

**EPA's New Source Review Rules
Massacre:
The Environmentalists' Perspective**

Ann Weeks, Clean Air Task Force

Boston Bar Association

November 17, 2003

In A Nutshell:

- The New Year's Eve and Labor Day NSR Final Rules Are Not Legally Defensible.
- The New Year's Eve and Labor Day NSR Final Rules Will Result in Massive Actual Air Pollution Increases.
- EPA's Assertions that the Rules Changes Will Not Affect Ongoing Enforcement Actions Are Belied By EPA's Own Recent Filings in the Enforcement Case Against Illinois Power.
- The Final Rules Will Result in Significant Environmental and Public Health Impacts.

The NSR Rules Changes Are Not Legally Defensible

Clear Statutory Language in Clean Air Act:

- Section 111(a)(4) defines “modification” as “*any* physical change in, or change in the method of operation of, a stationary source which *increases the amount* of any air pollutant emitted by such source” 42 U.S.C. § 7411(a)(4).
- Modifications are subject to New Source Review. 42 U.S.C. § § 7475(a), 7479(2)(C), 7501, 7503.

***WEPCO v. Reilly*, 893 F.2d 901 (7th Cir. 1990)**

- Replacement of major generating station systems – including steam drums and air heaters – constitutes a “physical change.”
- To hold otherwise would mean that the application of the PSD requirements to older facilities would be indefinitely postponed.
- “There is no reason to believe that such a result was intended by Congress.” 893 F.2d at 909.

Any Exemption Must Be Extremely Limited: *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)

- “[T]he term ‘modification’ is nowhere limited to physical changes exceeding a certain magnitude.” 636 F.2d at 400.
- “EPA has extremely limited authority to exempt activities from the definition of ‘modification’ The Agency’s authority is limited to circumstances of administrative necessity and circumstances having a ‘*de minimis*’ or ‘trivial impact on emissions.’” 636 F.2d at 358-361.

***Alabama Power, WEPCo* followed recently: *U.S. v. SIGECO*, 2003 W.L. 367901 (S.D. Ind. Feb. 13, 2003); *U.S. v. Ohio Edison*, 276 F.Supp. 2d 829 (S.D. Ohio, Aug. 7, 2003)**

- In *SIGECO*: exemption for “routine” maintenance activities is limited to those activities that are habitual, regular, ordinary at the source. Finding any more than a limited scope to EPA’s authority here would “flout the Congressional intent.” 2003 W.L. 367901 at *13.
- In *Ohio Edison*: EPA’s authority to grant exemptions from the statute’s requirements is limited to those projects that would result in *de minimis* (trivial) increases in air pollution. 276 F.Supp at 888-889.

Neither *Alabama Power* Justification is Available for the Massive Exemptions Contained in these Rules

- EPA has never attempted to argue that these rules are justified by “administrative necessity.” Nor could the Agency do so. There is no hard evidence that the previous NSR rules suppressed energy development or routine maintenance activities.
- The Rules are not “*de minimis*” in their impact on air quality: they will result in hundreds of thousands of tons of actual air emissions increases.

The New Year's Eve And Labor Day Rules Will Result in Significant Actual Pollution Increases

- Example from New Year's Eve Rule: 10-Year Look Back Provision, Alone, Has Been Estimated By EIP and Council of State Gov'ts/Eastern Regional Conference to Allow 488,947 Tons Per Year of Additional PM, NO_x, SO₂, and VOCs from sources in 12 states analyzed, without triggering NSR.
- The Labor Day Rule's 20% Replacement Cost Exemption Creates an Older Facility Immortality Provision which would apply to approximately 20,000 sources nation-wide.

10-Year Look Back Provision

- EIP/CSG/ERC analysis – non-utility sources in 4 sample Northeastern States (tons per year):

	# sources	PM	NO_x	SO₂	VOC	CO
CT:	11	na	2068	3219	54	512
NY:	86	2883	20,388	13,974	3149	18,263
VT:	6	45	0	158	64	149
ME:	24	2932	5776	14,755	1298	5472

Labor Day 20 Percent Equipment Replacement Rule

- The Labor Day Rule Would Permit Major Renovations at Older Plants Without NSR Review or Additional Pollution Control Requirements.
- Projects completely escape NSR review if the cost of the project represents less than 20% of the replacement cost of the “process unit.”
- “Process unit” is *very* broadly defined.
- No annual (or other) limit on the number of projects allowed.
- *Only* limitation: emissions limit of any existing permit.

The Labor Day Rule Would Allow All But 1 of the 11 Ohio Edison Projects to Escape NSR Review.

Percentage of Process Unit Replacement Cost Represented by Each of the 11 Equipment Replacement Projects at issue in *U.S. v. Ohio Edison*:

Year of Replacement Project	Cost of Replacement Project (Millions \$ 2001)	Cost of Process Unit (Millions \$ 2001)	Rep Proj.Cost as % Process Unit Cost
1993	8.116	162	5.0%
1991	8.396	162	5.2%
1992	11.383	162	7.0%
1990	7.746	162	4.8%
1984	56.249	270	20.8%
1990	6.785	270	2.5%
1986-87	7.918	540	1.5%
1991-92	29.460	540	5.5%
1998	17.951	540	3.3%
1989-90	36.316	540	6.7%
1991	1.491	540	0.3%

Methodology:

- (1) Year and cost of each replacement project taken from Findings of Fact in *U.S. v. Ohio Edison*, 276 F. Supp.2d 829 (S.D. Ohio, 2003)
- (2) Cost of Replacing Process Unit in \$2001 calculated by multiplying \$900 by the # of KW generated by the process unit. This is EPA's method taken from the Final Rule.
- (3) Cost of each replacement project is translated into \$2001 using CPI, All Urban Consumers, Series CUUR0000SAO, avail at

<http://data.bls.gov/servlet/SurveyOutputServlet>.

Another Example: Alcoa Sandow Plant NSR Enforcement Case Settlement

- Recently settled Enforcement Action against Alcoa, Inc.: Sandow Plant, a lignite coal-fired EGU serving an aluminum smelter in Rockdale TX. Sandow Projects ranged from 0.49% to 7.16% of process unit replacement cost – all would be permitted under the Labor Day 20% Equipment Replacement rule.

Actual Emissions Will Increase at Older Existing EGUs Due to EPA's Labor Day 20% Equipment Replacement Rule

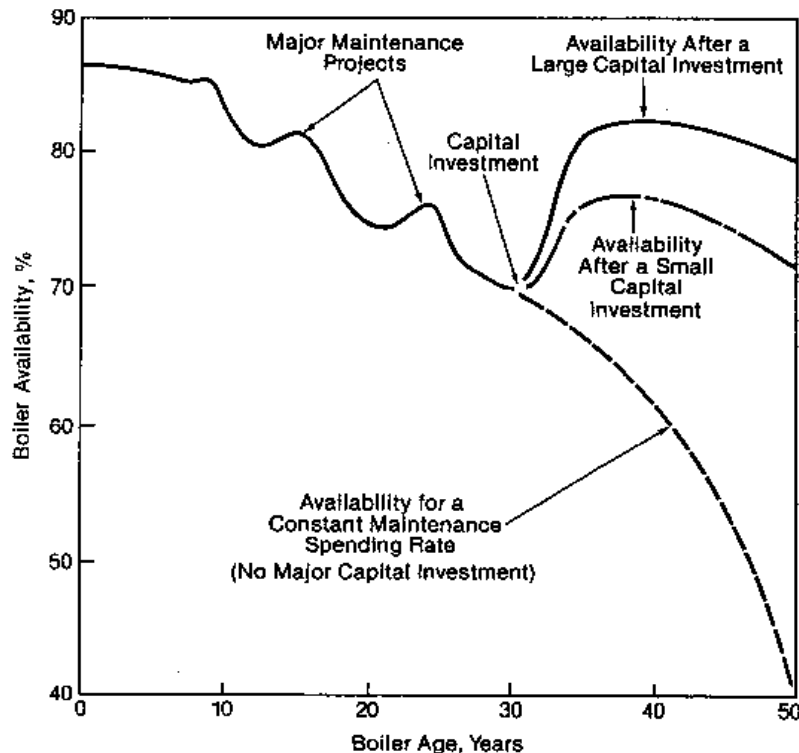


Fig. 2 Typical availability curve for a large, high pressure power boiler with life extension capital expenditures.

- The amount of air pollution emitted by a power plant is directly related to the number of hours it operates, or its “availability.”
- As the figure (taken from Babcock & Wilcox, Steam, Its Generation and Use, 40th Ed. 1992 at 46-2), demonstrates, the older a plant becomes, the less available it is, absent major life extension projects.
- An older plant, with a CAA permit issued in year 20 of the plant’s life, and based on potential to emit in that year, will, by 2003, be emitting significantly less than the permit allows.
- Allowing the plant to undertake major upgrades to equipment, without subjecting the plant to pollution control requirements, means major *actual* increases in air pollutants emitted.

EPA Ignores Reductions Associated with the NSR Program in Place Before the Massacre

- Since 2000 at least 30 Facilities Have Settled NSR Claims, Brought Under the Act and the Old Rules.
- These settlements have resulted in annual reductions of
 - 526,510 Tons of SO₂
 - 234, 656 Tons of NO_x
 - 225,992 Tons of VOC, PM, other pollutants.

**EPA's Assertions that New Rules Will Not Affect
Ongoing Enforcement Cases is Belied by
Recent Experience in *U.S. v. Illinois Power &
Dynergy*, Case No. 99-cv-0833-mjr (S.D. Ill.)**

- On September 5, shortly after Labor Day rule was final, EPA filed a withdrawal of certain aspects of the legal position it had already briefed – in particular EPA walked away from the previously articulated notion that the Act admits only limited authority to the Agency re: exemptions.
- Illinois Power case: no state AG and no enviro presence, prior to Fall 2003.
- Enviros recently won late filed intervention to make the legal arguments from which EPA has backed away.

The New Year's Eve and Labor Day Rules Will Have Significant Public Health Implications

- Under the New Rules, Older Plants Can Be Reconstructed without Triggering NSR – thereby avoiding the all-BACT scenario (required by the Act) on the nation's coal-fired power plants. The all-BACT scenario if in place by 2020 would yield:
 - ☐ • **24,000 avoided premature deaths per year,**
 - ☐ • **465,000 avoided asthma attacks per year,**
 - ☐ • **14,500 avoided cases of chronic bronchitis per year.**
- Using EPA's own figures for the value of an avoided premature death, this represents a benefit to society of **over \$165 billion per year.**

To be clear: these are benefits, under the prior rules, that EPA's own analysis methods demonstrate will not be realized under the final rules.