

May 2, 2003

**Via Electronic and First Class Mail**

The Honorable Christine Todd Whitman  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20004

EPA West Docket Center (Air Docket)  
U.S. Environmental Protection Agency  
1200 Constitution Avenue, NW  
Room B108  
Washington, DC 20460

**Re: Comments to EPA Proposed Rulemaking to Amend Clean Air Act New Source Review Regulations Under 40 CFR Parts 51 and 52,  
ATTN: Docket A-2002-04**

Dear Administrator Whitman:

The following are Clean Air Council's Comments to U.S. EPA's December 31, 2002 Notice of Proposed Rulemaking regarding the Clean Air Act's New Source Review Program.

Clean Air Council is a 501(c)(3) non-profit, environmental organization representing over 7,000 residents of Pennsylvania and Delaware. Established in 1967, the Council is dedicated to protecting the right of everyone to breathe clean air. The Council operates out of its offices in Philadelphia, Harrisburg, PA, and Wilmington, DE.

With the stated purpose of assuring greater efficiency for industrial sectors of the U.S. economy, EPA has with this proposal crafted a regulatory overhaul that will severely impact our nation's air quality in a manner that is contrary to the Clean Air Act.

New Source Review is a critical Clean Air Act program which serves as a necessary complement to the National Ambient Air Quality Standards (NAAQS). Congress recognized the need to improve air quality through a performance standard approach to stationary sources. In developing the New Source Review program, Congress addressed the need to ensure that both new sources and existing sources controlled air emissions to modern technological standards. The program has had great success in preventing and reducing air pollution since its inception. Indeed, EPA has acknowledged that as much as 300 million tons of emissions have been avoided due to New Source Review.<sup>1</sup> The NAAQS, while also crucial tools for air quality improvement, cannot alone deliver the promise of the Clean Air Act because implementation of the standards are more subject to delays and political determinations in the delivery of necessary pollution mitigation. It is therefore imperative that a viable and effective New Source Review program be preserved.

The changes to NSR embodied in EPA's Proposal compounds the damage caused by the Final Rulemaking that took effect on March 3, 2003. The proposed changes focus on the definition of "Routine Maintenance, Repair and Replacement" (RMRR), an important determination in the assessment of whether a given modification at a major source triggers New Source Review.

The current state of the law is to allow changes that are defined as "routine maintenance" to escape New Source Review, and each facility project is to be assessed on a case-by-case basis, taking into account many factors, which have been established by both EPA and the 7<sup>th</sup> Circuit Court of Appeals. *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (1990).

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<sup>1</sup> Memorandum from Karen L. Blanchard to William T. Harnett, "Benefits of the Prevention of Significant Deterioration Program (10/17/01)"

EPA's proposed changes, in essence, are to allow the following actions to qualify for a blanket exemption from NSR under the guise of RMRR:

- a) Modifications costing up to 20% of the cost of the affected unit or entire facility;
- b) Modifications in the form of replacement of equipment if the new equipment performs the same function.

Regarding a), for many industrial sources, a 20% cost modification represents a massive new investment in the facility, perhaps tens or even hundreds of millions of dollars. To characterize such facility overhauls as "routine maintenance" is clearly far beyond rational or legal conceptions of the term. To exacerbate this effect, the "20% of cost limit" on this particular RMRR exception is available to sources on an *annual* basis. The potential easily exists, therefore, for an almost complete replacement of an emissions unit accomplished on a piecemeal basis over just a few years, thereby completely circumventing the purpose of New Source Review and the intent of Congress. EPA's interpretation that this is permissible under the Act is outrageous.

The "like kind" replacement RMRR exemption from b) above threatens to be even more damaging. When major components of an emissions unit can simply be removed and replaced—even with larger, or higher powered versions—without triggering requirements for modern control technology under New Source Review, then "routine maintenance" has become devoid of any conception of traditional meaning. To employ an analogy from the world of the automobile, "routine maintenance" would surely apply to new oil filters and spark plugs, but you will find very few mechanics and fewer still car owners to say that replacing the drive train or the engine itself would be "routine." Instead, it might be time for a new model.

To ensure the maximum number of facilities can take advantage of the control technology avoidance mechanism that will be the new RMRR, EPA has decided to continue to offer traditional determinations of RMRR on a case-by-case basis.

In each case, anytime a facility avoids NSR through one of these exceptions, significant emissions increases are possible, if not likely, to occur. Some 17,000 industrial sources nationwide are subject to the New Source Review program affected by EPA's proposal. It defies logic and is deeply irresponsible of EPA to assert that the final and now proposed changes to NSR will not affect air quality when it has acknowledged that no studies have been performed to assess the impact of these changes on stationary source emissions inventories. According to the American Lung Association, some 137 million Americans live in areas which do not meet the health standards for ozone smog. To move forward with regulatory changes that ease restrictions on new air emissions from industrial sources at such a time is contrary to the mission of the EPA and will surely result in additional human suffering in the form of increased respiratory disease, such as asthma, and greater levels of air pollution induced premature mortality and morbidity.

Industry has long asserted that they are hampered by a lack of regulatory certainty around NSR, and that efficiency and economic growth are thereby restricted. EPA's proposal does not remove that uncertainty, and some say that litigation around NSR will continue if and when EPA finds occasion to attempt to enforce its revised NSR rules. If EPA was motivated by a need to clarify requirements and simplify the program, then it would have done better to simply promulgate across-the-board deadlines for pollution control upgrades.

The Council urges EPA to withdraw the current proposal until such time as it can affirmatively demonstrate that changes to RMRR concepts in the NSR program will not result in

increased air emissions when compared to the status quo regulatory framework, and good-faith enforcement thereof.

Clean Air Council hereby incorporates by reference the comments to this docket submitted by NRDC on behalf of itself and other environmental and public health organizations.

Sincerely,

Joseph Otis Minott, Esq.  
Executive Director

Michael Fiorentino, Esq.  
Air Program Manager

Clean Air Council