

Critical Issues: New Source Review Update

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Topics We Will Cover

- 2002 reform rule; status of state programs
- RMRR rule
- Utility enforcement cases
- Alternative applicability test for utilities
- PM_{2.5} issues
- The future

Status of Challenge to the 2002 NSR Rule

- On December 31, 2003, fourteen states filed suit in DC Circuit Court alleging rules unlawful. Eight states also intervened on behalf of EPA
- Decision rendered on June 24, 2005:
 - Provisions on calculating baseline, the “actual-to-projected-actual” emissions test, and PALs upheld
 - Clean Unit Test and PCP vacated as unlawful
 - Lack of record-keeping remanded to EPA
 - Court did not rule on whether EPA precluded adoption of more stringent rules by states, but invited state litigants to resubmit existing (i.e., “old”) NSR rules to EPA as test cases.
- EPA seeks rehearing on CU Test and on PCP retroactivity

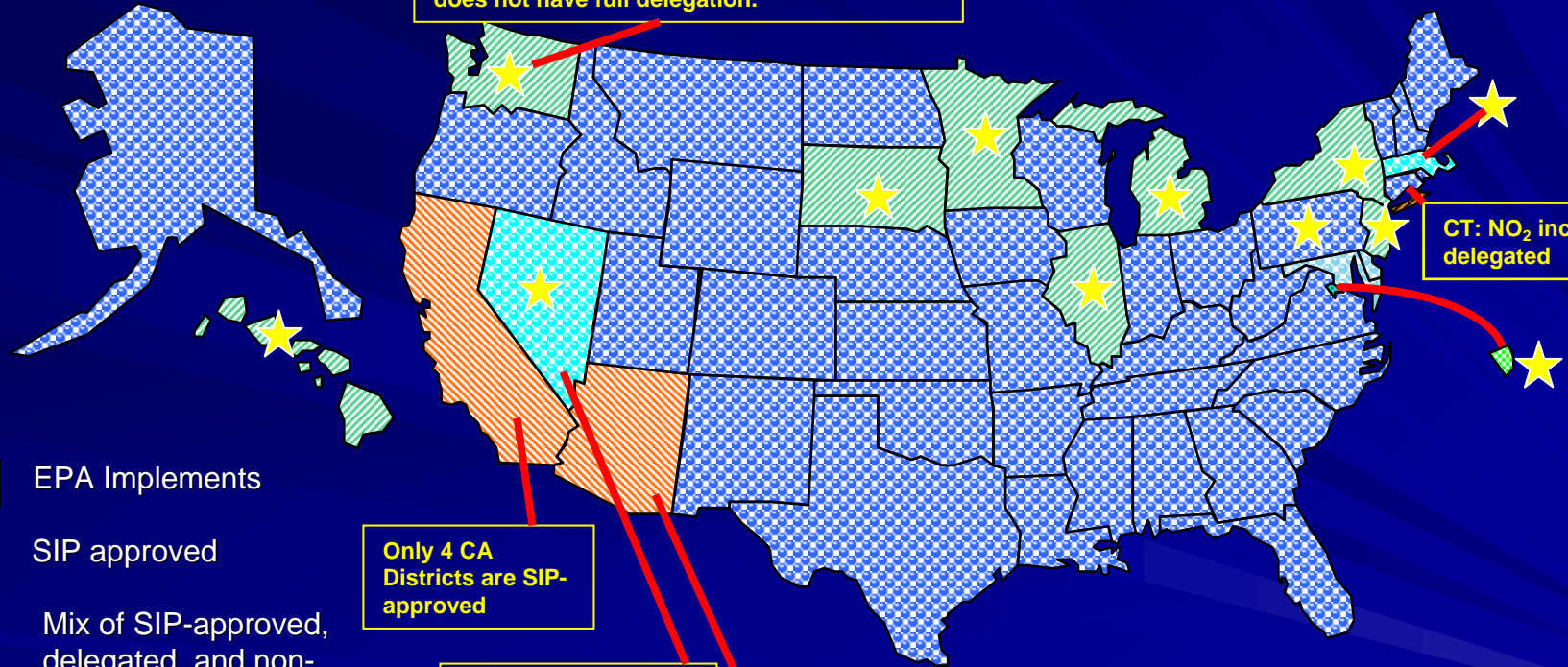
NSR Program Status

★ = States where 12/31/02 NSR revisions are in effect (generally, all delegated areas); revisions also apply in "no delegation" areas, including Indian lands, and to specific delegated pollutants and sources. Nonattainment areas within States are not delegated for that nonattainment pollutant.






No Delegation (EPA Region issues permits): Massachusetts, Nevada, Puerto Rico, Virgin Islands, Guam, American Samoa, all Indian lands (even in SIP-approved States).

Delegation was withdrawn 3/3/03 from all of NV except Clark County and from the following APCD in CA: Bay Area, Kern County, San Diego County, Santa Barbara County, Shasta County, and South Coast.

The Energy Facility Site Evaluation Council (EFSEC) permits power plants >350 MW, but does not have full delegation.



CT: NO₂ increments delegated

-  EPA Implements
-  SIP approved
-  Mix of SIP-approved, delegated, and non-delegated (EPA implements)
-  Partial delegation
-  Full delegation

Only 4 CA Districts are SIP-approved

Clark County is SIP-approved. NV delegation temporarily lost: EPA implementing

★ Maricopa & Pima Counties are delegated; Pinal County and State are SIP-approved except for PM-10.

NOTE: All nonattainment areas are SIP-approved, so the revised rule does not apply in any nonattainment area, even in delegated States.



What States and Locals are Doing

- Many States/localities were awaiting the outcome of the legal challenges
- Some are adopting federal rules verbatim
- Others are customizing the rules to fit programs
- Some are seeking equivalency determinations for existing rules

States Not Adopting the Rules

- Connecticut
- Maine
- Massachusetts
- New Hampshire
- Delaware
- Arizona
- New Jersey
- New York
- Rhode Island
- Vermont
- California
- Oregon

States Intending to Adopt the Rules (Many With “Tweaks”)

- Alaska
- Michigan
- Minnesota
- Ohio
- Washington
- W. Virginia
- Alabama
- Florida
- Georgia
- Iowa
- Hawaii
- Missouri
- Nebraska
- Oklahoma
- Wyoming
- Indiana
- Kentucky
- Kansas
- Louisiana
- Mississippi
- Montana
- New Mexico
- North Carolina
- North Dakota
- Utah
- Arkansas
- Idaho
- Nevada
- South Carolina
- Virginia
- Colorado

States Adopting Hybrid Rules (Significant Changes)

- Illinois
- Maryland
- Pennsylvania
- Wisconsin
- Texas

Really, except for those states adopting the rules by reference, nearly all states are adopting rules that are “tweaked” to some extent.

Unknown Intentions

- South Dakota
- Tennessee

Next Steps

- EPA says their January 2, 2006 remains
- States are free to adopt their own NSR reforms, provided they are “as stringent as” the federal rules (S/A Menu of Options is available)
- States may wish to seek equivalency determination on existing rules;
- States should consider developing their own recordkeeping requirements
- States should monitor closely outstanding policy, legal, and technical issues relating to EPA’s NSR reforms

Outstanding Policy, Legal, and Technical Issues

- NSR reform loose ends (monitoring/record keeping, reconsideration of PCP and CU)
- Appendix S revisions
- Final PM_{2.5} and 8-hr ozone implementation rules
- EPA's proposed NSPS hourly test for utilities
- Utility court case appeals

Status of Challenge to Equipment Replacement Rule

- Fourteen states filed suit against EPA claiming rule unlawful under CAA. Nine states intervened on behalf of EPA
- Stay granted by D.C. Circuit December 24, 2003; environmental groups petitioned for administrative reconsideration same day
- EPA's reconsideration of the rule completed in June 2005; no changes were made
- Judicial case in DC Circuit is now starting up again, with briefings this fall and oral arguments likely to begin in mid-2006
- Rule continues to be stayed

NSR Coal-Fired Utility Cases

- U.S. v. Illinois Power and Dynegy Midwest
[settled 2005; annual reductions of 54,000 tons of NO_x and SO_x]
- U.S. v. Southern Indiana Gas & Electric
[settled 2003; annual reductions of 10,600 tons of NO_x and SO_x]
- U.S. v. Cinergy (Indiana)
[summary judgment against Cinergy August 29, 2005; Cinergy has requested a direct appeal to the Circuit Court]
- U.S. v. AEP (American Electric Power Service Corp.) (Ohio)
[trial held in July 2005; closing arguments submitted in writing]
- U.S. v. Ohio Edison
[settled 2005; annual reductions of 134,000 tons of NO_x and SO_x]

NSR Coal-Fired Utility Cases

- U.S. v. Georgia Power
[inactive docket]
- U.S. v. Alabama Power
[adverse decision for EPA—June 2005]
- U.S. v. Duke Energy (North Carolina)
[adverse decision for EPA in Fourth Circuit Court of Appeals—June 2005]
- U.S. v. Eastern Kentucky Power Cooperative
[filed 2004; settlement discussions apparently occurring]
- Tampa Electric
[settled 2000; reductions of 85% by 2010]
- TVA v. EPA
[Eleventh Circuit Court of Appeals vacated decision of the EPA Environmental Appeals Board—July 2003]

Key Decisions on Modifications and Routine Maintenance Exemption

- **Ohio Edison, August 2003**—Court rejected source's claim that its modifications were routine maintenance using "4 factors" test to examine their nature, extent, cost and frequency. Court held that increases in emissions should be measured using actual annual emissions. Case consistent with ruling in U.S. v. Cinergy case, decided on August 29, 2005
- **Duke Energy, June 2005**—Fourth Circuit affirmed lower court, concluding that NSR only applies when modifications result in an increase in the hourly rate of emissions of a generating unit. NSR is therefore only applicable in states in 4th Circuit when modifications result in increases in hourly rate of emissions. (MD, WVA, VA, NC, SC). Court refused rehearing on August 30, 2005. Case consistent with ruling in Alabama Power, decided on June 3, 2005

EPA's "Alternative Applicability Test"

- Applies to all Electric Generating Units (EGUs)
- Changes the NSR applicability test from an actual annual emissions test to an hourly NSPS test (three options proposed—max achievable, max achieved, or output based)
- EPA rationale is that CAIR and BART address EGU emissions sufficiently, and that its rule will be consistent with the “Duke Energy” ruling in the Fourth Circuit that upheld the “hourly rate of emissions test” for the five states in the Circuit
- Opponents argue that EPA’s rule would allow significant increases in annual emissions that would have required the installation of modern pollution controls under EPA’s “old”—or even reformed—NSR rules. They contend that under this approach, NSR would rarely apply.

PM_{2.5} NSR Issues

- Precursors
 - SO₂
 - NO_x
 - VOC
 - Ammonia
- Major source threshold
- Significant emissions rate
- Significant impact level
- Preconstruction monitoring
- Offset ratios
- Precursor trading
- Interim measures
- Rural transport

The Future

- Court cases must be settled first
- Plans written, adopted, submitted, and approved (plus survive any legal challenges)
- SIPs for 8-hr ozone and PM_{2.5}
- Possibly a new PM standard
- New applicability test for utilities
- More court cases

NSR Committee Activities

- Continue to monitor state actions in response to 2002 reforms
- Draft comments on PM_{2.5} NSR issues
- Review the utility alternative applicability test proposal and comment
- Continue to monitor legislation with NSR exemptions