STAPPA / ALAPCO

STATE AND TERRITORIAL
AIR POLLUTION PROGRAM
ADMINISTRATORS

ASSOCIATION OF
LOCAL AIR POLLUTION
CONTROL OFFICIALS

S. WILLIAM BECKER
EXECUTIVE DIRECTOR

February 16, 2006

U. S. Environmental Protection Agency
Docket Center (EPA/DC)
Attention: Docket ID No. OAR 2005-0163
Room B102
1301 Constitution Avenue, NW
Washington, DC 20004

To Whom It May Concern:

On behalf of the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO), the two national associations of air pollution control agencies in 54 states and territories and over 165 metropolitan areas across the country, thank you for the opportunity to comment on the proposed rule entitled "Prevention of Significant Deterioration, Nonattainment New Source Review (NSR), and New Source Performance Standards: Emissions Test for Electric Generating Units ("the EGU hourly test") (October 20, 2005; 70 *Federal Register* 61081).

STAPPA and ALAPCO strongly oppose this proposed rulemaking and urge that you withdraw it. EGUs, particularly old, coal-fired power plants, are one of the most significant sources of air pollution in this country. Based on EPA reports on air quality and emissions trends, power plants are responsible for approximately 68 percent of annual sulfur dioxide (SO_2) emissions and 23 percent of nitrogen oxide (NO_x) emissions. Further, in some areas of the country, power plant contributions to SO_2 and NO_x levels are considerably higher. In addition, power plants emit more than 60 hazardous air pollutants (HAPs), including mercury, for which electric utilities are the single largest source of the nation's emissions. In addition, EGUs are responsible for 39 percent of U.S. carbon dioxide emissions, which contribute to global warming.

The associations believe that EPA's proposed rule 1) contravenes Congressional intent, 2) severely weakens the existing NSR program, 3) hampers state and local efforts to attain and maintain health-based air quality standards, 4) is based upon an inappropriate set of assumptions, 5) is not required by any legal rationale and

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6) seriously undermines ongoing NSR utility enforcement cases. We address these points in greater detail below.

EPA's EGU Hourly Test Contravenes the Intent of Congress

STAPPA and ALAPCO are concerned that the proposed rule nullifies a crucially important tool in the Clean Air Act that was intended by Congress in 1977 to help states and localities attain and maintain our nation's health-based air quality standards. In the Clean Air Act of 1977, Congress exempted existing coal-fired power plants and other facilities from the strict pollution control requirements that all new operations had to meet. However, Congress intended that older, high-emitting sources would gradually be upgraded or phased out. Under the law, the exemption for these so-called "grandfathered" plants ends when a facility is physically modified in a way that increases its emissions by a significant amount. At that point, NSR is triggered and the facility is required to install modern pollution controls. In addition, the plant must analyze the impacts of its increased emissions on existing air quality increments in attainment areas or offset its emissions in nonattainment areas.

These requirements were designed to advance the development of air pollution control technology, to protect Class I areas, and to aid in the attainment of health-based air quality standards. We find no evidence that Congress ever intended that the nation's largest sources of air pollution would be allowed to operate indefinitely without installing modern air pollution controls. Unfortunately, the proposed rule defies the intent of Congress by encouraging old, dirty units to rebuild and extend their lifetime, without installing best available control technology. We are very concerned that adoption of this rule could completely eliminate the application of NSR safeguards to EGU modifications.

We are obviously concerned about potential adverse health impacts if EPA promulgates this proposed rule. The health risks linked to sulfur dioxide and nitrogen dioxide emissions are well-known and undisputed: sulfur dioxide pollution causes premature death from heart and respiratory problems, while nitrogen dioxide forms ground-level ozone, which can cause or exacerbate respiratory illness and asthma. Old, dirty boilers emit vast quantities of these pollutants, and the proposed rule allows them to continue to do so without installing modern pollution control equipment. Congress did not envision—and the Clean Air Act does not allow—this outcome.

New Source Review Requirements Will Not Apply to Utility Modifications under the Proposed EGU Hourly Test

How the proposed rule will lead to this result brings us to our second point: Under the maximum "achievable" hourly rate of emissions test proposed by EPA, no increase in emissions—before and after the modification—would likely ever result from a modification, and, therefore, statutorily prescribed NSR requirements to install modern pollution controls and to obtain a permit would not be triggered. This is the case because EPA's proposed rule does not require representative actual emissions from the five years

before the change to constitute the baseline amount. Rather, the baseline amount is the "maximum achievable" hourly rate of emissions—a figure estimated conservatively in an analysis by EPA's Office of Enforcement and Compliance Assurance (OECA) to be at least 10 times higher than representative actual emissions.[1] Thus, any increases in hourly emissions after the change would still be far below the high theoretical "achievable" level chosen as baseline.

History supports our contention that NSR will rarely, if ever, be triggered. Virtually no EGU modification[2] has ever triggered NSR by resulting in an increase in the hourly rate of emissions—regardless of the exact approach to measurement of the hourly increase. This was confirmed in 1996 by the former head of EPA's Office of Air Quality Standards, who stated in a letter to Senator Robert Byrd that "no existing unit has become subject to new source performance standards (NSPS) under either the modification or reconstruction provision…" [3] Thus, if this proposed rule is promulgated, neither NSPS nor NSR requirements will apply to the modifications of existing units.

In fact, it is clear that the proposed test will allow the reconstruction of utility boilers across the nation without new source review, allowing EGUs to make major changes to their operations, operate their equipment longer hours, and increase their emissions thousands of tons per year without pollution controls or analysis of the impacts on air quality, including prevention of significant deterioration (PSD) increments. Not only will NSR simply not apply, but the facility will be able to make the changes it desires without the knowledge of the permitting authority or the public.

The Proposed Rule Will Interfere with the States' Ability to Achieve and Maintain the NAAQS

STAPPA and ALAPCO believe that EPA's rule will interfere with the ability of state and local agencies to develop and implement plans that achieve and maintain the NAAQS. As EPA is fully aware, today agencies across the country are faced with the daunting challenge of developing SIP revisions for the 8-hour ozone and $PM_{2.5}$ standards. In order for that SIP planning process to be successful, our agencies must not only have an accurate and complete understanding of all existing sources of emissions in their jurisdictions, they must be able to account for and regulate increases in emissions occurring from major modifications to these facilities. When we are unable to appropriately assess and regulate increased levels of emissions from EGUs, it undermines our efforts to protect the public health and welfare. This will not only undermine our SIP efforts, but will also place an unfair burden on other sources of pollution—including small businesses—which will be forced to make up for these emissions with far more expensive and considerably less cost-effective strategies.

[1] Memorandum from Adam M. Kushner to William Harnett, "Air Enforcement Division's Comments on the Draft New Source Review Clean Air Interstate Rule (August 24, 2005 draft)

[2] One exception appears to be the extensive modifications made by WEPCO's Port Washington plant in 1990.

[3] Letter from John Seitz, Director, U.S. EPA, Office of Air Quality Planning and Standards to the Honorable Robert C. Byrd, U. S. Senate (January 26, 1996).

The Proposed Rule Is Based on Flawed Assumptions

We strongly disagree with EPA's main rationale for this rule, namely that EGU emissions reductions are not necessary because other programs—the Clean Air Interstate Rule (CAIR), the Best Available Retrofit Technology rule (BART), the Acid Rain program and the NO_x SIP Call—already result in sufficient reductions of pollutants. On the contrary, CAIR will not compensate for the loss of NSR for EGUs.

Specifically, the effect of CAIR is limited by the fact that it does not cover the 22 western states. Nor will CAIR require a source to install best available control technology (BACT) or lowest achievable emissions reduction (LAER). In fact, CAIR requires no pollution control equipment at all for the first five years. Moreover, because it is a market-based, cap-and-trade program, there is no way to ascertain which power plants will buy allowances and continue to pollute and which will not. EPA invokes aggregate statistics to justify the proposed rule, but national statistics have no bearing on the health of individuals living in communities near power plants that pay to pollute by purchasing credits under CAIR. Recent data released by EPA indicate that only 187 out of 975 coal-fired power plants are projected to have both scrubbers and selective catalytic reduction equipment by 2010—despite CAIR.[4] Even by 2020, only 328 coal-burning power plants out of 1041 nationwide are projected to have scrubbers and SCR. Clearly, the vast majority of communities will continue to be impacted by emissions that will not be reduced by CAIR.

In addition, CAIR addresses only NO_x and SO_2 emissions, while NSR addresses all pollutants covered under the Clean Air Act, including PM, VOCs and CO, all of which can be expected to increase when EGUs are no longer required to comply with NSR requirements. Finally, CAIR controls for utilities that do install them are unlikely to be in place soon enough to help states achieve the new health standards for 8-hour ozone and $PM_{2.5.}$ In short, CAIR cannot substitute for the utility-by-utility requirements for pollution control equipment, increment analysis, and offsets that NSR provides, which will result in steady and even-handed emissions reductions nationwide.

Moreover, BART will not compensate for the loss of NSR for EGUs. Not only does BART apply only to units constructed between 1962 and 1977, but many believe that the numerous regulatory exceptions to the requirements to install controls render it largely ineffective. In fact, many states have expressed serious concern that BART would not provide a safety net if EGUs are no longer subject to NSR. The associations do not share EPA's optimism that there will be "negligible" impacts from a few uncontrolled EGU sources. Even a relatively small EGU is still a significant source of air pollution, typically emitting many thousands of tons of contaminants per year.

[4] These figures are based on a spreadsheet submitted by William Wehrum, Assistant Administrator for EPA's Office of Air and Radiation, to the Senate Environment and Public Works Committee Subcommittee on Clean Air, Climate Change, and Nuclear Safety (February 9, 2006). The spreadsheet lists all coal-fired power plants, emissions in tons per year of NO_x and SO_x, attainment status of the area, and controls anticipated by EPA's Integrated Planning Model (IPM).

Additionally, the NO_x SIP Call and the Acid Rain program will not compensate for the loss of NSR for EGUs. A 2003 Public Interest Research Group study on power plant emissions concluded that despite national and regional NO_x reduction initiatives implemented during the 1990s, more power plants increased their NO_x emissions between 1995 and 2000 than decreased their pollution. Specifically, 263 of the oldest 500 power plants increased their NO_x emissions, even while collectively these 500 plants decreased their total NO_x emissions. Moreover, the Acid Rain program will not compensate for the loss of NSR for EGUs. The same report concluded that although the program has clearly reduced aggregate SO_2 emissions, 300 of the 500 power plants analyzed by PIRG actually increased their emissions since 1995, resulting in local emissions impacts despite overall national advances.

Finally, none of these programs requires air quality modeling to determine the impacts of increased emissions on either local or regional air quality. Hence, increases in actual emissions could exacerbate local air quality problems or cause new violations of air quality standards without the evaluation of the air quality impacts of those increases that ordinarily would be required under NSR.

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EPA's Extension of the Duke Energy Decision is Not Legally Required

Fifth, there is no acceptable legal rationale for the *Duke Energy* decision of the Fourth Circuit Court of Appeals to be extended beyond the bounds of that Circuit. Each United States Circuit Court of Appeals decision binds only those states within its jurisdiction. Thus, the Fourth Circuit's decision upholding the NSPS hourly rate of emissions test to NSR applies only to Maryland, Virginia, West Virginia, North Carolina, and South Carolina. EPA's rush to apply this decision to the other 45 states in the country through the current rulemaking cannot be justified as a matter of law. Nor do we find persuasive EPA's stated reason that it wishes to achieve consistency. We believe that an opinion that is detrimental to health and the environment should be confined rather than broadened.

It is also important to note that, of the five federal courts that have considered the question of the correct statutory definition of "modification" for purposes of NSR, three courts—the D.C. Circuit Court of Appeals, the Southern District of Ohio, and the Southern District of Indiana—have strongly disagreed with the reasoning and conclusion of *Duke Energy*. Specifically, in *New York v EPA*, the D.C. Circuit stated that it was "not convinced" by the industry arguments that the *Duke* test was correct. The Court noted further that the *Duke* holding regarding the definition of "modification" does not even address the question of how to measure emissions increases under two different regulatory programs—NSPS and NSR. On December 9, 2005, the D.C. Circuit denied EPA's petition for a rehearing on certain issues raised by the agency, thereby affirming its opinion.

The Courts in the *Ohio Edison* and *Cinergy* enforcement cases also have rejected the *Duke* approach. In the *Cinergy* opinion released August 29, 2005, the Court stated that,

"if a physical change will result in a unit increasing its operating hours, the projected actual operating hours would include the increase."

Rather than let these disparate legal views play out in the federal courts, however, EPA has seized on the approach that the utility industry has pursued since 1980 to propose the current rule. Meanwhile, the Fourth Circuit decision has been appealed to the U.S. Supreme Court by several environmental groups, and the Seventh Circuit has accepted an appeal of the *Cinergy* decision. In light of the judicial uncertainty surrounding interpretations of "modifications" under NSR, the proposed EGU rule is inappropriate and unwarranted.

The EGU Hourly Rule Seriously Undermines the NSR Utility Enforcement Cases

Finally, many are extremely concerned that EPA has proposed a rule that seriously—perhaps, in some cases, fatally—undermines the NSR utility enforcement cases that were initiated in 1999. Most state and local agencies firmly support these cases and the litigators in EPA and the Department of Justice who have diligently and effectively pursued them. The health and quality of life of millions of Americans has been improved by the reductions in emissions that have been achieved. Most recently, in March 2005, EPA settled *Illinois Power*, which resulted in annual reductions of 54,000 tons of NO_x and SO_x, and *Ohio Edison*, which resulted in annual reductions of 134,000 tons of NO_x and SO_x. According to a report released in 2004 by the EPA Office of the Inspector General, EPA enforcement officials project that, if NSR requirements were enforced against the original nine defendants in the 1999 NSR enforcement initiative, the result could be emission reductions of 1.75 million tons of SO_2 and 629,000 tons of NO_x annually.

Nonetheless, like EPA's Equipment Replacement Rule, finalized in October 2003, the proposed EGU NSR rule squarely conflicts with the NSR law being enforced, frustrating the efforts of plaintiffs, encouraging defendants, and irritating courts. The EPA Inspector General's report, "New Source Review Rule Change Harms EPA's Ability to Enforce Against Coal-fired Electric Utilities" (September 2004) might as well have been written about the proposed EGU hourly rule. Both the Equipment Replacement Rule and the EGU NSR rule will seriously hamper the efforts of EPA's enforcement office, settlement activities, and existing enforcement cases.

Already, briefs based on the proposed EGU rule have been filed in the *Cinergy* and *AEP* cases. AEP moved for a stay in November, stating (in one argument) that EPA's proposed rule severely undercuts plaintiff's liability claims. Similarly, Cinergy moved for summary judgment on the following day on the grounds that EPA made "binding admissions [that] compel the conclusion that the regulated community, including Cinergy, lacked fair notice of the legal standards urged by Plaintiffs in this case." The proposed rule's effect of undermining these cases could potentially curtail huge emissions reductions.

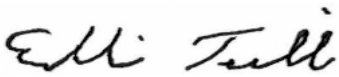
Under the current NSR/PSD applicability test, modified sources have no significant advantage over new units. Under the proposed test, however, existing units are likely to rebuild and increase their annual tons of emissions, deteriorating limited air resources and placing those who build new units at a competitive disadvantage. Plant managers are likely to choose to rebuild old boilers at existing units to recapture lost capacity without installing BACT. It can be expected that this practice will consume available annual increments, reduce the number of new unit installations (thereby sacrificing efficiency increases), and retard the development of new technologies.

To summarize our views, EPA states in the proposal that "the central policy goal …is to ensure that they [stationary sources] will install state-of-the-art pollution controls at the juncture where it otherwise makes sense to do so." We believe, as did Congress, that it makes sense to install state-of-the-art controls on EGUs when they are making major modifications, that is, when they are renovating boilers to recapture lost capacity or when they are conducting life-extension activities. This is the logical juncture to take steps to protect public health and the environment. This proposed rule, which eviscerates NSR for EGUs, should not be finalized.

The associations appreciate this opportunity to comment on the proposed rule. We regret that we have no suggestions that could revise or moderate it. Rather, we request that EPA withdraw this proposal for the reasons that we have set forth here. Please do not hesitate to contact one of us or Mary Stewart Douglas if you wish to discuss these comments.

Sincerely yours,

John Paul
ALAPCO President



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