

EPA Issues Supplemental Proposal on NSR Emissions Test for EGUs

On May 8, 2007, EPA issued a supplemental proposal to establish a revised test for determining emissions increases for electrical generating units (EGUs) under the federal NSR programs. 72 Fed. Reg. 26,202. In October 2005, EPA proposed to substitute the NSPS test under which emissions increases are determined by comparing "maximum achievable hourly emissions" before and after a change for the "actual-to-projected-actual" emissions increase test under the 2002 rules that is currently applicable to EGUs and other stationary sources.

The supplemental proposal revises somewhat the options outlined in the October 2005 proposal. Of particular significance, EPA proposes as its Option 1 that, if a physical or operational method change would result in an hourly emission rate increase, the EGU would then review the change to determine whether it would result in a significant net emissions increase under the current NSR rules adopted in 2002. In other words, the effect of the proposal for EGUs would be that an NSPS-type test would be added as a threshold test to be first applied and, if no hourly emissions increase would result, NSR permitting would not be triggered. This option is EPA's preferred option. The second option would be to establish a new NSPS-type test as the sole emissions increase test to be applied in determining NSR applicability.

In the October 2005 proposal, EPA requested comment on three alternatives for the hourly test to determine if a change would result in an emissions increase. These were: (1) a maximum *achievable* hourly emissions test; (2) a maximum *achieved* hourly emissions test; and (3) an output-based hourly emissions test. In the supplemental

proposal, EPA recast the proposed alternatives so that the output-based test is a way to measure the hourly emissions rate, rather than being an alternative to the maximum achievable or maximum achieved hourly test.

EPA proposes six alternatives for the hourly emissions test -- three of which are input-based and three are output-based. EPA proposes two variants of a maximum achieved test -- one of which is a statistical approach for assessing the emissions increase and the other is based upon a 1-in-5-year baseline.

As indicated above, EPA sets forth two basic options. The preferred alternative (Option 1) would include the current actual-to-projected-actual emissions test as a subsequent step to be applied when a change would result in an hourly emissions rate increase. In each of the two options, EPA proposes the six alternative ways of possibly applying the hourly emissions test.

EPA strongly ties the policy justification for the hourly emissions test for EGUs to the various control programs that it has established to control EGU emissions. EPA does not indicate any intention to issue a proposal to extend the hourly emissions test to non-EGU sources.

Comments are due on the proposal on July 9, 2007. □

EPA Issues Notice on Possible Audit Policy Changes for New Owners

Background

On May 14, 2007, EPA issued a notice requesting comment on whether and to what extent the Agency should consider offering "tailored incentives" to encourage new owners of regulated sources to "discover, disclose, correct, and prevent the recurrence of environmental violations." 72 Fed. Reg. 27,116. EPA is considering whether actively encouraging such disclosures has the potential to yield significant environmental benefit. EPA states that new owners "may be particularly well-situated and highly motivated to focus on, and invest in, making a clean start for their new facilities by addressing environmental noncompliance." The "tailored incentives" would be designed to enhance implementation of the Audit Policy and encourage its use in the new owner context, but would not constitute a change to the Policy overall.

After reviewing comments on this notice, EPA will decide whether to develop a pilot program to test the policy of offering tailored incentives and then will issue a second notice to seek comment on a proposed pilot program. After a second round of public comment on the proposed pilot program, EPA would issue a notice describing the final version of the pilot program, an announcement of its start date, and a description of how its success in achieving increased self-auditing and disclosure and significant improvement to the environment will be evaluated.

EPA's notice describes how the Audit Policy currently applies to new owners as reflected in the 2007 Frequently Asked Questions (FAQ) document EPA issued earlier this year. The FAQ document itself reflects revised EPA policies to encourage new owners to examine facility operations to determine compliance and correct

violations. "[F]or new owners that in good faith undertake such efforts and inform the Agency of such actions, either by disclosure in writing or entry into an audit agreement with EPA prior to submission of the facility's first annual Title V certification under new ownership, the violations disclosed would be considered voluntarily discovered for purposes of the Audit Policy." EPA also provides that new owners "may be eligible for penalty mitigation under the Audit Policy for violations of newly acquired facilities irrespective of the disclosing entity's compliance history at other facilities."

EPA specifically focuses on the fact that new owners who are interested in taking advantage of the Audit Policy may have to pay substantial civil penalties under the policy because only the gravity portion of the penalty can currently be mitigated. EPA states that "new owners may be uncomfortable about calling EPA's attention to compliance issues at their newly acquired facilities when they themselves may not be fully aware of all the compliance issues presented." EPA says that this may be particularly the case when "many and/or complex facilities are involved," because it "may indeed be difficult for new owners to have a reasonable idea of the full spectrum of compliance issues." EPA states that there is a "strong equitable argument that a new owner should not be penalized for economic benefit relating to violations that arose when a facility was not under the new owner's control, if that new owner is willing to promptly address violations and make changes to ensure the facility stays in compliance in the future."

Issues

EPA identifies a number of issues on which it seeks comment. These issues are described below.

- A. *Should the Agency Offer Tailored Incentives to Encourage New Owners of Regulated Entities to Self-Audit and Disclose Violations?*

In general, the Agency's question here is whether incentives are needed to encourage self-audit and

disclosures by new owners or whether the Audit Policy already offers sufficient incentives. In addition, EPA raises the following subsidiary issues:

- **Due Diligence in Mergers and Acquisitions.** EPA seeks comment on the extent to which pre-acquisition due diligence reviews reveal environmental noncompliance (as opposed to environmental contamination and remedial liability) and whether it would be appropriate to require that new owners have performed a certain level of pre-acquisition due diligence to qualify for tailored incentives (and, if so, what that level should be). EPA also seeks comment on the potential effects on environmental compliance and on due diligence reviews that might result from offering tailored incentives.
- **Purchase Price Calculation.** EPA seeks comment on the extent to which environmental noncompliance liabilities (as distinguished from environmental remediation liabilities) are reflected in the purchase price, and whether tailored incentives should take this into account.
- **Indemnification Agreements Between Purchaser and Seller.** EPA raises the question as to how it should take indemnification agreements into account in designing any tailored incentives and whether the existence or terms of an indemnification agreement should have any bearing on a new owner's eligibility for tailored incentives. EPA raises the issue of whether, if a selling firm has indemnified the purchaser for violations which are ultimately disclosed by the new owner, tailored incentives to self-report are needed at all? However, EPA notes that the mere existence of an indemnification agreement does not insulate the purchaser from EPA liability.

- **Other Requirements for Incentives.** EPA asks whether other eligibility criteria or participation requirements should be developed in connection with offering tailored incentives.

B. What Constitutes a "New Owner" for Purposes of Being Offered Tailored Incentives Under the Audit Policy?

EPA raises questions regarding: (1) what the standard should be for what is a new owner (for example, whether a self-certification should be required and, if so, what it should contain); (2) how long after an acquisition is an owner still "new" for the purpose of being offered tailored incentives; and (3) how should the Agency treat different acquisition transactions?

C. What Incentives Should the Agency Consider to Encourage New Owners to Self-Disclose?

EPA has identified three major potential incentives: (1) reducing civil penalties beyond what the current Audit Policy provides, by reducing any economic benefit portion of the penalties; (2) allowing Audit Policy consideration of violations which would otherwise be ineligible because their discovery is legally mandated and thus not discovered voluntarily; and (3) providing recognition from the Agency to new owners who self-audit and disclose under the Audit Policy. EPA is seeking comment on each of these three possible incentives.

With regard to the calculation of economic benefit for disclosures by new owners, EPA asks when the clock should start running when calculating economic benefit, whether EPA should take into account the existence of and the extent to which an indemnification has been made by the seller of the buyer, and whether the new owner should be allowed to offset the cost of an audit when the economic benefit is calculated.

Comments in response to the notice are due on July 13, 2007. □

Federal Court Requires EPA to Issue or Deny Title V Permit

On May 21, 2007, in *Sierra Club, et al. v. Johnson*, No. 06 C 04000 (E.D. Illinois May 21, 2007) an Illinois federal district court issued a ruling on environmental groups' claim that EPA is required to issue or deny a Title V permit once a state fails to act on an EPA Title V permit objection. The principal issue in the case was whether EPA's duty to issue or deny the permit is a nondiscretionary one on which citizens with standing to sue can initiate a lawsuit to compel EPA to act.

The court reviewed the timetable in the Clean Air Act on which Title V permit-related actions are to be taken. The plaintiffs petitioned EPA to object to the Title V permit for the Onyx Facility in Sauget, Illinois. After EPA failed to grant or deny plaintiffs' petition within sixty days, plaintiffs filed suit in federal court and the court required EPA to respond pursuant to a consent decree it entered.

Subsequently, EPA issued objections to the permit, but the Illinois EPA did not submit a revised permit within ninety days. Plaintiffs then filed suit to require the Administrator to issue or deny the Title V permit, arguing that the Administrator's requirement to act is a nondiscretionary duty under the Act.

On the day EPA was due to file an answer in this case, a letter was sent to Onyx requiring the facility to submit an application for a Title V federal operating permit. EPA indicated that it was initiating a process to issue or deny a Title V permit but that its letter did not represent final Agency action to issue or deny a permit.

In this action, EPA first argued that the letter requiring that an application be filed showed that the Agency was conducting Title V proceedings and therefore the plaintiffs' claims were moot. The court ruled that until the Title V permit was

issued or denied there was a case or controversy and thus the action was not moot.

Next, EPA argued that the Clean Air Act only waives the sovereign immunity of the United States granting district courts jurisdiction where there is a nondiscretionary duty under the Act, and that the requirement to "issue or deny a permit" is not a nondiscretionary duty. EPA argued that the duty is "*mandatory, but not discretionary*" (italics in original). The court ruled that Congress did not allow EPA to conduct a new permit process once it issues an objection to a Title V permit. The court held that, instead, EPA has a nondiscretionary duty to issue or deny the permit.

In conclusion, the court ordered EPA to appear thirty days after the court's order and report "the date by which you will issue or deny the Title V permit." □