Clean Air Task Force * Environmental Integrity Project * Hoosier Environmental Council
Natural Resources Defense Council * Ohio Environmental Council
Southern Alliance for Clean Energy * Southern Environmental Law Center

August 26, 2003

Attention Docket Number A-2002-04

Acting Administrator Marianne Lamont Horinko
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20004

EPA Docket Center (Air Docket)
U.S. Environmental Protection Agency
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Re: Supplemental Comments on the Proposed Rule: "Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Routine Maintenance, Repair and Replacement"

Dear Acting Administrator Horinko:

We are in possession of a draft Federal Register notice setting forth a final version of the above-titled rule ("draft final rule"). A proposed version of the rule appeared in the Federal Register on December 31, 2002.[1] On May 2, 2003, we submitted comments on the proposal.[2] The draft final rule indicates that the U.S. Environmental Protection Agency ("EPA") has disregarded all of our comments, declined even to respond to most of them, and elected to promulgate a rule that is arbitrary, capricious, and in direct conflict with the Clean Air Act.

We write now to inform you that if EPA promulgates this rule, we will challenge it in the U.S. Court of Appeals for the District of Columbia Circuit. We ask that you abandon this rulemaking in order to avert costly litigation, further damage to EPA's credibility, prolonged regulatory uncertainty, and severe harm to public health and the environment.

Because the draft final rule fails to resolve any of the objections set forth in our May 2 comments, we reassert all of those objections now. In addition, we submit three categories of supplemental comments below. The first category explains how the recent decision in U.S. v. Ohio Edison Co., when applied to the particulars of the draft final rule, strengthens the basis of two objections raised in our May 2 comments and reinforces our demonstration that the rule EPA has elected to promulgate is unlawful. The second category of supplemental comments below

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[1] 67 Fed. Reg. 80290 (Dec. 31, 2002).

[2] The Environmental Integrity Project submitted its own comments in addition to signing those submitted jointly by several environmental organizations.

provides two illustrations of EPA's utter failure, in the draft final rule, to correct arbitrary, capricious, and otherwise unlawful aspects of the December 2002 proposal. The final category sets forth an objection to an especially egregious attribute of the draft final rule.

I. The Findings of Fact and Conclusions of Law in U.S. v. Ohio Edison Co. Reinforce Our Demonstration That the Equipment Replacement Exemption Violates the Clean Air Act.

A. The Draft Final Rule "Would Vitiate the Very Language of the CAA Itself."

In our May 2 comments, we demonstrated that EPA's proposed equipment replacement exemption violated unambiguous provisions the Clean Air Act.[3] The recent ruling in U.S. v. Ohio Edison Co.[4] confirms that the exemption, as set forth in the draft final rule, violates the Act's clear language.

The draft final rule declares that an equipment replacement is "routine" as long as it costs no more than twenty percent of what it would cost to replace the entire process unit in question. As the enclosed analysis by MSB Energy Associates demonstrates, that definition of "routine" is so broad as to cover all but one of the eleven equipment replacement projects that the U.S. District Court for the Southern District of Ohio found that Ohio Edison had undertaken at its Sammis power plant in violation of the Act.[5] In its Analysis of Law, the court held that any regulation defining "routine" to cover *any* of Sammis replacement projects "would vitiate the very language of the CAA itself."[6] Because the draft final rule adopts a definition of "routine" that covers many of the Sammis projects, the rule vitiates language that the court found clearly set forth in the Act.

B. The Draft Final Rule Exempts More Than the Trivial Emissions Increases That EPA Has Authority to Exempt.

We also demonstrated in our May 2 comments that each of the options set forth in EPA's proposed rulemaking was unlawful in that it would exempt from control emissions increases that could not be described as *de minimis*, i.e., trivial.[7] For example, we showed that the option EPA has now elected to finalize would have exempted from control all of the projects at issue in the enforcement proceedings against the Tennessee Valley Authority ("TVA") and ALCOA – projects that individually increased annual emissions by thousands of tons.[8]

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[3] See May 2 Comments at 7-71.

[4] 2003 WL 21910738 (S.D. Oh. Aug. 7, 2003) (attached at Tab A).

[5] The MSB Energy Associates analysis is attached at Tab B.

[6] United States v. Ohio Edison Co., 2003 WL 21910738, at *57.

[7] May 2 Comments at 23-47. We further noted the concession by one utility, SIGECO, that none of EPA's proposed options "can fairly be described as *de minimis* or narrow." SIGECO's Notice of Supplemental Authority on Fair Notice and Routine Maintenance, filed on January 8, 2003 in U.S. v. SIGECO, Civil Action No. IP99-1692-C-M/F (S.D. In.), at 2 (emphasis in original).

[8] May 2 Comments at 9 (Table A), 16-20 (demonstrating that none of the equipment replacements at issue in the TVA and ALCOA enforcement proceedings cost more than twenty percent of the cost of replacing the units in question); Appendix A to Final Order on Reconsideration in *In re* Tennessee Valley

In the enforcement case against SIGECO, EPA insisted, consistent with the holding of the U.S. Court of Appeals for the D.C. Circuit in Alabama Power Co. v. Costle, that the scope of the exemption for "routine" extended only to the extremely narrow bounds of the agency's *de minimis* authority.[9] In the SIGECO case, the U.S. District Court for the Southern District of Indiana followed Alabama Power, holding that the government's limited reading of its authority was consistent with the Clean Air Act. Indeed, the court wrote that a broad reading "would flout the Congressional intent."[10]

Now the Southern District of Ohio has followed Alabama Power as well, holding in the Ohio Edison case that EPA's ability to exempt any pollution-increasing activities as "routine" is bounded by its limited authority to exempt from control pollution increases that are "*de minimis*," *i.e.*, "trivial."[11] The enclosed MSB Energy Associates analysis demonstrates that the equipment replacement exemption set forth in the draft final rule would have exempted all but one of the projects found to have taken place at Ohio Edison's Sammis plant – projects that, according to the court's Findings of Fact, individually increased annual emissions by thousands of tons.[12] The court's legal conclusions and factual findings in Ohio Edison thus reinforce the demonstration we have already made, namely, that EPA has no authority to promulgate the equipment replacement exemption set forth in the draft final rule.

II. A Small Sample of the Many Arbitrary, Capricious, and Otherwise Unlawful Elements That Persist in the Draft Final Rule

A. Lack of Support for Conclusions Concerning Environmental Impacts

EPA has failed to release data to support the anecdotes recited in its rulemaking proposal to justify the adoption of its equipment replacement exemption. Further, EPA has made no attempt to quantify the impact of the proposed rule changes on air quality and public health. Finally, the agency has made no effort to consider emissions reductions achieved through cases brought to enforce the NSR provisions, thereby ignoring all benefits of the program as currently written.

Authority, (EPA Environmental Appeals Board, September 15, 2000) (detailing pollution increases resulting from projects); Testimony of Joseph Van Gieson in *In re* Tennessee Valley Authority (same).

[9] See, e.g., Pl.'s Opposition to Def.'s Motion for Summary Judgment on Fair Notice in U.S. v. SIGECO, at 7-8 ("When interpreting th[e] term ['routine'], its dictionary meaning (habitual, regular, ordinary) and the objectives of the Clean Air Act are important guides. . . . In particular, the term's scope is constrained by EPA's limited authority to create exemptions from the Clean Air Act requirements, a central holding in Alabama Power Company v. Costle, 636 F.2d 323 (D.C. Cir. 1980)."); id. at 28-29 ("EPA's authority to adopt the defendant's interpretation is highly doubtful. As discussed earlier, EPA has extremely limited authority to exempt activities from the definition of 'modification' under the Clean Air Act. The agency's authority is limited to circumstances of administrative necessity (which EPA has never claimed) and circumstances having a 'de minimis' or 'trivial' impact on emissions. Alabama Power, 636 F.2d at 358-61.").

[10] United States v. SIGECO, 2003 WL 367901 (S.D. In. Feb. 13, 2003), at *13.

[11] United States v. Ohio Edison Co., at *58.

[12] Tab B; United States v. Ohio Edison Co., at *52.

Since 2000, at least thirty facilities have settled claims of violations of the NSR program. These settlements have resulted in 526,510 tons of reductions in sulfur dioxide emissions, 234,656 tons of reductions in nitrogen oxides emissions, and 225,992 tons of reductions in emissions of volatile organic compounds, particulate matter, and other pollutants.[13] In the draft final rule, EPA makes no mention of these achievements in concluding that the NSR program is currently ineffective.

In the preamble to the forthcoming rule, EPA purports to respond to comments made by the Environmental Integrity Project by stating that efficiency improvements (presumably the replacement projects EPA will now exempt) will bring about environmental benefits that will counteract, or more than counteract, increases of emissions from improvements made using the new equipment replacement exemption. According to EPA, the current NSR rules discouraged these improvements.

EPA has never demonstrated that exempting the broad swath of activities covered by the draft final rule's definition of "routine" would result in less air pollution. In fact, the available data – from the enforcement proceedings against Ohio Edison, TVA, and ALCOA – indicates that air pollution increased dramatically as the result of projects that the draft final rule would exempt from control. Moreover, as EPA well knows, the Clean Air Act does not impose the NSR requirements on changes that *reduce* emissions.

In its crusade to gut the Clean Air Act, EPA is content to rely on self-serving anecdotes supplied by anonymous industry sources. The agency makes no effort to address the hard facts from Ohio Edison or to justify its chosen reliance on unverified anecdotes and assumptions.[14] As

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[13] The nine companies sued in 1999 and 2000 for NSR violations emitted, in the year 2000, 4 million tons-per-year of sulfur dioxide (one quarter of all such emissions nationwide), and over 1.5 million tons-per-year of nitrogen oxides. U.S. EPA Clean Air Market Programs, Acid Rain Program, available at http://www.epa.gov/airmarkets/arp/index.html. One of the companies, TVA, ranked as the second highest emitter of nitrogen oxides in the country, and the third largest emitter of sulfur dioxide, while its Paradise plant was responsible for emitting approximately one percent of the total sulfur dioxide emitted by all sources in the nation. See Resp'ts' Br. in Tennessee Valley Authority v. Horinko, Case No. 00-12310-E (11th Cir.), at 4.

[14] As noted by the Environmental Integrity Project in comments on the proposed rulemaking, EPA refers to one anecdote in the proposed rulemaking, citing a forest product company's claim that NSR prevented it from replacing analog controllers at a series of six batch digesters. Presumably, the agency is also relying on a series of examples outlined in pages 22 through 26 of its report to the President last summer. *See* "New Source Review: Report to the President" (June 2002). These include examples of various projects at chemical, aerospace, pulp and paper, plastics, flexible packaging and automotive industry, all of which were allegedly abandoned due to obstacles presented by New Source Review.

These examples were submitted by various trade associations, but are not otherwise identified. Because they are anonymous, neither the public nor the state agencies that implement the New Source Review program are able to ascertain the merits of the various claims, or to consider how best to address the concerns raised without additional emissions increases. On May 2, 2003, Eric Schaeffer, Director of EIP, requested copies of any underlying data that the agency received on the forest products anecdote described in the proposed rule, and on the various anonymous examples outlined on pages 22 through 26 of the report to the President, including the name of the company and affected facility, the date and location of the proposed project, and all other materials submitted to EPA. While EPA acknowledged the receipt of Mr. Schaeffer's request, it has not provided Mr. Schaeffer with the requested information nor has it made the information available to the public.

noted by the National Academy of Public Administration, EPA lacks "crucial information" about the NSR program, and has operated it with "no consistently collected and reported information on the basic functioning of the NSR program and therefore virtually no accountability by regulated facilities."[15]

EPA has also ignored potential emissions reductions from pending lawsuits and investigations. On top of the NSR lawsuits already filed or settled, the agency has issued 360 notices of violation and information requests against power plants, refineries, and other manufacturers for violating NSR rules.[16]

EPA has offered no evidence to support its conclusions that obtaining a pre-construction determination from the appropriate permitting authority is too costly and time consuming for major sources to undertake. EPA contends in the draft final rule's preamble that plant owners and operators have difficulty ascertaining whether their activities will trigger NSR. However, as evidenced by the current enforcement cases, very few owners or operators have ever requested an applicability determination. Having no empirical evidence to support this assertion, EPA cannot justify the radical "reforms" made in the draft final rule.

EPA makes no attempt in the draft final rule to rectify its failure to collect and analyze data on the effects of the rule, and it continues to ignore critical information. EPA has provided no justifiable reason why this rule is an appropriate exercise of its authority, has provided no justifiable reason why this rule will improve upon the current rule, and has not explained how the rule meets the statutory mandate. EPA condemns the previous rule without considering the benefits gained through proper enforcement as evidenced by numerous enforcement cases initiated in the late 1990's and 2000, and ignores that the program's shortcomings are due to EPA's own enforcement shortfalls.[17] The agency offers an overhauled, gutted, and industry-friendly version of NSR that would eviscerate a crucial part of the Clean Air Act.

B. Lack of Support for Conclusions Concerning Non-Utility Sources

The preamble to the draft final rule fails to support either EPA's claim that the exemption only covers projects that can rationally be called "routine," or its claim that the rule's operation will not have adverse environmental impacts. The preamble does not begin to support – or even address – why the exempt activities are not physical or operational changes within the plain meaning of the Clean Air Act. With regard to the agency's parallel claims for the 15,500 major *non-utility* sources of air pollution in the country, the agency cannot point to even a single

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[15] National Academy of Public Administration, *A Breath of Fresh Air: Reviving the New Source Review Program, Summary Report* (Apr. 2003), at 27-28.

[16] EIP, *NSR Investigations: Notices of Violations and § 114 Information Requests for Power Plant and Non-Power Plants* (current as of Mar. 21, 2003). Recent NSR settlements with Tampa Electric, PSE&G, Dominion Virginia, and Wisconsin Electric Power Company will reduce by more than seventy percent sulfur dioxide and nitrogen oxides emissions from power plants owned by those companies. If the agency achieves similar reductions from just the utility companies against which it has filed suit or is currently investigating, it will reduce sulfur dioxide emissions alone by four million tons below 2000 levels, or more than one quarter of the emissions from all sources in the United States combined. EPA has estimated power plant emissions cause more than 12,800 premature deaths in this country every year.

[17] See NAPA Report at 23 ("A combination of flaws in EPA's regulations and the failure to enforce NSR early in the program has fostered . . . widespread noncompliance with NSR's requirements to install cleaner technologies.").

document in the administrative record providing any support whatsoever for the new rule. The preamble only serves to highlight the utter lack of any shred of basis for EPA's claims regarding this second, larger category of sources.

The most that EPA can muster in the preamble to the draft final rule are bald assertions that the agency's data on electric utilities reflect, in broad outline, what the data would be in other industries. The agency does not attempt to enunciate any rational basis for this belief. In fact, these assertions are tantamount to an admission that the agency has *no* data to support the establishment of the equipment replacement exemption for non-utility sources. A staff notation – not meant for publication – that appears at the end of the preamble section entitled "Quantitative Analysis" actually raises the question whether the so-called analysis can support any assertions concerning impacts in sectors other than the electric utility industry. Based upon our review of the draft final rule and its administrative record, the answer plainly is no.

EPA's absolute failure to provide any basis for its assertions concerning non-utility sources exposes the rule as arbitrary and capricious. The notations appearing in the draft final rule shortly before its planned adoption reveal EPA's awareness of its lack of basis for extending the equipment replacement exemption to the 15,500 non-utility major sources in the country. The fact that the agency nevertheless intends to extend the exemption to those sources reveals the degree to which EPA has abdicated its responsibility to carry out and comport with the Clean Air Act.

III. An Especially Egregious Attribute of the Draft Final Rule

Finally, the draft final rule is arbitrary and capricious because it is internally inconsistent. The preamble acknowledges that an emissions-increasing reconstruction of a unit is necessarily a "modification," as that term is used in § 111(a)(4) of the Act. At the same time, however, the rule contains no safeguard to ensure that the equipment replacement exemption will not operate to allow an entire process unit – or even an entire facility – to be reconstructed in one fell swoop without triggering the preconstruction permitting requirements, no matter how much emissions increase as a result.

The preamble to the draft final rule declares that the twenty-percent ceiling for equipment replacements applies on a "per-activity" basis. A footnote elsewhere in the preamble seems to equate "activity" with "project," but "project" is never defined. The "Equipment Replacement Provision" in the rule language itself provides that the twenty-percent ceiling applies to the replacement of one part with another, plus any "associated" maintenance and repair. It would seem, then, that the rule counts the replacement of any part of a process unit, including any associated maintenance and repair, as a single "activity."

We see nothing in the draft final rule to prevent multiple exempt replacement activities from occurring simultaneously at a single process unit. As long as each replacement, along with its associated maintenance and repair, does not cost more than twenty percent of the replacement cost of the entire process unit in question, the replacement is exempt from NSR irrespective of whether other replacements occur at the same time, at the same process unit. We have not been able to identify any provision in the draft final rule that would prevent the owner or operator of a facility from simultaneously replacing every "part" at a unit – or at the whole facility – as long as each replacement costs less than twenty percent of the replacement cost of its associated process unit. There is certainly nothing in the draft final rule to prevent exempt replacements from

occurring just as fast as the facility owner can finance them.[18] By changing the focus from "any change" – the focus required by the Act – to any replacement costing no more than twenty-percent of a broadly defined "process unit", the draft final rule ensures that emissions-boosting changes – emissions-boosting reconstructions, for that matter – will not trigger the preconstruction permitting requirements. This attribute of the draft final rule is an extraordinarily offensive assault on public health and the environment. It is also arbitrary and capricious, in that it stands in stark contrast to the agency's acknowledgment that a reconstruction is necessarily a modification. Finally, this aspect of the rule violates the unambiguous statutory requirement of preconstruction permitting review for "any change" that increases emissions at a major source.[19]

Sincerely,

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[18] The draft final rule explicitly states that multiple exempt replacements may occur at the same process unit in a single calendar year.

[19] 42 U.S.C. § 7411(a)(4).

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Enclosures (2)