal Register to amend their SIPs or, alternatively, must demonstrate that that State program is at least as stringent as new rules. (40 States)

Reconsideration of December 31, 2002 Changes

- One key goal was to improve legal defensibility of final changes
- Open a select group of elements for public comment
- Committed to Court to respond to requests for reconsideration by end of October 2003



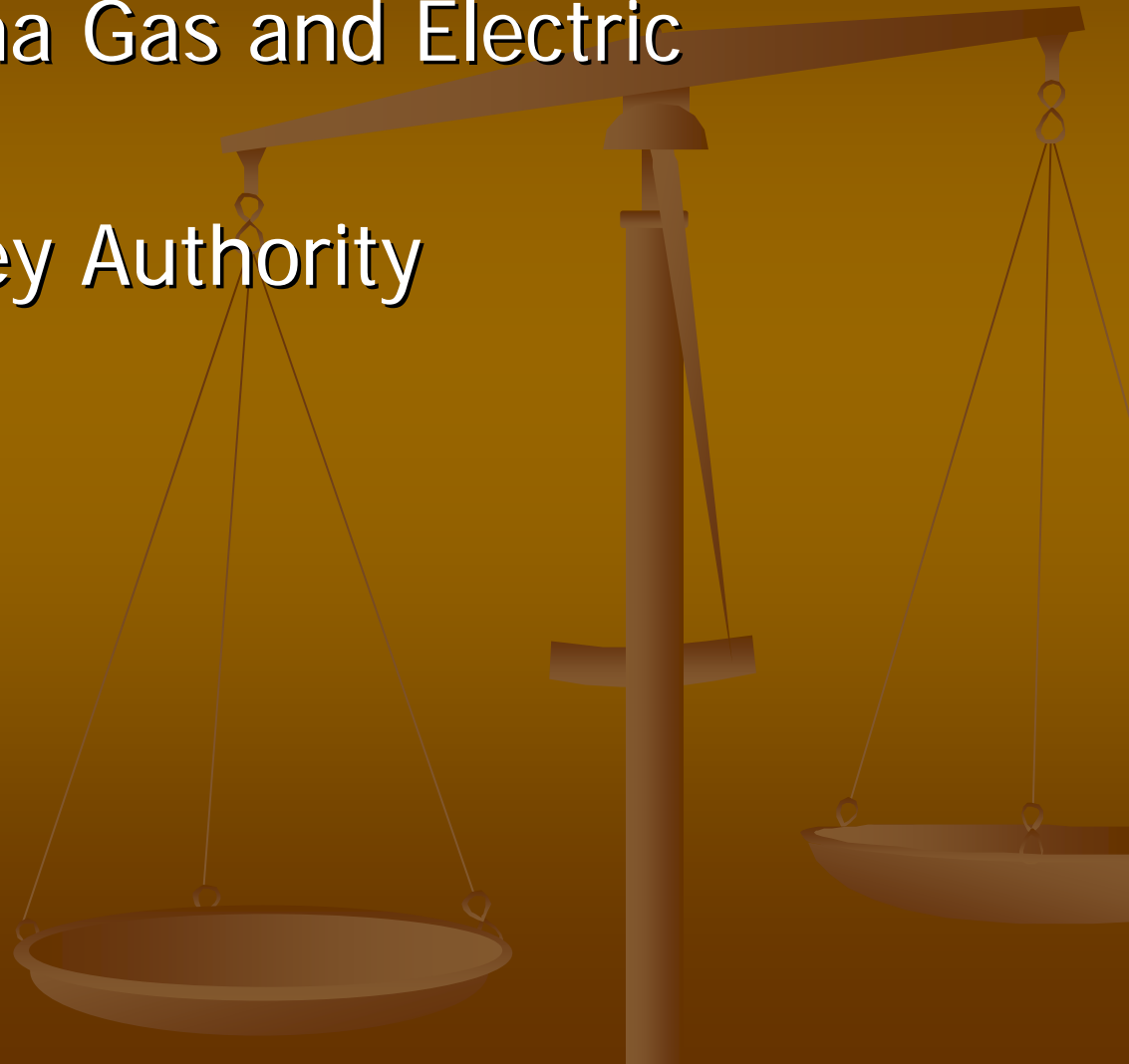
Other Litigation



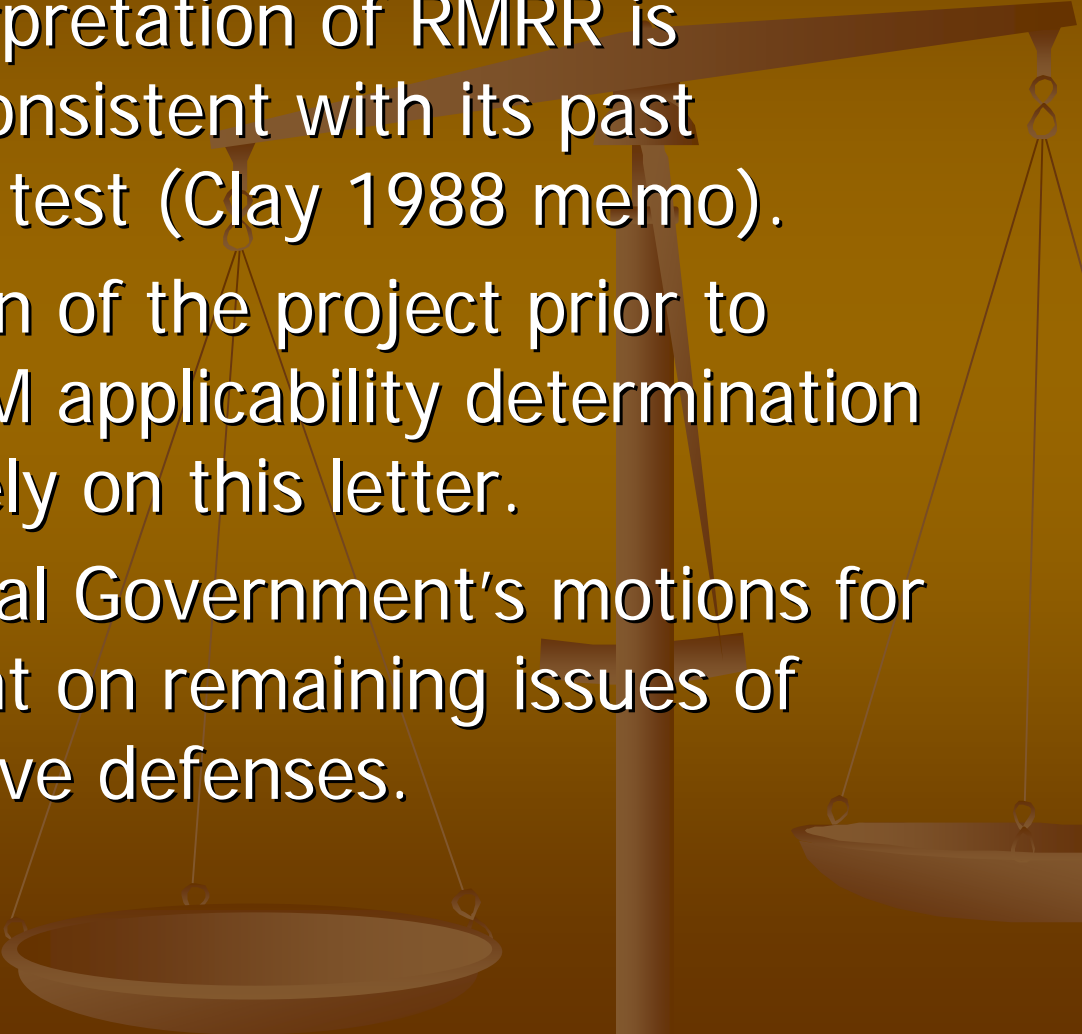
- Litigation on 1980 Rules
- Reconsideration requests from certain utilities related to a desire to have the same baseline and emission projection test as other sources
- Reconsideration request on whether fugitive emissions should count toward emission increases for applicability determinations on modifications
- Anticipate litigation, request for stay and request for reconsideration on final RMRR change NO₂ increments litigation

Court Decisions

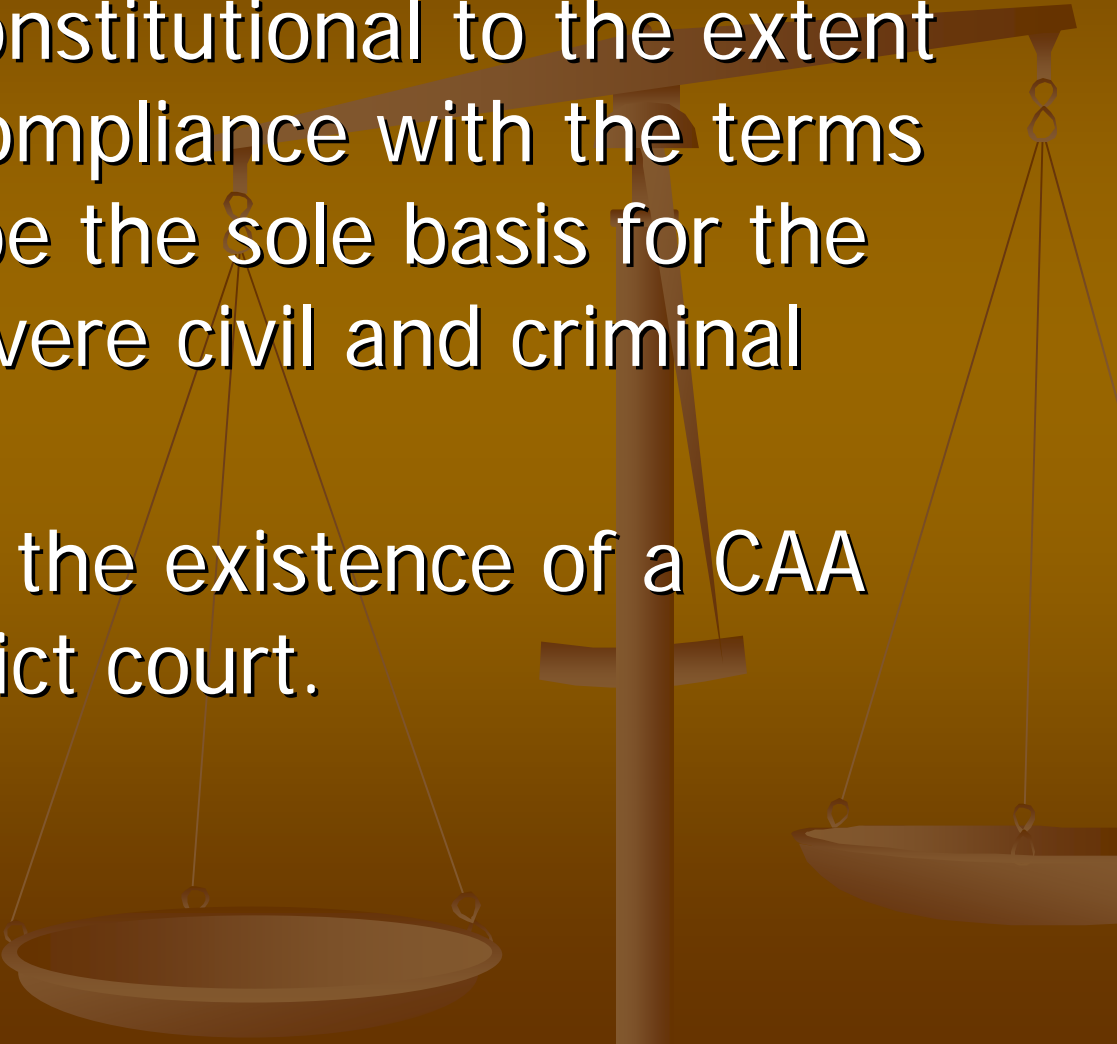
- Southern Indiana Gas and Electric Company
- Tennessee Valley Authority
- Ohio Edison
- Duke Energy



Southern Indiana Gas and Electric Company

- EPA's current interpretation of RMRR is reasonable, and consistent with its past formulation of the test (Clay 1988 memo).
 - SIGECO completion of the project prior to receipt of the IDEM applicability determination shows it did not rely on this letter.
 - Granted the Federal Government's motions for summary judgment on remaining issues of SIGECO's affirmative defenses.
- 

Tennessee Valley Authority

- The CAA is unconstitutional to the extent that mere noncompliance with the terms of an ACO can be the sole basis for the imposition of severe civil and criminal penalties.
 - EPA must prove the existence of a CAA violation in district court.
- 

Ohio Edison

- Found that the plain language of the CAA, read together with the routine maintenance exemption, make it clear that the exemption must have a narrow interpretation so as not to swallow the general rule requiring CAA compliance when a modification is made
- Concluded that all eleven activities constituted “physical changes” for the purposes of CAA compliance, do not qualify as RMRR, and should have been determined to result in significant net increases in emissions
- Adopted the actual-to-future-actual test for estimating emission increases.

Duke Energy



- EPA must consider what activities have occurred within the industry not just at the source to determine RMRR
- EPA bears the burden of proving Duke Energy's projects do not fall within the RMRR exemption
- In calculating post-project emissions, EPA must hold pre-project and post-project hours and conditions of operation constant.
- Failure to obtain a PSD permit constitutes a continuing violation and EPA's claims for civil penalties are therefore not barred
- The statute of limitations does not operate to bar EPA claims for injunctive relief.



Analysis of Impacts of NSR Reforms – Senate Request

- Database to analyze NSR as it existed prior to December 2002 and how it will change going forward
- Key information needed for past
 - All minor source permits issued and reason for any limits in them
 - All major source permits issued and information on 10-year baseline of emissions and controls
 - Listing of all projects foregone because of previous rules
- Key information for future
 - All minor source permits with 10-year baselines of emissions and projected actual emissions if relevant plus information on potential emissions plus necessary information for PALs and Clean Units
 - All major source permits



Analysis of Impacts of NSR Reforms – Senate Request (RMRR)

- Database to analyze NSR as it existed prior to October 2003 and how it will change going forward
- Key information needed for past
 - All replacements that occurred in past years plus their cost and replacement cost of the process unit
- Key information for future
 - All replacements that occur in future years plus their cost and replacement cost of the process unit
 - Information on existing controls on all process units which have replacements