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NSR Enforcement: Are you prepared?

What happens when you mix increased industrial output with a disproportionately small number of new air permit applications? From the perspective of EPA's Office of Enforcement and Compliance Assurance (OECA), the answer is a potentially high rate of noncompliance with Major New Source Review (NSR) air quality permitting requirements and justification for a

nationwide initiative to investigate specific industries for potential violations. Recent enforcement activity shows that the cost for settling these alleged violations is very high. For example, under a July 20, 2000, settlement agreement, the wood product manufacturing company, Willamette Industries, must pay a civil penalty of \$11.2 million for failure to obtain proper Prevention of Significant Deterioration (PSD) permits. In addition, Willamette will spend an added \$8 million on supplemental environmental projects and install air pollution control equipment, valued at approximately \$74 million.

One of OECA's top priorities is to find facilities that should be evaluated for significant violations of NSR requirements. Based on permitting activities over the past few years, OECA believes that Major NSR permits are being issued for very few projects "despite evidence that industrial facilities have significantly increased their production and modified their processes to a degree that should have trig-

gered many NSR actions." OECA has also noted that, because NSR permits can add substantial costs to the construction and operation of new sources, companies "have an incentive to avoid permit review." Once potential violators have been identified, OECA then initiates investigations, identifies physical or operational modifications, requests information, and takes enforcement actions if warranted.

When a plant is suspected of NSR violations, regulatory agencies are authorized to request an enormous amount of information, including emissions data, copies of all stack tests and monitoring reports, copies of all permits and permit applications, production data, and a description of capital expenditures. Frequently, data covering several decades is required. These basic information requests may trigger other questions, including:

- How did allowable emissions change over time?
- How should potential emissions be quantified for sources like paint booths or storage piles or road dust?
- How should historical actual emissions be determined (e.g., using dated emission factors or more recent stack tests)?
- How should questionable stack test data be handled?
- Is information needed about the net change in emissions associated with every capital expenditure?
- How should the company handle requests for missing or unavailable information; should it make some rea-

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News Briefs

Proposed Ozone Plan for Houston/Galveston Encounters Strong Opposition

TNRCC recently completed an extensive round of hearings on its proposed revisions to the State Implementation Plan (SIP) for controlling ozone in the Houston / Galveston (HGA) area. The Agency encountered strong opposition to the proposed Chapter 117 rule changes, designed to reduce NO_x emissions in the HGA by 750 tons per day through controls on a broad spectrum of stationary and mobile sources. Most significantly, industry advocates claim that even though many of the technologies have been developed to achieve this level of reduction, supplies of emissions control equipment and materials will fall far short of the demand. Two other issues that were strongly debated were 1) the use of ozone catalysts in air conditioning units and 2) restrictions on the use of small gasoline-fired equipment during morning hours. TNRCC now believes its proposed control measures will not be sufficient to bring the HGA area into compliance by the target date and has asked EPA for an extension until later in 2001 for sub-

mitting the revised SIP. For more information, contact Bob Henderson at rhenderson@zephyrenv.com (713) 977-8797.

TNRCC Proposes NO_x Emissions Cap-and-Trade Rules

In August, TNRCC published the draft of its proposed program for capping and trading allowances of NO_x emissions in the HGA area – a program designed to provide additional flexibility in reducing NO_x emissions as part of the ozone standard compliance planning process. Under this program, to be codified under Chapter 101 of the TNRCC rules, existing and new sources of NO_x would be assigned emissions allowances based on a number of factors, including source category, existing NO_x emissions limits, and operation start date. The TNRCC has received substantial public comment on these proposed rules, which are closely tied to the TNRCC's proposed revisions to its Chapter 117 NO_x rules. If the Commission is able to meet its schedule, these rules will go into effect in early December 2000. For more information, contact Celeste Wiley at cwiley@zephyrenv.com (512) 329-5544.

TNRCC Freezes Permitting of Large NO_x Sources in the Houston/Galveston Area

In a September 22 letter to the regulated community, Jeffrey Saitas, Executive Director of the Texas Natural Resource Conservation Commission (TNRCC), placed a temporary hold on the processing of new applications for sources that will use NO_x emissions credits, netting, or allocations in the HGA area. TNRCC took this unprecedented action in response to uncertainties about the impact of anticipated new air permit applications on the ability of the HGA area to meet the Federal ozone standard. Applications declared administratively complete before September 18 should not be affected by this freeze. For more information, contact Celeste Wiley at cwiley@zephyrenv.com or (512) 329-5544.

EPA reinstates 1-Hour Ozone Standard

On October 18, EPA plans to reinstate the 1-hour ozone standard nationwide, rescinding its prior findings that the 1-hour standard did not apply in 3,000 counties. EPA is reversing itself at this time because continued litigation regarding the 8-hour ozone standard has created considerable uncertainty regarding when and whether EPA may be able to fully implement that standard. For

more information, contact Art Bedrosian at abedrosian@zephyrenv.com or (512) 329-5544.

EPA Highlights Flexible Title V Permits in Its White Paper No. 3.

On August 7, EPA issued a draft of its latest Operating Permits Program White Paper for review and comment. According to the Agency, this guidance provides options to State and local permitting authorities on how to design air permits that provide sources with more operational flexibility while meeting the provisions of Title V of the Clean Air Act and EPA's Part 70 operating permit rules. The White Paper also addresses how to include minor NSR in Title V permits. EPA hopes that the guidance will be helpful to sources such as non-dedicated batch plants, which must make frequent changes to meet the demands of a changing marketplace. For more information, contact Julian Levy at jlevy@zephyrenv.com or (410) 730-8812.

TNRCC Adds Monitoring Provisions to Operating Permit Rules

In August, the TNRCC revised its operating permit rules (Chapter 122) to include the Federal requirements for Compliance Assurance Monitoring or CAM (new Subchapter H) and Periodic Monitoring or PM (new Subchapter G). According to EPA, the general purpose of CAM is to provide reasonable assurance of compliance with emission standards through monitoring the operation and maintenance of the control equipment. PM, on the other hand, is required where an applicable requirement does not specify periodic testing or instrumental or non-instrumental monitoring. PM may consist of recordkeeping in lieu of monitoring and should be sufficient to yield reliable data from the relevant time period that is representative of an emission unit's compliance with the permit. To streamline the process of implementing the new monitoring requirements, TNRCC plans to develop and issue General Operating Permits and to require that affected sources apply for these permits. For more information contact David Cabe at dcabe@zephyrenv.com or at (512) 329-5544.

Interim Approval of Federal Operating Programs to Expire

EPA warns that Federal Title V operating permit programs with only interim approval will

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Zephyr is a professional services firm providing consulting, training and software to the industrial, commercial and public sectors. The firm's major areas of practice focus on environmental permitting, compliance and corrective action, incident management, occupational health and safety, risk assessments, ISO 14001 implementation, audits and regulatory tracking.

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expire on December 1, 2001. To have a fully approved program by the expiration date, States must correct any program deficiencies and submit revisions to EPA for full approval by June 1, 2001. The TNRCC, whose operating permit program has only interim approval, has announced its intention to correct deficiencies and request full approval by the deadline. The most significant deficiency identified by EPA is Texas' failure to recognize the conditions of minor NSR permits as "applicable requirements" under Title V. To correct this deficiency, the TNRCC is moving toward a one-permit system for all air quality permits. For more information, contact Celeste Wiley or Jerry Kung at (512) 329-5544.

TNRCC Plans Study of Industrial Emissions of Greenhouse Gases

The TNRCC Commissioners have directed the Agency to evaluate the impact of Texas greenhouse gas emissions on global warming. The results of this study, due out in a report by December 1, 2001, are expected to include an inventory of actual or estimated greenhouse gas emissions and estimates of how much Texas' greenhouse gases have been reduced by existing TNRCC measures. In addition, the report should include current scientific information regarding potential effects and solutions to global climate change, actions taken by other states and the Federal government to address global warming, and reduction strategies for the state of Texas. For more information, contact Maria Gou at mgou@zephyrenv.com or (512) 329-5544.

EPA Announces Plans to Audit Risk Management Plans

In a recent announcement, EPA reminded the regulated community that it will begin auditing Risk Management Plans (RMPs) that were submitted for facilities with more than a threshold quantity of regulated substances in a process. Audits may consist of a document review and/or on-site visits and will focus on the RMP and associated safety programs. Based on the results of these audits, facilities may be required to modify their RMPs to ensure compliance with the requirements of the Risk Management Program rule. For further information, contact Elena Rivera at rivera@zephyrenv.com or (512) 329-5544.

Standard Permit Issued for Concrete Batch Plants

The TNRCC's new Air Quality Standard Permit for Concrete Batch Plants went into effect on September 1. This standard permit, unlike other New Source Review (NSR) permits, is not published in the Texas Administrative Code. Instead it is held at the TNRCC and viewable at the Agency's website. New construction, modification, and relocation of concrete batch plants may qualify for the new Standard Permit if the proposed activities do not meet the requirements of a permit-by-rule. Facility owners considering the use of the Standard Permit must register with the TNRCC and make the registration available to the public for review and comment. For more information, contact Jerry Kung at jkung@zephyrenv.com (512) 329-5544.

TNRCC Adopts Upset/Maintenance Rules

On July 23, the amended TNRCC Chapter 101 air rules related to upset and maintenance activities went into effect. The new version of the rules establishes criteria for determining whether an upset or maintenance event is reasonably avoidable or whether the resulting emissions should be treated as a true upset or maintenance activity. The rules also mandate follow-up reports to be submitted to TNRCC when actual information about the event is different from that which was originally reported to the Agency. For more information contact Jennifer Junker at jjunker@zephyrenv.com or (512) 329-5544.

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Multi-Sector General Permits Expire - What's A Texas Facility To Do?

EPA's Federal Multi-Sector General Permit

(MSGP), used to authorize industrial discharges to storm water, expired on September 29, 2000. It will be replaced in Texas by an MSGP issued under a TNRCC-administered program. The TNRCC is not expected to issue its MSGP until the end of November 2000; therefore, existing permits will remain in effect until the reissuance date. Texas is not accepting new applications at this time and will not be sending notices to current permit holders. Instead, companies are expected to keep informed about TNRCC filing requirements by checking the TNRCC website or the *Texas Register*. For more information, contact David Sorrells at dsorrells@zephyrenv.com or (512) 329-5544.

Proposed CAMU Rule Could Offer Relief for Remediation Projects

On August 10 EPA proposed revisions to portions of the Corrective Action Management Unit (CAMU) rules related to the following: 1) the types of wastes that can be managed in a CAMU, 2) treatment standards for wastes, 3) information to be included in a CAMU application, 4) public participation, and 5) response to releases from CAMUs. The proposed changes would "grandfather" certain wastes and create standards for CAMUs only used for treatment or storage. Additionally, staging pile regulations would be changed. Public comment for the proposed rule changes ends on October 23. For more information contact Betty Moore at bmoore@zephyrenv.com or (512) 329-5544.

TNRCC Provides Ecological Risk Assessment Guidance

TNRCC has developed the draft final "Guidance for Conducting Ecological Risk Assessments at Remediation Sites in Texas." This guidance provides describes in detail how to conduct ecological risk assessments (ERA's) using TNRCC's three-tiered approach, discusses the interface of the ERA program with the Texas Risk Reduction Program (TRRP) Rule, and presents ecological risk management options. For more information, contact Joe Zupan at 512-329-5544 or jzupan@zephyrenv.com.

sonable assumptions or just state that the data are not available?

The responses to these information requests can become the basis for issuance of Notices of Violation and, in some cases, criminal indictments. In addition, they can ultimately result in the requirement for emissions controls that must meet *today's* standards, which may be significantly more stringent and expensive than controls that would have been required when the alleged NSR violations took place.

Major NSR permitting rules are extremely difficult to interpret, especially those that address NSR applicability to modifications. For example, the PSD rules exclude "routine maintenance, repair, and replacement" activities from the definition of "modification". But what is "routine"? Since EPA has never explicitly defined this term, industry historically has interpreted it based on common sense understanding. Recently, however, EPA Administrator, Carol Browner called for a more limited interpretation, stating that changes to plants that resulted in increased capacity or modifications that prolonged the life of the plant are not considered "routine". But where should the line be drawn? Suppose an old conveyor motor is worn out and requires replacement, the original model is no longer available from the manufacturer, and a more reliable, slightly larger model is substituted. Can this change be considered "routine replacement" or should it be considered a means for increasing production and, thus, potentially a modification under PSD? Industry positions on how the "routine" exemption should be applied are currently being debated. In the meantime, enforcement actions are being taken against well-meaning plant owners who have interpreted the rules differently from EPA.

While the current NSR rules are difficult to interpret for proposed projects, it's even harder to assess whether a past project should have triggered review. The PSD rules, first promulgated in 1974, were amended in 1977, 1978, 1979, 1980, 1989, and 1992. In addition, numerous policy decisions have been made in more recent years. As a result, determining whether a past project should have triggered NSR review is anything but a straightforward exercise.

Regulators now have access to an enormous amount of information in companies' operating permit applications. With these data, along with EPA's perception that a disproportionately small number of NSR permits have been issued in recent years, it is no surprise that EPA has turned up the heat on NSR enforcement. In response, facility owners may want to take a second look at past NSR applicability determinations, along with historical modifications and capital expenditures, and seek legal advice if it appears EPA could make a case for past NSR noncompliance. Companies may also want to consider using EPA's Self-Policing and Voluntary Disclosure Policy to rectify noncompliance situations. Although this program may not provide amnesty from enforcement actions, facilities that promptly correct and report violations discovered through a compliance management system may receive some enforcement relief. But most important, facility owners and operators should put in place an ongoing program of reviewing all operational changes and capital projects for Federal NSR applicability to avoid the dreaded question from the regulator: "Should this project have been subject to PSD"?

- Jennifer Seinfeld,
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***We want to hear from you - send your comments online to
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