

# CLEAN AIR ACT

## information network

### EPA Issues Proposed Revisions to Particulate Matter NAAQs

On January 17, 2006, EPA issued proposed revisions to the primary and secondary National Ambient Air Quality Standards (NAAQs) for particulate matter (PM) and to make revisions in monitoring reference methods and data handling conventions for PM. 71 Fed. Reg. 2620.

EPA proposes to revise the level of the 24-hour  $PM_{2.5}$  standard to 35 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ); the current 24-hour standard is 65  $\mu\text{g}/\text{m}^3$ . EPA does not propose to revise the annual  $PM_{2.5}$  standard of 15  $\mu\text{g}/\text{m}^3$ . The Agency solicits comments on alternative levels of the 24-hour  $PM_{2.5}$  standard (down to 25  $\mu\text{g}/\text{m}^3$  and up to 65  $\mu\text{g}/\text{m}^3$ ) and the annual  $PM_{2.5}$  standard (down to 12  $\mu\text{g}/\text{m}^3$ ), and an alternative approach for selecting the standard level.

EPA also proposes to revise the 24-hour  $PM_{10}$  standard, in part by establishing a new indicator for thoracic coarse particles (particles generally between 2.5 and 10  $\mu\text{m}$  in diameter,  $PM_{10-2.5}$ ). The particles covered by this standard would include any ambient mix of  $PM_{10-2.5}$  that is dominated by resuspended dust from high-density traffic on paved roads and PM generated by industrial sources and construction sources. The standard would exclude any ambient mix of  $PM_{10-2.5}$  that is dominated by rural windblown dust and soils and PM generated by agricultural and mining sources. EPA proposes to set the new  $PM_{10-2.5}$  standard at a level of 70  $\mu\text{g}/\text{m}^3$ .

EPA also proposes to revoke, upon finalization of a primary 24-hour standard for  $PM_{10-2.5}$ , the current 24-hour  $PM_{10}$  standard in all areas of the

country except in areas where there is at least one monitor located in an urbanized area with a minimum population of 100,000 that violates the current 24-hour  $PM_{10}$  standard based on the most recent two years of data. In addition, EPA proposes to revoke the current annual  $PM_{10}$  standard upon promulgation of the revised standards. EPA solicits comment on alternative approaches for selecting the level of the 24-hour  $PM_{10-2.5}$  standard, on alternative approaches based on retaining the current 24-hour  $PM_{10}$  standard, and on revoking and not replacing the 24-hour  $PM_{10}$  standard.

Finally, EPA proposes to revise the current secondary PM standards by making them identical to the proposed primary standards for fine and coarse particles. EPA also solicits comment on adding a new sub-daily  $PM_{2.5}$  standard to address visibility impairment.

Comments are due on the proposal by April 17, 2006. □

### Environmental Groups File Cert Petition in *Duke Energy* Case

In December 2005, Environmental Defense and several other environmental groups filed a petition for certiorari seeking to have the Supreme Court overturn the Fourth Circuit's ruling in *U.S. v. Duke Energy*, 411 F.3d 539 (2005). In that decision, the Fourth Circuit held that an emissions increase under the 1980 NSR rule must be based upon whether there is an increase in the source's

hourly emissions rate, as is provided under the NSPS modification provisions.

The environmental groups' cert petition attempts to recast the Fourth Circuit decision as one that "invalidates" EPA's 1980 NSR rule. After making this claim, the petition then argues that the Fourth Circuit's decision conflicts with the Clean Air Act, because challenges to EPA's nationally-applicable rules under the Act can only be brought in the D.C. Circuit. The petition acknowledges, despite its claim to the contrary, that the Fourth Circuit specifically indicated that it was not invalidating the 1980 NSR rule. The petition fails to point out that the Fourth Circuit simply interpreted the rule in a manner that would be consistent with the NSPS rule.

The cert petition also argues that the Fourth Circuit erred by finding that the emissions increase test must be consistent under both the NSPS and NSR rules. The petition references other decisions in which elements of the modification definition have been upheld, even though the regulatory interpretations under the NSR and NSPS programs differed. The environmental groups also argue that the relevant case law does not support the position that regulatory definitions must, in effect, be identical if they are implementing the same statutory definition.

The environmental groups assert that the Fourth Circuit decision will have far-reaching implications. In particular, they point to EPA's issuance of the proposal under which emissions increases for electric utilities would be determined in the same manner under NSR as is currently the case under the NSPS regulations.

EPA did not file a petition for certiorari in the *Duke Energy* case. EPA's decision should reduce the chances that the Supreme Court will decide to consider the environmental groups' petition. However, the Court will likely seek the government's views on the petition. This request from the Court will create problems for EPA in developing a response for several reasons. First, the Agency's arguments in the Fourth Circuit were consistent with those now being made by the

environmental groups. Second, EPA has indicated that in the future it will determine whether to bring enforcement actions against electric utilities for past activities based on the hourly emissions test, the test it argued was impermissible in the *Duke Energy* case. Finally, in contrast to its position in the *Duke Energy* case, EPA now proposes to revise its regulations to specifically provide for basing emissions increases for electric utilities on the hourly emissions test. □

## D.C. Circuit Denies Rehearing Petitions in 2002 NSR Rule Case

On December 9, 2005, the three-judge panel in the 2002 NSR Rule case denied all petitions for rehearing (filed by EPA, CAIP, and UARG). Judge Williams issued a brief opinion on the Clean Units issue attempting to justify the panel's not recognizing that the section 111(a)(4) "modification" definition had been interpreted by EPA prior to 1977 as authorizing an emissions test based on the maximum allowable emissions rate. The two other judges on the panel indicated in a footnote to the order of denial that they voted to deny the petitions "substantially for the reasons" in the opinion. The petition for rehearing *en banc* also was denied.

In his opinion, Judge Williams first asserts that the pre-1977 authorization was brought to the panel's attention for the first time in the EPA and industry rehearing petitions. He bases this position, which conflicts with the numerous references in EPA and industry briefs to pre-1977 regulations authorizing an emissions test based on maximum emissions rate, on EPA's reference to a 1976 regulation of general applicability related to review of new sources and modifications. After deciding he should consider the argument, through a contorted interpretation of the regulatory history, Judge Williams concludes that, "in the adoption of § 111(a)(4) as the governing standard, . . . Congress was evidently superseding rather than codifying the prior regime." He reaches this conclusion even though Congress adopted the statutory language of section 111(a)(4)

without any indication that it was superseding prior interpretations and, indeed, included statements in the legislative history indicating the contrary.

The panel also denied EPA's request for clarification that there is no retroactive effect of its ruling on the pollution control project exclusion provision. The panel ruled that it would be "premature" to act on this request because "no specific retroactive application" of the provision was before the court.

The court issued its "mandate" in the case on December 23, 2005. This means that the panel's rulings are now final insofar as the D.C. Circuit is concerned. It is unclear whether EPA will file a petition for certiorari on the Clean Units statutory construction issue. □

## Court Addresses Scope of NSR Demand Growth Exclusion

On November 9, 2005, the federal district court ruled on EPA's motion for summary judgment regarding the demand growth exclusion in the Agency's NSR enforcement action brought against Cinergy Corporation. *U.S. v. Cinergy Corp.*, 2005 WL 3018688 (S.D. Ind.). EPA filed the motion seeking a purely legal determination interpreting the NSR demand growth exclusion under which the projection of future emissions does not take into account "that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change." 57 Fed. Reg. 32,334. Cinergy argued that the issue is not relevant and that the Court need not make a determination because Cinergy is not relying on the demand growth exclusion.

Although the Court concluded that it is not clear that there is a "ripe" dispute regarding interpretation of the demand growth exclusion, the Court stated that Cinergy disagrees with EPA's proposed standard of causation and

decided to determine the causation standard to be used at trial. The Court noted that the parties appear to agree that a physical change must cause the emissions increase, but that they disagree on the precise language to explain the causation. EPA takes the position that "to exclude an increase, it must be completely unrelated to the physical change and entirely caused by independent factors." On the other hand, Cinergy argued that the increase should be included in the calculation only if it could not have occurred "but for" the physical change. Cinergy disputed that an independent factor must be the complete cause of an increase for the increase to be excluded.

The Court ruled that "[f]or the sake of clarification, the Court must grant [EPA's] motion and rule that an increase in emissions may be excluded from the 'actual to projected actual' calculation if (1) the unit could have accommodated the increase before the physical change and (2) the increase is unrelated to the physical change." The Court then adds that the demand growth exclusion "applies to emissions increases that could have been predicted or projected regardless of whether a physical change was to occur." It would seem that the Court's last statement is confused and that the Court should have stated that the exclusion would apply to emissions increases that could have been "accommodated," rather than ones that could have been "predicted or projected." Although the Court grants EPA's motion and does not endorse Cinergy's "but for" test, the Court did not state that it accepts EPA's view that an "independent factor" must be the complete cause of an increase for the increase to be excluded. Indeed, the Court's ruling does nothing more than restate the language of the exclusion without seeming to accept either EPA's interpretation or that of Cinergy. □

## The Eleventh Circuit Overturns "Credible Evidence" Ruling

On November 22, 2005, the Eleventh Circuit Court of Appeals overturned a key portion

of a federal district court's dismissal of a citizen suit based upon the lower court's finding that enforcement using continuous opacity monitoring (COM) measurements was subject to a 2% *de minimis* rule. *Sierra Club, et al. v. TVA*, Case No. 04-15324. The appellate court upheld the portion of the district court's ruling in which it found that COM measurements could not be used as evidence prior to the incorporation of the "credible evidence" rule in Alabama's SIP.

The Sierra Club brought an action against TVA seeking civil penalties and injunctive relief for 9,000 alleged opacity violations, based upon the TVA Tuscumbia plant's COM measurements. Throughout the period, there had been no determination of opacity violations based upon Method 9 observations. The State's SIP provided that opacity violations were to be determined based upon Method 9. A significant portion of the alleged violations occurred before the State's adoption of the "credible evidence" (CE) rule. However, a significant fraction also occurred after its adoption.

The district court ruled that COM measurements could not be considered in determining violations in the period before adoption of the CE rule, because violations could be proved only through Method 9 observations. The Sierra Club argued that the COM data could be taken into account because the plant was required to install a COM and report COM data to ADEM. The Eleventh Circuit ruled that the CE rule could not be applied retroactively, and upheld this portion of the district court's ruling.

With support from the Alabama Department of Environmental Management (ADEM), TVA argued that COM measurements subsequent to adoption of the CE rule did not prove violations, because ADEM had established a "2% *de minimis* rule." The 2% provision initially was reflected in ADEM policy and later was adopted as a formal rule, but it had never been included in the Alabama SIP. Citing a number of cases, the

Eleventh Circuit ruled that the 2% *de minimis* provision could not be taken into account in determining violations unless and until it is included in the SIP. Accordingly, the Court found that ADEM's practice of employing the 2% *de minimis* rule was "invalid under Clean Air Act § 110(i)."

The Sierra Club argued that the effective date for taking into account COM data as credible evidence should be the date of EPA's promulgation of the CE regulations, not the date the CE rule was included in the Alabama SIP. The Eleventh Circuit rejected this assertion, pointing out that EPA's regulations specifically contemplated that states would adopt the CE provisions before they would take effect in states.

The final issue addressed was whether TVA was exempt from Clean Air Act civil penalties based upon TVA's claim of sovereign immunity. After reviewing in depth the case law relevant to the doctrine of sovereign immunity and, in particular, its applicability under the Clean Air Act, the Eleventh Circuit upheld the district court's grant of summary judgment to TVA on the Sierra Club's claim for civil penalties for all past opacity violations. Accordingly, the Sierra Club's potential remedy is to obtain injunctive relief from the district court. □