Congress of the United States

Washington, DC 20515

August 21, 2003

The Honorable Marianne Horinko
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Ms. Horinko:

We are writing regarding the Environmental Protection Agency's ongoing rulemaking to change the definition of "routine maintenance, repair and replacement" in the New Source Review regulations.[1] In the past, we have expressed numerous concerns about the substance of EPA's routine maintenance proposal and the rulemaking process. The recent court decision in *United States v. Ohio Edison* affirms these concerns and strongly suggests that EPA's routine maintenance rulemaking is on a collision course with the Clean Air Act.[2]

We question the wisdom of proceeding with this rulemaking given this court decision. At a minimum, before finalizing this rule we believe that EPA must, in light of the court ruling, issue and allow public comment on a supplemental proposal providing details on the substance and legal rationale for the proposed rule.

In this rulemaking, EPA proposes to redefine the scope of the exemption from the NSR requirements for activities that comprise "routine maintenance, repair and replacement." To issue a rule under the CAA, EPA must publish a proposal, provide a "statement of its basis and purpose," and allow a period for public comment on the proposal.[3] EPA's December 31, 2002, proposal fails to satisfy these requirements. The proposal does not provide sufficient specificity regarding the scope of activities to be exempted and the effect of such exemptions to allow the public to meaningfully comment on the proposal. In addition, the proposal provides virtually no discussion of the legal "basis" for the rule, as required.

These problems are exacerbated by the recent court decision interpreting the existing "routine maintenance" exemption. The court strongly endorsed the view that the CAA allows only a narrow exemption from the NSR requirements. The rule currently contemplated by EPA, however, would provide an extremely broad exemption from NSR for "routine maintenance" activities. It is likely that such a final rule would violate the CAA. It is critical that this issue be thoroughly vetted in the rulemaking process before EPA issues a final rule.

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[1] U.S. EPA, *Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Routine Maintenance, Repair and Replacement,* 67 Fed. Reg. 80290 (Dec. 31, 2002) (proposed rule).

[2] *See U.S. v. Ohio Edison Co.*, 2003 WL 21910738 (S.D. Ohio, Aug. 7, 2003).

[3] CAA section 307(d)(3).

Routine Maintenance Proposal

The routine maintenance proposal is inadequate in key respects. First, it fails to discuss the legal basis for the rule. The preamble states that under the CAA, NSR applies to a "modification," which is defined 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."[4] EPA notes that the CAA does not further define "any physical change . . . or change in the method of operation."[5] EPA states, "[w]e have recognized that Congress did not intend to make every activity at a source subject to the major NSR program," and references routine maintenance as one of the exemptions that EPA has previously adopted.[6] The discussion then concludes, "[t]oday's rulemaking proposes two provisions that will improve and help carry out the purposes of this exclusion."[7]

The sole discussion of the legal authority for these specific proposals is the bald assertion that the proposal will "improve and help carry out the purposes of" an exemption that is in itself not provided in the CAA. This is patently inadequate. As discussed below, it also appears to be in conflict with contemporaneous federal interpretations of the underlying statutory provision, which are contained in the Department of Justice's briefs to the courts in NSR enforcement cases on behalf of its client, EPA.

The routine maintenance proposal also fails to include information critical to understanding the substance and effect of the proposed definition of routine maintenance. Specifically, EPA proposes to adopt an annual maintenance, repair, and replacement allowance for each source.[8] Activities involving expenditures up to the level of the annual allowance would not trigger the NSR requirements. The annual allowance would be set at a percentage of the replacement cost of the source. This approach would arbitrarily allow a given level of activity unrelated to the expected or actual emissions increases. Obviously, the overall effect of such an approach would depend in large part on the size of the expenditures allowed, which would depend in turn on the percentage specified. EPA proposed to set the percentages on an industry-specific basis within the range of 0.5 percent to 20 percent, based on information to be obtained by EPA during the public comment period.[9]

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[4] 67 Fed. Reg. at 80296 (quoting CAA section 111(a)(4)).

[5] 67 Fed. Reg. at 80296.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 80294–80295.

[9] *Id.* at 80298.

Assuming that the capital cost of a new replacement power plant is likely to be in the range of $400 to $600 million, even an annual allowance based on a percentage in the lower end of the range would allow for very large projects. At the upper end of the range, such an allowance would allow a plant owner to entirely rebuild an existing plant over the course of several years.

EPA also proposes to adopt an exemption for replacement of existing equipment with identical or functionally equivalent equipment.[10] The main limitation would be that the replacement equipment must not change the basic design parameters of the affected process unit. EPA also requested comment on adding a cost trigger limiting the exemption to replacement projects that cost no more than 50 percent (or some other percent) of the capital cost of a comparable new unit.[11]

It appears that most if not all of the projects at issue in the NSR enforcement cases brought to date would have been exempt from NSR under one or both of EPA's proposed approaches.[12] Before EPA finalizes any rule on routine maintenance, EPA should publish and allow public comment on the information that EPA would use to establish the percentage for the cost allowance for each specific industry, and specific proposed percentages for the cost allowances. In addition, EPA should provide and allow public comment on an analysis of the types and scope of projects that would be exempt from NSR under these provisions. In particular, for the public to understand the extent of the proposed change to the current rule, it is critical that EPA conduct and publish an evaluation of: (1) whether any of the projects at issue in the ongoing enforcement cases would have been subject to NSR under the proposed rule; (2) if so, which projects; and (3) the emissions increases associated with the projects that would be exempt.

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[10] *Id.* at 80295–80296.

[11] *Id.* at 80301.

[12] *See, e.g.,* American Lung Association et al., *Comments on the Proposed Rule: "Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Routine Maintenance, Repair and Replacement*, 8–16 (May 2, 2003) (analysis showing that all but one of the projects at issue in the TVA enforcement case would have been exempt from NSR under EPA's preferred approach, and that all of the projects would have been exempt under some of the proposed approaches).

DOJ's Arguments in Litigation

Based on the limited information available in EPA's proposal, it appears that the new definition of routine maintenance that EPA is contemplating is not legally permissible under the CAA. In the enforcement litigation, the government has interpreted the CAA as limiting the allowable scope of a routine maintenance exemption. For example, in NSR legal briefs, DOJ has asserted the following:

> Congress, however, also built into the CAA a provision aimed at terminating this grandfather status; if a source makes a physical or operational change that increases emissions, it must comply with the Act's rigorous pollution control requirements. Hence, Congress fully expected that even "grandfathered" plants would ultimately incorporate the required controls as they underwent "modifications" or were retired and replaced with new, state-of-the-art units that fully complied with pollution control requirements.[13]

> TVA's argument that under EPA's regulations its "life-extension" projects are mere "routine maintenance, repair, or replacement," and thus forever exempt from the Act's pre-construction permitting and pollution control requirements, is antithetical to the purposes of the CAA and would inappropriately "open vistas of indefinite immunity from the provisions of [the CAA]."[14]

> Thus, only in the most limited circumstances should electric generating plants be permitted to avoid, by invoking the routine activity exception, the requirement to install pollution controls.[15]

> EPA's narrow construction of the exemption is consistent with the horn book principle that exceptions should not swallow the general rule, and with EPA's limited authority to exempt activities from the broad, statutory definition of "modification."[16]

> According to the Court [in *WEPCO*], the statute says that a modification consists of *any* physical change, and the statute "means exactly that."[17]

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[13] Respondent's Brief at 3, *Tennessee Valley Authority v. United States Environmental Protection Agency,* No. 00-12310, 2003 WL 21452521 (11th Cir. June 24, 2003).

[14] *Id.* at 5 (internal citations omitted).

[15] *Id.* at 62–63.

[16] Plaintiff's Reply Brief in Support of Motion for Summary Judgment Applicable Legal Test for Routine Maintenance and Thirteen Affirmative Defenses at 3, *United States v. Southern Indiana Gas and Electric Co. ("SIGECO")*, No. IP-99-1692-C-M/S, 2002 WL 31427523 (S.D. Ind. Oct. 24, 2002).

[17] *Id.* at 4 (emphasis in original).

> When interpreting [routine repair], its dictionary meaning (habitual, regular, ordinary) and the objectives of the Clean Air Act are important guides. *See WEPCO*, 893 F.2d at 908 (interpreting the term "modification" in harmony with the Clean Air Act's objectives). In particular, the term's scope is constrained by EPA's limited authority to create exemptions from Clean Air Act requirements, a central holding in *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1980).[18]
>
> Implementation of the statute's definition of "modification" will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for de minimis increases. The statutory scheme intends to "grandfather" existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit.[19]

EPA's NSR proposal, however, implicitly suggests that the CAA allows sweeping exemptions from NSR for sources undergoing modification. If EPA's final rule is to be based on a new interpretation of the language of the CAA that conflicts with EPA's present understanding of this language, as explained by the Justice Department to the courts, this is a fundamental problem with the proposed rule.

EPA officials have argued that the legal effect of the rule is prospective only. Yet this position is increasingly implausible to the extent that the rule rests implicitly or explicitly on an interpretation of the CAA that conflicts with the government's litigation position in the enforcement cases. It is only reasonable to anticipate that such a new interpretation may weaken, if not completely undermine, the ongoing enforcement cases. This in itself is sufficient reason to abandon the proposed rule change. At a minimum, however, EPA must discuss and solicit public comment on the effect of the rule change and its underlying CAA interpretation on the ongoing and any future NSR enforcement cases.

Court's Opinion in *Ohio Edison*

The apparent conflict between the sweeping routine maintenance exemption proposed by EPA and the government's interpretation of the CAA is highlighted by the thorough and well-reasoned opinion in *Ohio Edison*.

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[18] Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment on Fair Notice at 7-8, *United States v. SIGECO*, No. IP-99-1692-C-M/S, 2002 WL 31427523 (S.D. Ind. Oct. 24, 2002).

[19] *Id.* at 7–8 (citing *Alabama Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1980)).

Under EPA's proposed rule, it appears that most or all of the activities at issue in *Ohio Edison* would be exempt from NSR, either because they would not exceed the cost allowance (unless, perhaps, EPA chooses a percentage at the lowest end of the proposed range) or because they would be considered replacement of existing equipment with functionally equivalent equipment.[20] Yet the court states:

> If any of the activities undertaken could be considered to be "routine maintenance," the regulation would vitiate the very language of the CAA itself. Such a result could not have been intended by Congress.[21]

The court also states:

> Further, it is beyond dispute that a regulation promulgated by an administrative agency is invalid to the extent the regulation conflicts with the language of a statute. Ohio Edison's interpretation of the term "routine maintenance, repair or replacement" is so broad as to conflict with the clear language of the Clean Air Act requiring compliance in conjunction with only a "modification." The Court finds that the plain language of the CAA, read together with the routine maintenance exemption, make it clear that the exemption must have a narrow interpretation so as not to swallow the general rule requiring CAA compliance when a modification is made.[22]

To the extent that EPA intends to issue a final rule that could conflict with the *Ohio Edison* opinion, which upholds the legal positions taken by the government in the litigation, EPA must explain how such a rule is authorized by law and is consistent with EPA, DOJ, and the courts' interpretation of the CAA.

Finally, we note that the *Ohio Edison* opinion serves to point out, once again, the significant emissions and public health benefits at stake with this rulemaking. The court noted that in almost every instance, after Ohio Edison conducted the projects at issue, actual emissions from the source increased.[23] Had Ohio Edison installed the required control technologies, of course, these emissions instead would have been substantially reduced. In the upcoming remedy phase trial, the government will present evidence on the very large quantities of excess pollution emitted by these sources and the resulting harm to public health and the environment.

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[20] *See U.S. v. Ohio Edison* at 46–49 (describing the activities at issue and their costs, which range from $1.1 million to $33 million).

[21] *Id.* at 104.

[22] *Id.*

[23] *Id.* at 94–96. The court emphasized that these results were not relevant to the applicability determination, which must rest on emissions projections made before the project begins.

Changing the NSR regulations and the government's underlying interpretation of the CAA could have serious effects on the remedies that would be ordered by the courts in the *Ohio Edison* and other enforcement cases. In general, courts are likely to be more reluctant to require companies to control pollution and incur sizable costs when their competitors would be exempt from such expenditures for identical future maintenance activities. As a result, even if the government's success on the merits of the enforcement cases were unaffected by the routine maintenance rulemaking, EPA's final rule could still have the effect of protecting utilities from the consequences of their violations and depriving the public of some or all of the benefits of the enforcement actions. EPA must discuss these issues in a supplemental proposal, which should be developed with substantial participation by EPA's enforcement staff and DOJ.

Conclusion

In light of the inadequate detail of the routine maintenance proposal, the potential conflict with arguments that the government has made to the courts in the NSR enforcement litigation, and the court's recent decision in *Ohio Edison*, we urge you to reconsider the NSR routine maintenance rulemaking. At a minimum, we request that you issue a supplemental proposal to address the points we have raised and allow for public comment on these issues. In our view, EPA's failure to do so will likely jeopardize the legal viability of the final rule on procedural and substantive grounds.

Thank you for your consideration of our request.

Sincerely,

Henry A. Waxman
Member
U.S. House of Representatives

Joseph I. Lieberman
Senator
U.S. Senate

James M. Jeffords
Senator
U.S. Senate

John Edwards
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