

# NSR Current Events

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October 25, 2011

- Plan to talk about six key current NSR issues:
  - Recent NSR Utility Enforcement Decisions
  - WINSR SIP
  - GHG BACT
  - GHG NSPS for Utilities
  - Avenal
  - NAAQS Implementation Permitting Issues

- Detroit Edison
  - First case decided under the 2002 reform rules.
  - EPA alleged NSR violations related to typical maintenance projects.
  - Company filed for summary judgment on the grounds that it complied with the rules:
    - Submitted notice of the project ahead of time.
    - Provided emissions projections indicating no significant emissions increase of NSR regulated pollutants.
    - Post-project tracking underway.
  - EPA contended that the company should have predicted a significant emissions increase.
  - Judge ruled for the company – all that had to be done was properly done under the rules
  - Still opportunity for EPA to appeal.

- Homer City
  - EPA claimed NSR violations associated with typical maintenance projects.
  - Current owners moved to dismiss on the grounds that the alleged violations occurred before they bought the facility.
  - Past owners moved to dismiss on the grounds that the statute of limitations had passed and injunctive relief was inappropriate given that they no longer controlled the facility.
  - The judge agreed with defendants and dismissed the case.

# Wisconsin SIP Implementation of 2002 NSR Rules

- In 2003, a WDNR preliminary analysis suggested that emissions would increase in Wisconsin if the 2002 NSR rules were adopted.
- WDNR later disavowed this conclusion and adopted the 2002 NSR rules provisions.
- EPA approved the SIP.
- Sierra Club and NRDC petitioned for review in 7<sup>th</sup> Circuit on the grounds that the NSR reform rules would interfere with attainment under §110 or and “backsliding” under §193 of the CAA—in abeyance pending reconsideration.
- EPA denied reconsideration March 8, 2010.

- NRDC and Sierra Club argue EPA's approval of Wisconsin SIP adoption of 2002 NSR rules:
  - Violates “anti-backsliding” provisions of CAA § 193
    - Prohibits relaxation of (i) a “control requirement in effect” in a nonattainment area as of November 15, 1990; or (ii) a “control requirement” required by a plan “in effect” as of that date
    - Petitioners argue, because 2002 NSR Rules are less stringent, they constitute an impermissible “backslide”
    - Similar to arguments made by state petitioners in *New York I*, which court there found to “unripe”
  - Violates “companion anti-backsliding” of CAA § 110(1)
    - Prohibits approval of SIP revision that “interfere” with attainment or “progress” towards attainment

- EPA response:
  - Petitioners are trying to re-litigate issues they lost in *New York I*
  - No basis to claims that 2002 NSR rules are “less stringent” than prior rules; thus, no “backslide”
- Industry intervenors response:
  - CAA § 193 is a “savings” provision that has no application to EPA’s 2008 approval of Wisconsin SIP
    - Approval was to SIP provisions adopted in 1995 – *after* November 15, 1990
    - SIP provisions in effect in Wisconsin as of November 15, 1990 were based on 1978-79 NSR “potential-to-potential” test – *less* stringent than 2002 NSR rules

- Industry response (cont'd):
  - Petitioners misconstrue CAA § 110(1)
    - Wrong as a matter of statutory interpretation; NSR permit programs are *not* “applicable requirements”
    - Wrong as a matter of jurisdiction; subsection (1) does not authorize collateral attack on 2002 NSR rules
  - In any event, 2002 NSR rules are not “less stringent”
    - Actual-to-projected actual test is same as under 1980 NSR rules
    - Baseline methodology not less stringent than test allowed under prior NSR rules
    - PALs provision does not make 2002 NSR rules less stringent
    - Record supports EPA’s approval



## Decision June 16, 2011 – Petition Denied

- Opinion by Chief Judge Easterbrook; panel included Judges Evans and Williams
- No more evidence today than in 2002 that the revisions to PSD rules approved by D.C. Circuit in *New York I* would result in more emissions
- While court found it need not to address industry’s arguments regarding the “inapplicability” CAA § 193, structure of opinion indicates court agreed with industry that pre-1990 Wisconsin SIP was based on “potential-to-potential”
- Court also embraced industry’s argument – stressed during oral argument – that even if post-SIP revision emissions did increase, remedy is *not* disapproval of revision but, instead, steps taken under CAA § 110

- EPA approved OH SIP implementing 2002 NSR rules on February 25, 2010.
- Sierra Club and NRDC petitioned for review in 6<sup>th</sup> Circuit and petitioned for reconsideration on the grounds that the NSR reform rules would interfere with attainment under §110 or and “backsliding” under § 193 of the CAA—in abeyance pending reconsideration.
- Industry intervened.

- Issued on Nov. 17, 2010
  - EPA invited public comments by Dec. 1, particularly on technical corrections.
  - Guidance was effective immediately.
  - Revised draft issued March 2011 – “technical corrections” only.
- Some helpful suggestions:
  - No air quality analyses needed for GHGs.
  - Long term compliance periods/averages suggested.
  - EPA claims the guidance does not change the rules.
  - Biomass – subsequent proposal deferral.
- On the other hand:
  - EPA asserts that CCS must be considered for large emitters.
  - “Clean fuels” must be considered.
  - “Redefining the source” is on the table.
  - BACT review for new major sources extends to non-emitting units.

- Utility NSPS for GHGs
  - Why is EPA doing this?
    - NSPS is the floor for BACT.
    - Section 111(d) existing source program.
  - Deadline for proposal pushed back two months to September 2011, then deferred again ...
  - EPA claims to have plenty of relevant data and their work is far along.
  - SBA briefing materials give some insights:
    - “No basis” for setting work practice standards.
    - “May set different standards for new and modified sources.”
    - Considering energy efficiency, post combustion, and other measures (e.g., co-firing, fuel switching, CHP).

- Utility NSPS for GHGs (cont'd)
  - Options under consideration (new sources):
    - Energy efficiency:
      - Supercritical and ultra-supercritical.
      - IGCC.
      - Coal drying.
      - Boiler feedwater heating.
    - CCS: “no insurmountable technological, legal, institutional or other barriers.”
      - Five to ten large scale projects by 2016.
      - Goal of widespread cost-effective deployment after 2020.

- Utility NSPS for GHGs (cont'd)
  - Options under consideration (existing sources):
    - Energy efficiency:
      - Combustion control optimization.
      - Cooling system heat loss recovery.
      - Flue gas heat recovery.
      - Low rank coal drying.
      - Sootblower optimization.
      - Steam turbine design.

- Avenal Power Center
  - Proposed project to construct 600 MW CCGT power plant.
  - Submitted PSD permit application in Feb. 2008.
  - Determined complete by EPA in Mar. 2008.
  - Sued EPA in the DDC on Mar. 8, 2010 for failure to issue the PSD permit within one year.
  - Among other things, delays due to EPA's desire to apply new requirements:
    - 1-hr NO<sub>2</sub> standard.
    - PSD for GHGs.
  - Delay also caused by EAB review process:
    - Permit not final if appealed to EAB.
    - Permit not final if remanded by EAB.
    - Permit only becomes final if not appealed or when EAB upholds it.
    - A process that "EPA freely concedes could take anywhere from six to eighteen months, or longer, to complete."

- Avenal Power Center (cont'd)
  - DDC ruled in favor of Avenal on May 26, 2011:
    - Ordered the Administrator to issue a final PSD permit by August 27, 2011.
    - Summarily rejected EPA's assertion that its EAB procedural regulations must be given deference.



- Avenal Power Center (cont'd)
  - According to the DDC:
    - The EPA has labored mightily to convince this court that [the statutory 12-month deadline for issuing PSD permits] is somehow ambiguous and, therefore, this court should defer to its interpretation under *Chevron*. Horsefeathers! The EPA's self-serving misinterpretation of Congress's mandate is too clever by half and an obvious effort to protect its regulatory process at the expense of Congress's clear intention. Put simply, that dog won't hunt.

- Avenal Power Center (cont'd)
  - EPA issued a “final” permit on May 27, 2011.
  - GHG BACT was not required:
    - “Due to the fact that Avenal’s permit application was complete and a proposed permit issued in advance of EPA’s proposal of certain recently-promulgated regulations establishing new and additional requirements and other compelling factors, EPA has tentatively determined that it should grandfather this permit from those requirements....”
  - EAB declined review on this issue.

## Primary NO<sub>2</sub> NAAQS

- Final Rule published on Feb. 9, 2010 (75 Fed. Reg. 6474)
  - Retained the annual standard of 53 ppb
  - Added a standard limiting the 3-year average of 98<sup>th</sup> percentile maximum daily 1-hour concentrations to 100 ppb
  - Added a new road-side monitoring program
- Although primary focus during rulemaking was on mobile source emissions, stationary sources are not exempt
- Requirement to address the 1-hr NAAQS has posed significant permitting problems for many sources

## Primary SO<sub>2</sub> NAAQS

- Final Rule published on June 22, 2010 (75 Fed. Reg. 35520)
  - Repealed the current 24-hr and annual NAAQS
  - Added a standard limiting the 3-year average of the 99<sup>th</sup> percentile maximum daily 1-hour concentration to 75 ppb
- Focus is on large stationary sources such as power plants
- Included unprecedented and unproposed reliance on modeling for designations and for maintenance/infrastructure SIPs
  - Indicated guidance on modeling would be released for comment

- On April 1, 2010, EPA's Office of Air Quality Planning & Standards indicated that all PSD permits pending as of the effective date of a new NAAQS are required to address that NAAQS
  - April 12, 2010 for the 1-hr NO<sub>2</sub> NAAQS; August 23, 2010 for the 1-hr SO<sub>2</sub> NAAQS
  - EPA's decision to issue a PSD permit to Avenal Power Center on May 27, 2011 indicates that this is not a settled issue
- The end of the PM<sub>10</sub> surrogate policy on May 16, 2011 means that PSD permit applicants will have to model annual and daily PM<sub>2.5</sub> concentrations
  - The August 12, 2009 decision in the Trimble County case had already limited the applicability of the surrogate policy

- On June 29, 2010, EPA issued guidance on 1-hr NO<sub>2</sub> modeling
  - Issued in response to reports that modeling showed “potential violations” of the NAAQS
  - Noted particular problems for emergency electric generators and pump stations
  - Acknowledged that large coal- and natural gas-fired power plants could be affected

## June 2010 NO<sub>2</sub> Guidance:

- Suggests raising stacks to GEP height
  - Implication is very tall stacks needed for emergency generators
- Acknowledges problems with modeling emergency generators
  - Suggests taking enforceable conditions of time and hours of operation
- Establishes an interim Significant Impact Level (“SIL”) of 4 ppb, which is very low
  - Compared to the highest modeled or monitored value although the standard has a 98<sup>th</sup> percentile form
- Increases the conservatism of assumptions concerning the ambient ratio of NO to NO<sub>2</sub>
- Rejects the default in-stack NO<sub>2</sub>/NO<sub>x</sub> ratio

## **Additional NO<sub>2</sub> Guidance:**

- On March 1, 2011, EPA issued supplemental guidance on 1-hr NO<sub>2</sub> modeling, which addressed some of the problems
  - Allows the use of average hourly emission rates when modeling many intermittent sources
  - Appears to limit to 10 km in most cases the area that must be modeled
  - Established a default ambient ratio of NO to NO<sub>2</sub>, which may still be too high
  - Established a default in-stack ratio of NO<sub>2</sub>/NO<sub>x</sub> which may still be too high
- Concerns remain.



- EPA's decision on the SO<sub>2</sub> NAAQS appears to require modeling of all major SO<sub>2</sub> sources
- EPA issued guidance on August 23, 2010, clarifying that the *Guideline* applies to modeling for the 1-hr SO<sub>2</sub> NAAQS
- EPA issued further guidance on modeling for 1-hr designations on March 24, 2011
- Additional draft guidance issued Oct. 2011
- Many sources are likely to model exceedances of the 1-hour NAAQS

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