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EPA Releases Final Rule On NSR "Reasonable Possibility" Recordkeeping and Reporting Provisions

On Friday, December 28, 2007, EPA issued the final rule to clarify the "reasonable possibility" recordkeeping and reporting standard of the 2002 NSR reform rules ((72 Fed. Reg. 72,607). The "reasonable possibility" standard identifies the criteria under which a major source undertaking a physical or operational-method change that does not trigger major NSR permitting must keep records and make reports. In *New York v. EPA I* (413 F. 3d 3 (D.C. Cir. 2005)), the D.C. Circuit remanded the "reasonable possibility" provisions for EPA either to provide an acceptable explanation for its "reasonable possibility" standard or to devise an appropriately-supported alternative. To satisfy the court's remand, EPA is clarifying what constitutes "reasonable possibility" and when "reasonable possibility" recordkeeping and reporting requirements apply.

In EPA's 2002 NSR reform rules, EPA provided that the "reasonable possibility" standard would apply "in circumstances where there is a reasonable possibility that a project that is not part of a major modification may result in a significant emissions increase." Sources whose project would result in a reasonable possibility of a significant emissions increase were required to keep pre-change and post-change records. Pre-change records include a description of the project, identification of units that could be affected, a description of the applicability test used, and netting calculations (if applicable). For purposes of pre-change recordkeeping, the description of the applicability test is to address baseline actual emissions, projected actual emissions, and emissions excluded (such as due to demand growth) with an explanation as to why they are excluded. The post-change recordkeeping requirement required sources to monitor emissions of those regulated NSR pollutants for which there was a reasonable possibility of a significant emissions increase and calculate and maintain records of the annual emissions for five, or in some case ten, years.

In this rule, EPA finalizes the "percentage increase trigger" option set forth in its proposal, with a few changes from what EPA proposed as its preferred option. Under the proposed "percentage increase trigger" option, EPA provided that there would be a "reasonable possibility" that a change would result in a significant emissions increase if the projected increase in emissions of a pollutant equaled or exceeded 50% of the applicable NSR significant level for that pollutant. Under the proposed rule, EPA would require recordkeeping, emissions monitoring, and reporting requirements on any source projecting that a change could result in a reasonable possibility of a significant emissions increase.

In determining whether there would be a significant emissions increase, sources would compare baseline actual emissions to "projected actual emissions." Under EPA's regulations, "projected actual emissions" exclude emissions attributable to an independent factor (such as demand growth). In the proposal, EPA excluded emissions attributable to independent factors from the projected increase in emissions to which the "reasonable possibility" recordkeeping trigger would apply.

In the final rule, EPA is retaining the proposed approach under which sources whose projected emissions increase (determined by comparing baseline actual emissions to "projected actual emissions") would be required to comply with both the pre-change and post-change recordkeeping and reporting requirements if the increase equals or exceeds 50% of the applicable NSR significant level. In making this threshold determination, sources would be authorized to exclude emissions

attributable to independent factors in determining whether the 50% threshold would be met.

However, the rule also provides that sources whose projected actual emissions increase is less than 50% of the applicable NSR significant level must determine whether emissions attributable to demand growth that are unrelated to the change would cause the post-project emissions increase to exceed 50% of the applicable NSR significant level. If so, then under the final rule, these sources also would be found to have a reasonable possibility of causing a significant emissions increase, but under these circumstances, the final rule only requires that such sources comply with the pre-change recordkeeping requirements and not the pre-change reporting requirements or post-change recordkeeping and reporting requirements.

Among the justifications for establishing the "percentage increase trigger" provisions, EPA sets forth a detailed review of the many other sources of information that are available for determining whether sources act in compliance with the NSR provisions. Industry representatives had urged that EPA advise the court that these reporting requirements, by themselves, are sufficient to provide necessary information for EPA and state regulatory authorities to ensure compliance with the NSR requirements.❒

EPA Issues NSR Fugitive Emissions Proposal

On November 13, 2007, EPA issued a proposal to revise the 2002 NSR reform rules to provide that fugitive emissions would only be taken into account in determining whether a physical or operational change constitutes a major modification for sources in the source categories that have been designated through rulemaking under section 302(j). 72 Fed. Reg. 63,850. EPA also sets forth "guiding principles for determining fugitive emissions" in the proposal's preamble.

Revision to NSR Fugitive Emissions Provisions

In the 2002 NSR reform rules, EPA provided that fugitive emissions would be taken into account to the extent they are quantifiable in determining whether physical or operational changes constitute a major modification at *all* sources, not just ones listed under section 302(j). Under EPA's regulations, fugitive emissions are only taken into account in determining whether a source is a major source for sources in source categories listed under section 302(j). Prior to adoption of the 2002 NSR rules, EPA had generally provided that fugitive emissions would not be taken into account in determining whether a change constituted a major modification if a source was not in a source category listed under section 302(j). Newmont Mining filed a petition for reconsideration of the change in fugitive emissions provisions and EPA granted reconsideration in 2004.

EPA's proposal would reverse the policy in the 2002 NSR reform rules and include fugitive emissions in determining whether a physical or operational change results in a major modification only for sources in the source categories that have been designated through rulemaking pursuant to section 302(j). In other words, EPA proposes to adopt the same approach to fugitive emissions currently used for determining whether a source is major, for determining whether a change is a major modification.

Guiding Principles for Determining Fugitive Emissions

Under the major NSR and Title V permit rules, EPA defines "fugitive emissions" as "those emissions that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening." EPA states that it "in practice" interprets the phrase "could not reasonably pass" by determining whether such emissions can be reasonably collected or captured. Any emissions actually collected or captured by the source are obviously "non-fugitive emissions," but the answer is less clear when the source is not currently collecting or capturing the emissions. In such circumstances, EPA makes case-by-case determinations as to whether a source could reasonably collect or capture such emissions.

EPA states that its past determinations articulate a number of principles used in making case-by-case determinations, though probably none express the entirety of the Agency's policy. EPA states that some memoranda, "when viewed in isolation," may appear to provide "divergent positions." For that

reason, EPA has decided to "rearticulate" its guiding principles in making case-by-case determinations. EPA proposes to use the following guiding principles in determining whether emissions qualify as fugitive:

1. Determining which emissions could "reasonably pass" is a case-by-case decision based on whether or not the emissions can be reasonably collected or captured.

2. Because another similar facility collects, captures, or controls emissions does not mean that it is reasonable for others to do the same, but it is a factor in each consideration.

   (a) If a source already collects or captures and discharges the emissions through a stack, chimney, vent or other functionally equivalent opening, then such emissions are non-fugitive at that source.
   (b) If EPA establishes a national emissions standard or regulation that requires some sources in the source category to collect or capture and control such emissions, then this weighs heavily towards a finding that the emissions are non-fugitive at other sources in this category; and,
   (c) The more common collection or capture of such emissions is by other similar sources the more heavily this factor should weigh toward a finding that collection is reasonable.

3. The cost to collect or capture emissions is a factor when considering what is "reasonable."

   (a) The combined costs to collect or capture and control emissions can be used as an alternative measure for the costs of emissions capture or collection alone in the case-by-case analysis;
   (b) The surrounding air quality (e.g., nonattainment areas) is a consideration when deciding if costs (collection, capture, control) are reasonable, and,
   (c) If it is not technically or economically feasible to control the emissions, then collection or capture of such emissions may not be reasonable.

EPA believes that the three overarching principles represent its existing policy on defining fugitive emissions. Moreover, EPA believes that the proposed expansions of these basic concepts represent a reasonable interpretation of its existing regulatory language to be applied to future fugitive emission determinations. Accordingly, EPA is not proposing specific changes to the existing regulatory language to accommodate this proposal. Nonetheless, EPA requests comment on the specific ideas expressed in its expanded explanations, and on whether this approach should be implemented under the existing regulatory language, or whether regulatory changes to the specific definition of fugitive emissions are needed or desired to implement this proposal.

EPA elaborates on how costs can be taken into account in determining whether emissions are fugitive. Historically, EPA focused on the cost of collection or capture and not the cost of control. As indicated above, EPA proposes to allow the reviewing authority to consider the reasonableness of the combined costs of capture or collection and control as an alternative to considering only the cost of collection or capture. EPA states, however, that it would expect permitting authorities to find higher costs reasonable when considering combined costs as an alternative compared to what would be reasonable if considering capture or collection costs alone. EPA states that the purpose of the fugitive emissions inquiry is "to determine which emissions should count for determining source size with a view toward requiring large sources to install pollution controls. If the emissions cannot be controlled, then it is reasonable to consider this factor in determining whether such emissions can be 'reasonably' collected or captured."

Comments on the proposal are due on January 14, 2008. ❐

EPA Issues Flexible Air Permitting Rule Proposal

On September 13, 2007, EPA issued a proposed rule to revise its Title V and New Source Review (NSR) regulations to establish requirements for flexible air permitting. 72 Fed. Reg. 52,206. EPA states that the proposal is based, in large part, on the lessons learned through its pilot flexible permitting experience. Through flexible air permitting approaches, the objective is to provide for greater operational flexibility and, at the same time, ensure environmental protection and compliance with applicable laws.

In its pilot permits, the increased flexibility was primarily achieved through advance approvals under NSR and alternative operating scenarios (AOSs). The proposed revisions are to clarify how such approvals can often be done under the existing Title V regulatory framework. The proposed revisions also add major NSR requirements for “Green Groups,” which allow future changes to occur within a group of emissions activities, provided that they are ducted to a common air pollution control device which is determined to meet BACT or LAER, as applicable, and that they are determined to comply with all relevant ambient requirements.

Definition of Flexible Permit

EPA states that a flexible permit is a Title V permit that “facilitates flexible, market-responsive operations at a source through the use of one or more permitting approaches, while ensuring equal or greater environmental protection as achieved by conventional permits.” In particular, flexible permitting approaches are to allow the source, “under protection of the permit shield, to make certain types of physical and operational changes without further review or approval by the permitting authority.” One approach includes, for example, may exist with respect to AOSs and to provide a quick, clear, regulatory pathway governing flexible air permit development in that area by clarifying the 1992 Title V regulations.

obtaining advance approval for anticipated changes (such as through a minor NSR action), incorporating the advance approval in the Title V permit, and adding terms in the Title V permit as necessary to assure compliance with all other applicable requirements implicated by the anticipated changes. Another approach is to establish one or more AOSs in the Title V permit to allow existing emissions units the flexibility to operate in varying ways and/or at varying rates of production, where such variations would be subject to different applicable requirements but would not require prior authorization (*i.e.*, advance approval).

Purpose of Title V and NSR Revisions

As indicated above, EPA proposes to revise both its Title V and NSR regulations to provide for flexible air permitting. The proposed revisions to the Title V regulations add a definition and clarify requirements for AOSs and add a definition for “approved replicable methodology” (ARM). The proposed revisions to the major NSR program add a definition and codify requirements for Green Groups.

The primary purpose of the Title V revisions is to build upon the existing regulatory framework and ensure that the flexible permitting approaches with which EPA has experience are more readily and widely used. EPA recognizes that many states' minor NSR and Title V programs may already provide for the flexible permitting approaches proposed and that such states are currently able to implement these approaches. Because of the diversity of existing state minor NSR programs and EPA's pilot experience indicating the ability of many programs to approve categories of future changes in advance of making those changes, EPA is not proposing any revisions to the rules governing state minor NSR programs. The Title V revisions are not intended to preclude states from continuing to develop and use existing flexible permitting approaches where their current regulatory structure provides authority to do so, but rather to encourage the use of advance approvals where available and appropriate and to eliminate any uncertainty that

The proposed major NSR revisions would clarify that the definition of emissions unit would allow a number of emissions activities, meeting certain criteria, to be treated as a single emissions unit (*i.e.*, a “Green Group”). EPA proposes to change the

current NSR requirements to provide expressly for Green Groups so as to authorize in a major NSR permit that emissions increases and changes within such a group can occur over a 10-year period, provided the increases and changes are authorized in advance through major NSR and the emissions activities associated with the Green Group are controlled to the level determined to be BACT/LAER. Also, the provisions requiring reevaluation of BACT for phased construction projects and requiring continuous construction to commence within 18 months would not apply to NSR permits involving Green Groups.

Key Elements of Proposed Title V Revisions

EPA proposes several key regulatory revisions to Parts 70 and 71. First, EPA proposes to modify section 70.6(a)(9) generally to refer to "alternative operating scenarios," as opposed to "operating scenarios." In addition, EPA proposes to define the term "alternative operating scenario (AOS)" and codify certain AOS requirements. Specifically, EPA proposes to define "alternative operating scenario as a scenario authorized in a part 70 permit that involves a physical or operational change at the part 70 source for a particular emissions unit, and that subjects the unit to one or more applicable requirements that differ from those applicable to the emissions unit prior to implementation of the change or renders inapplicable one or more requirements previously applicable to the emissions unit prior to implementation of the change." EPA also proposes to establish provisions for "approved replicable methodologies (ARMs)" and the way in which they may be approved into the Title V permit by the permitting authority. EPA proposes to define an ARM as part 70 permit terms that: (1) specify a protocol which is consistent with and implements an applicable requirement, or requirement of part 70 such that the protocol is based on sound, scientific/mathematical principles and provides reproducible results using the same inputs; and (2) require the results of that protocol to be used for assuring compliance with such applicable requirement or requirement of part 70, including where an ARM is used for determining applicability of a specific requirement to a particular change. An ARM, however, cannot modify an applicable requirement in any way. An ARM can be particularly useful in facilitating the implementation of advance approvals and AOSs, but can also be used independent of them.

EPA also proposes that a source include in its Title V semi-annual monitoring reports information related to any AOS and/or ARM implemented during the reporting period. The purpose of this requirement would be to help permitting authorities remain informed as to which AOSs and ARMs in the Title V permit are being implemented at the site and at which time.

EPA is not proposing revisions to any applicable requirement to facilitate advance approvals. Although its pilot experience confirms that obtaining advance approvals under minor NSR is often a critical element in the design of a flexible permit, EPA's experience suggests that many state NSR programs may already provide the legal authority necessary to issue minor NSR permits that accommodate various types of operational flexibility that can be readily incorporated into Title V permits. Accordingly, EPA is not proposing any revisions to the minor NSR regulations. In addition, EPA is not proposing to revise part 70 to address how advance approvals might be accomplished. EPA believes that part 70 already requires incorporation of the terms in a permit issued to advance approve changes under applicable requirements. While additional permit terms may be necessary to authorize advance approval of certain changes in order for the changes to be made without further review of approval, these terms can be added pursuant to existing part 70 regulations. Finally, EPA specifically provides that changes that are advance-approved would occur under protection of the permit shield (where it is available and granted by the permitting authority).

Proposed Revisions to Major NSR Regulations

As indicated above, EPA proposes to add a definition of 'Green Group.' It also proposes to add monitoring, recordkeeping, reporting and testing safeguards applicable to Green Groups to enhance the availability of information and ensure that these groups function as intended.

A Green Group consists of designated emissions activities that are ducted to one common air

pollution control device that is determined to meet BACT or LAER, as applicable, for the entire group of emissions activities taken as a whole. A Green Group is, by definition, a single emissions unit for purposes of major NSR. In addition to designating emissions activities, a Green Group may include changes (*e.g.*, reconfiguration and/or expansion) to these existing activities and/or the addition of new emissions activities ducted to the control device, either of which would result in an increase in capacity and a significant increase in actual emissions. To establish a Green Group, the source must go through the major NSR permitting process and obtain a permit. To protect the NAAQS, PSD increments, and Class I areas, the proposed rules require an annual emissions limit and any necessary short-term limits for the Green Group, as well as comprehensive monitoring, reporting, recordkeeping, and testing under NSR for Green Groups to assure compliance with the limit(s).

Comments on the proposal are due on January 14, 2008. ❒

Eleventh Circuit Rules Statute of Limitations Bars Citizen Recovery of Civil Penalties and Injunctive Relief

On October 4, 2007, the Eleventh Circuit issued a decision holding that the five-year statute of limitations under federal law precludes the granting of civil penalties in actions involving failure to obtain PSD permits for projects undertaken more than five years prior to the filing of the action. *National Parks and Conservation Association, et al. v. TVA,* Case No. 06-10729. The court also ruled that the concurrent remedy doctrine precluded granting of injunctive relief (*i.e.*, requirements to install controls) in actions brought by private citizens or citizen groups, but not claims brought by the federal government in its sovereign capacity. The court specifically distinguished the Sixth Circuit decision finding that the failure to obtain PSD construction permits was a continuing violation and thus plaintiffs could obtain civil penalties and injunctive relief for PSD claims based upon projects undertaken more than five years prior to the action. The Eleventh Circuit distinguished the Sixth Circuit ruling on the grounds that the Tennessee provision in its State Implementation Plan established a continuing obligation to obtain a preconstruction permit and thus it provided a basis for the Sixth Circuit to find a series of discrete violations, rather than a single violation that occurred when construction began.

Statute of Limitations

The case involved TVA's undertaking a $50 million overhaul in 1982-83 of the coal-fired boiler at its power plant in Colbert County, Alabama. The principal elements of the appeal were based upon the district court's granting TVA's motion to dismiss plaintiffs' PSD claims for civil penalties and injunctive relief. The Eleventh Circuit reviewed *de novo* the court's orders granting TVA's motions to dismiss all claims.

After reviewing the statutory framework under which the PSD claims arose, the court reviewed the basic positions of plaintiffs and TVA. Plaintiffs argued that the failure to obtain PSD permits constituted a "continuing violation," whereas defendants argued that the failure to obtain the permit was a one-time violation. The court noted that plaintiffs had not argued that TVA had failed to comply with its operating permit, but rather that its violation constituted a failure to obtain a PSD preconstruction permit. The court pointed out that "numerous district courts" have held that violations of the preconstruction permitting process do not constitute continuing violations of the Clean Air Act.

Next, the court reviewed plaintiffs' claim that the alternative line of cases characterizing violations of the requirement to obtain preconstruction permits as continuing violations supported their claims. The Eleventh Circuit found that only the district court opinion in *Duke Energy* offered a rationale for treating such violations as continuing violations and pointed out that the case was not directly analogous because the state regulations at issue in *Duke Energy* integrated construction and operating permits such that "compliance with preconstruction permitting requirements was a condition for the legal operation of the source." The court concluded that this was not the situation with Alabama's program.

Plaintiffs also argued that their basic claim was that TVA failed to operate without best available control technology after its allegedly illegal modification.

Plaintiffs pointed to the Sixth Circuit decision as supporting its claim that their action was not time-barred. After reviewing the "divided panel" Sixth Circuit decision, the court pointed out that the Sixth Circuit had ruled that the Tennessee regulations created an ongoing obligation to install best available control technology. The Eleventh Circuit ruled that the Sixth Circuit decision would be "persuasive authority" if the case were governed by Tennessee's regulations. The Eleventh Circuit ruled that "the obligation to apply Best Available Control Technology – like all the violations alleged in the New Source Review counts of the complaint in this suit – was solely a prerequisite for approval of the modification, not a condition of [the unit's] lawful operation." Thus, the court ruled that plaintiffs' PSD claim was "completely time-barred." The court additionally noted that the obligation to install best available control technology was, under the Alabama regulations, a set of source-specific emissions limitations determined by the Alabama air director before construction begins and "apparently do not provide a way for a party who had undertaken a modification to obtain such a determination outside the preconstruction process."

Accordingly, the court ruled that the obligation to install BACT was to be met at the time of construction in 1982 and "was not an ongoing duty." The court further ruled that it could not say that TVA's failure to apply BACT constitutes a series of discrete violations as the Sixth Circuit held was the case under the Tennessee regulations.
The court also ruled that, where "TVA has not been accused of violating its operating permit," the unit's present pollutant emissions "have significance in this case only as a current ill effect of its past failure to fulfill the requirements of Alabama's preconstruction permitting program in 1982." "That is not sufficient to bring [plaintiffs'] New Source Review claims within the five-year statute of limitations, which serves several important purposes including barring stale claims and protecting expectations that have settled over time."

Concurrent Remedy Doctrine

In considering the applicability of the concurrent remedy doctrine, the court first points out that the statute of limitations, by its plain language, applies only to claims for legal relief; it does not apply to equitable remedies. However, the court points out that "where a party's legal remedies are time-barred, that party's concurrent equitable claims generally are barred under the concurrent remedy doctrine." Plaintiffs argued that the concurrent remedy doctrine did not bar their claims because of the exception for claims brought by the federal government. However, the court pointed out that the exception is for "'claims brought by the federal government in its sovereign capacity'" as an enforcer of the environmental regulations. Plaintiffs argue that that exception should be extended to them because they are acting as "'private attorneys general'" to enforce environmental regulations for the public benefit. The court finds no authority for expanding the governmental exception to preclude application of the concurrent remedy doctrine in the plaintiffs' action. It points out that private attorneys general "do not represent the public at large in the same way the government does when it brings suit to enforce the statute."

Plaintiffs also argued that their legal and equitable claims were not "concurrent remedies," urging the court to adopt the reasoning articulated by the Indiana district court in the *Cinergy* case. The court there held that the concurrent remedy doctrine did not bar a citizen suit seeking injunctive relief that was paired with time-barred claim for civil penalties. The court there ruled that "the separate claims were not concurrent because the remedies had 'different goals and effects.'" The Eleventh Circuit explained that it is "not aware of other authority for this novel distinction and are not persuaded that it is a meaningful one." It proceeded to find that the claims for civil penalties and equitable relief are concurrent because "'an action at law or equity could be brought on the same facts.'"

Plaintiffs also argued that their claim for equitable relief was not a concurrent remedy because of TVA's sovereign immunity on claims for civil penalties. The court rejected this argument finding that the fact that "TVA has sovereign immunity by no means renders its statute of limitations defense superfluous."

Accordingly, the court ruled that the concurrent remedy doctrine barred plaintiffs' claim for equitable relief. ❐

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Wisconsin Court Applies NSR "Actual-to-Potential" Test

On November 7, 2007 the Federal District Court judge in *Sierra Club v. Morgan* issued a decision in an action alleging that defendants failed to obtain PSD permits in connection with a number of repair and replacement projects at a plant that provides heating and cooling for several buildings in Madison, Wisconsin. No. 07-C0-251-S, 2007 WL 3287850 (W.D. Wis. Nov. 7, 2007). The judge ruled on whether the projects constituted routine maintenance, repair, and replacement (RMRR) and, if not, whether they resulted in a significant emissions increase. The judge interpreted the RMRR exclusion in an even more narrow fashion than in some of the least favorable electric utility decisions and concluded that the "actual-to-potential" test should be applied to most of the replacement projects.

In applying the RMRR exclusion, the court applied the 4-factor WEPCO test. Of the five repair and replacement projects reviewed by the judge, only one was considered to come within the RMRR exclusion. Of the four projects found not to constitute RMRR, the cost of two of them was less than $100,000 each. In the case of one of the projects, the judge found that the fact that boiler tube failures had been frequent and replacement was necessary to increase availability and reliability, the fact that the tubes replaced had never been worked on as a single project in 36 years, and the fact that the $77,000 cost was paid from a spending authorization rather than an annual maintenance and operating budget, all weighed against having the project treated as RMRR. In the case of another project, the court ruled that the fact that feeders had been in need of continuous repair to deal with plugging, the fact that the project was the second time the feeders had been replaced, and the fact that the $90,700 cost was paid with funds authorized by a building commission and not from the operating and maintenance budget all weighed against the project being treated as constituting RMRR.

In ruling on whether specific projects would result in a significant emissions increase, the court held that "any physical change not excluded from the CAA under some exemption like RMRR is presumed to be sufficiently significant to support a finding that normal operations have not begun before the physical change occurred and fall under the 'actual-to-potential' test." The court stated that "showing that the physical change is a 'like-kind replacement' is not determinative but a factor that weighs in favor of normal operations having begun before the change." The court cites the *Murphy Oil* decision for this proposition. Of particular note, *Murphy Oil* was decided by the same court as this *Sierra Club* decision.

In applying the court's presumption, it finds that only one of the four projects not excluded as RMRR should be subject to the "actual-to-projected-actual" test. The court finds various types of improvements in the replacement equipment in the other three projects are sufficient that the "presumption in favor of [the projects] having been sufficiently significant is not defeated." Thus, the court finds that the "actual-to-potential" test should be applied. Applying that test, the court, not surprisingly, concluded that a significant emissions increase would result from each of the three projects. ❐