

EPA Finalizes Part 63 SSM Provisions

On April 20, 2006, EPA published its final action on reconsideration of the startup, shutdown, and malfunction (SSM) provisions in the NESHAP General Provisions. 71. Fed. Reg. 20,446. EPA's action is in response to a reconsideration petition filed by NRDC on July 29, 2003. The action finalizes, with minor changes, the proposed revisions to the SSM provisions and thereby should achieve substantial improvements.

Background

EPA first promulgated the NESHAP General Provisions on March 16, 1994. Numerous industry trade organizations challenged the General Provisions and settlement negotiations ensued for much of the balance of the 1990s. EPA proposed revisions in March 2001 and finalized them in April 2002. The Sierra Club filed a petition for review challenging the revisions and also filed a reconsideration petition. A principal focus of Sierra Club's reconsideration petition was the SSM provisions in the final rule.

In a settlement negotiated with Sierra Club, EPA agreed to issue a proposal under which all sources required to prepare SSM plans would be required to submit them to the permitting authority, instead of only when requested as EPA had provided in the April 2002 final rule. After numerous industry commenters strongly opposed the proposed new requirement, EPA issued final amendments that provided that a source must promptly submit a copy of its SSM plan to its permitting authority, if and when the permitting authority requests that the plan be submitted. Also, the permitting authority was required to

obtain a copy of the plan from a facility if a member of the public makes a "specific and reasonable" request to examine or receive a copy. Subsequently, NRDC filed the reconsideration petition on which EPA has now taken final action. NRDC's petition requested that EPA reconsider the public access aspects of the SSM provisions. Specifically, NRDC opposed the criteria for the public to obtain access to SSM plans, *i.e.*, that a plan may be obtained only if a request is "specific and reasonable."

EPA's Final Action on NRDC's Reconsideration Petition

EPA points out that the requirement in the General Provisions to develop SSM plans is an implementation mechanism in response to the "general duty" clause, which requires that "at all times, including periods of startup, shutdown, and malfunction, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions."

The general duty clause in the NESHAP General Provisions is modeled on the general duty clause in the NSPS General Provisions. As with the NSPS General Provisions, the NESHAP General Provisions require that, if standards cannot be met during a period of SSM, then the source must take steps to minimize emissions to the extent practicable. The NSPS regulations rely solely on the general duty clause to minimize emissions during SSM periods, whereas the NESHAP General Provisions require that owners or

operators develop and implement a written SSM plan that describes procedures for operating and maintaining the source during periods of SSM, and a program of corrective action for malfunctioning process, air pollution control, and monitoring equipment used to comply with the relevant standards.

While sources are required to develop and implement an SSM plan, the plan itself does not become part of the source's Title V permit. Thus, the provisions in the plan are not "applicable requirements." EPA's final action clarifies that the applicable requirement is the general duty to minimize emissions, not the specifics in the SSM plan itself. It also retracts the requirement to implement the plan during periods of SSM. This is consistent with the concept that the plan specifics are not applicable requirements and thus cannot be required to be followed. The determination of whether a source meets its obligation during periods of SSM can be made in part by whether a source followed an adequate plan.

EPA's final action clarifies that recordkeeping and reporting for startups and shutdowns is only required when the applicable standards are exceeded. However, recordkeeping and reporting of malfunctions are required whether or not the standards are exceeded.

EPA's notice points out again that it is not necessary to require that permitting authorities review SSM plans for adequacy prior to implementation. EPA states that the proposed SSM reporting regime accomplishes the same result, but in a much more efficient way for identifying poor performance and inadequate plans.

In its reconsideration petition, NRDC argued that SSM plans must be made available to the public because they are "compliance plans" within the meaning of sections 502(b)(8) and 503(c) of the Clean Air Act. EPA explains why the SSM plan is not a "compliance plan."

EPA's notice states that the EPA Administrator or an authorized permitting authority may at any

time require a facility to submit a copy of an SSM plan under section 114(a) of the Act. Also, under section 114(c), the public may obtain a copy of any SSM plan obtained by EPA or a permitting authority under section 114(a). Since an SSM plan is not part of a permit and is not a compliance plan or schedule of compliance within the meaning of section 503(c), EPA concludes that the Act does not require EPA or permitting authorities to obtain SSM plans at the request of the public. EPA explains that it believes that mandating public access could lead to SSM plans being less effective because a source might be less likely to include sensitive details about its operations in the plan -- details that are likely to be effective in minimizing emissions during periods of SSM.

Consistent with the foregoing, EPA denies NRDC's request to revise the NESHAP General Provisions to allow unlimited public access to a source's SSM plan. EPA states that any mechanisms and conditions under which a permitting authority would decide to respond to a request that it obtain an SSM plan is best left to the permitting authority. □

EPA Seeks Rehearing of D.C. Circuit's Vacatur of ERP Rule

On May 1, 2006, EPA filed a petition with the D.C. Circuit seeking rehearing or rehearing *en banc* of the Panel's vacatur of its Equipment Replacement Provision (ERP) Rule under which qualifying projects would be excluded from NSR under the routine maintenance, repair and replacement (RMRR) exclusion. The Panel ruled that the term "any physical change," as used in the definition of the term "modification" in section 111(a)(4) of the Act, must be construed broadly to include all possible meanings of the term "physical change" and therefore EPA lacked authority to interpret those terms to exclude equipment replacement projects that increase emissions by more than a *de minimis* amount.

EPA states that the Panel's "holding is not consonant with the ambiguous statutory language or the legislative or regulatory history of NSR." It further states that "NSR must be considered within the context of" other provisions of the Act that apply directly to regulated facilities and limit their emissions. EPA states that the "rule will have little or no impact on emissions."

EPA explains that "[w]hen Congress enacted NSR in 1977 . . . it did so with full knowledge of EPA's longstanding interpretation that 'modification' excludes routine equipment replacement and other activities that could result in non-*de minimis* emissions increases. . . ." EPA argues that "the Panel erred in concluding that the word 'any' transformed the admittedly ambiguous term 'physical change' into an unambiguous term that includes activities that Congress knew, when it cross-referenced the section 111(a)(4) definition of 'modification' in 1977, that EPA already reasonably excluded from that definition."

EPA also points out that the Panel's holding "calls into question the validity of EPA's longstanding interpretation of the RMRR exclusion, as none of the five factors to which EPA has traditionally looked in determining whether an activity qualifies for the exclusion, . . . explicitly considers emissions." Accordingly, "in addition to vacating the Rule, the Panel's opinion could require EPA's traditional approach to RMRR to be overlaid with an emissions increase test, thus rendering the exclusion useless: whether a project met or failed the multi-factor test would be irrelevant; NSR applicability would depend on emissions alone."

EPA further explains that the Panel's decision "could also undermine other 'modification' exclusions in the NSR and NSPS programs." EPA states that the opinion "calls into question EPA's ability to continue to interpret the 'modification' definition's other provision – which requires NSR permitting for 'any . . . change in the method of operation' of a source that results in an emission increase – as it has in the past." EPA points out that the hours of operation exclusion from NSR "could allow increases far above any level that could be justified as *de minimis*." Similarly, since 1975, EPA's NSPS regulations

have contained an exemption that excludes production rate increases that can be accomplished without a capital expenditure. EPA points out that, "[o]f particular relevance here is not only that this pre-1977 exclusion under CAA section 111(a)(4) was based on cost, but also that 'capital expenditure' itself was defined in terms of a percentage of the cost of a facility." It notes that, "[s]ignificantly, the regulation makes no reference to the level of emissions increase that might be associated with the change in production rate. So to, the pre-1977 exclusion for fuel and raw material-switching could result in non-*de minimis* emissions increases, again without triggering PSD or NSPS." EPA concludes its parade of inconsistencies of the court's decision with pre-1977 interpretations of the "modification" definition by pointing out that, "[e]ven the RMRR exclusion has always potentially excluded at least some non-*de minimis* activities from NSR and NSPS."

The D.C. Circuit has so far not acted on EPA's rehearing petition. □

Supreme Court Grants Cert Petition in *Duke Energy* Case

On May 15, 2006, the Supreme Court granted the petition for certiorari of Environmental Defense and several other environmental groups seeking to have the 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.

Specifically, the Supreme Court granted certiorari to review the following questions, as stated in the cert petition of the petitioner groups:

- Whether the Fourth Circuit's decision violated Section 307(b) of the Act, which provides that national Clean Air Act

regulations are subject to challenge “only” in the D.C. Circuit by petition for review filed within 60 days of their promulgation, and “shall not be subject to judicial review” in enforcement proceedings, 42 U.S.C. 7607(b); and

- Whether the Act’s definition of “modification,” which turns on whether there is an “increase” in emissions and which applies to both the NSPS and PSD programs, rendered unlawful EPA’s longstanding regulatory test defining PSD “increases” by reference to actual, annual emissions.

Environmental Defense v. Duke Energy Corp., S. Ct. No. 05-848, Pet. for Writ of Certiorari, at i.

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.

The Supreme Court will hear oral argument in either the last week of October or the first week of November 2006. □

Ohio Court Vacates Operational Restrictions As “New Substantive Requirements” Under Title V

On March 31, 2006, the Ohio State Court of Appeals issued an opinion in which it held that the Ohio EPA’s inclusion of restrictions on operation of an electrostatic precipitator (ESP) constituted “new substantive requirements” and thus are in violation of the Title V requirement that no new substantive requirements may be established in permits. *General Elec. Lighting v. Ohio EPA*, Case Nos. 05 AP-310, 05 AP-323 (Ct. App. Ohio, 10th App. Dist.). Ohio EPA had established ranges on secondary voltage and secondary current within which the lime glass-melting furnace of General Electric Lighting (GEL) must operate and provided that operation of the ESP outside the established parameters was a violation of the permit, even if the particulate emissions were under the limit prescribed in federal regulations.

This decision comes after a lengthy series of court challenges by GEL. In October 2001, GEL appealed the permit to the Environmental Review Appeals Commission (ERAC). In November 2002, Ohio EPA and GEL both filed summary judgment motions. One of the grounds in GEL’s motion, which was at issue in this appeal, was that the voltage and current conditions were unlawful because they violated the prohibition on any “new substantive requirements” in the federally enforceable portion of a Title V permit. ERAC initially found that Ohio EPA’s actions were lawful with regard to the setting of ESP parameters because Title V permits can contain operation requirements and emissions limitations

that “assure compliance with” applicable requirements. ERAC then ordered that the parties proceed to a *de novo* hearing regarding the reasonableness of the operational restrictions in the Title V permit. After the parties resolved all issues other than the parameter limitations of ESPs, ERAC held a hearing and ruled that, although the permit and the operational restrictions were lawful, the restrictions prescribing the parameters were unreasonable and thus impermissible. Ohio EPA appealed this finding and GEL appealed the original holding that the operational restrictions, if reasonable, were lawful.

Ohio EPA argued that the court should first address whether the operational restrictions were reasonable, because, if it found them to be unreasonable, it would not be necessary to address the issue as to whether they constituted new substantive requirements. The court ruled that such a holding would still not conclude the dispute between the parties, because GEL still would seek a ruling that the limitations constituted new substantive requirements.

The court then proceeds to review the relevant terms in Title V of the Clean Air Act and Ohio EPA’s regulations. It quotes extensively the provision that provides that a Title V permit “shall not impose new substantive requirements beyond the federally enforceable requirements.” It then points out that Ohio’s Title V program must track federal requirements, because state law would require it to adopt rules “that are consistent with, and no more stringent than, federal requirements.” Also, “if a term is defined in federal regulations, then it has the same meaning under the Ohio program.” The court also points out that permits “shall include . . . such other conditions as are necessary to assure compliance[.]” Further, federal regulations provide that permits shall include “operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.”

The court next readily concludes that the parametric limitations are “new” and

“requirements,” and thus the key issue is whether the requirements are “substantive.” The court then concludes that the operational restrictions are substantive for the following reasons:

First, they create and define a duty imposed on GEL under the permit, as they govern the conditions under which the ESP may operate. Second, they create a liability upon GEL, as failure to adhere to these restrictions constitutes a violation of the permit and it subjects GEL to federal penalties. Third, they define the terms under which EPA or a citizen may bring legal action to enforce the permit. Thus, the operational restrictions are substantive requirements.

The court also quotes extensively from *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1026-1027 (D.C. Cir. 2000), specifically pointing out that the D.C. Circuit stated that the court has “recognized before that changing the method of measuring compliance with an emission limitation can affect the stringency of the limitation itself. . . . If a State agency . . . devised a permit condition increasing a company’s stack test obligation . . . from once a year to once a month, no one could seriously maintain that this was something other than a substantive change.”

The court notes that the very method of monitoring cited by the D.C. Circuit, “stack testing,” is the alternative that Ohio indicates would be the option that would be necessary if the operational restrictions established on the ESP had not been imposed. The court states that “if Ohio EPA had imposed additional monitoring rather than operational restrictions, no one could seriously maintain that this [would have been] something other than a substantive change.”

The court also reviewed the Ohio EPA’s claim that ERAC had applied the wrong standard in determining whether there is an adequate correlation between the power inputs and

emissions. After reviewing the evidence presented, the court ruled that, while the evidence did not demonstrate that “absolutely no correlation exists between power input and emissions, the evidence presented in this particular case suggests that the correlation is weak and unpredictable without taking into account the myriad of other factors that affect emissions. Given such a weak correlation, attempting to assure compliance with emissions standards by using power input limitations alone would not be reasonable.” The court also ruled that the “direct correlation” requirement ERAC used was “not improper.” ERAC had analyzed whether there was a “direct correlation” between power inputs and emissions limits in order to determine the reasonableness of Ohio EPA’s operational restrictions.

One of the three judges hearing the case dissented in part, finding that the court should not have addressed whether the operational restrictions constituted “new substantive requirements” and should have restricted its decision to finding that the Ohio EPA’s action was not reasonable. □