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Attention Docket ID No. OAR-2005-0163

To Whom It May Concern:

On behalf of the National Association of Clean Air Agencies (NACAA), we are writing to urge EPA to withdraw its proposed rulemaking: "Prevention of Significant Deterioration, Nonattainment New Source Review (NSR), and New Source Performance Standards: Emissions Test for Electric Generating Units," 70 *Federal Register* 61081 *et seq.* (October 20, 2005) and "Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units," 72 *Federal Register* 26,202 *et seq.* (May 8, 2007) (collectively, "the EGU Hourly Test" proposal).

Under EPA's proposed applicability test, increases in maximum hourly emissions rate, rather than increases in actual annual emissions, will trigger NSR, meaning that, if this rule is finalized, electric generating units (EGUs) will be allowed to increase operating capacity and annual emissions without triggering NSR requirements.¹ Such increases will occur without review, without installation of air pollution controls and without modeling of impacts on ambient air. Thus, PSD increments will likely be violated, Class I areas degraded, and national ambient air quality standards violated, all of which will be discovered after the fact, if at all, rather than reviewed and mitigated prior to their occurrence. This situation is worsened with the CAIR vacatur. A rule that allows unreviewed degradation of air quality is unacceptable and should be withdrawn.

Memorandum of Adam M. Kushner, Director, Air Enforcement Division, U. S. EPA, to William Harnett, Director, Information Transfer and Program Integration Division, Office of Air Quality Planning and Standards, Aug. 25, 2005.

NACAA urges EPA to withdraw this proposal for the reason that EPA's fundamental rationale for the EGU Hourly Test no longer exists now that the Clean Air Interstate Rule (CAIR) has been vacated by the U. S. Circuit Court of Appeals for the District of Columbia. EPA's EGU Hourly Test proposal was premised on, and relied on, emission reductions required by CAIR, together with mercury reductions from the Clean Air Mercury Rule (CAMR), and the Clean Air Visibility Rule (CAVR). The EGU Hourly Test proposal stated, "to the extent that changes resulting in increased hours would occur under the proposed regulatory scheme, any resulting increases in emissions will be diminished as the CAIR and BART programs are implemented and the SO₂ and NO_x emissions for most EGUs are capped... These caps greatly reduce the significance of hours of operations on actual emissions from the sector nationally." 72 *Federal Register* 26,208. (Emphasis added). Using the agency's own logic, if the caps attributable to CAIR were projected to reduce the national significance of increases in actual emissions due to longer hours of operations, then, conversely, the elimination of CAIR greatly augments the significance of increases in uncontrolled emissions that will be allowed by the EGU Hourly Test at the national as well as local level.

Although NACAA disagreed with the assumptions underlying EPA's conclusions regarding CAIR,² the fact remains that CAIR was the cornerstone of EPA's proposed EGU Hourly Test. Now that CAIR, together with CAMR, have been vacated (and CAVR has been thrown into question because it depended on CAIR emission reductions), no justification whatsoever remains for the proposal. No "backstop" exists that could even partially mitigate the emissions increases that will result if the EGU Hourly Test is finalized.

Such increases in emissions will, if the proposal is finalized, be detrimental to public health and the environment. Old, coal-fired power plants that make modifications that increase annual emissions will not be required to comply with NSR pollution control requirements. Seventy-one percent of the nation's coal-fired capacity is between 27 and 57 years old. As EPA's proposal recognized, when these plants make renovations, their annual, actual emissions will increase significantly because the modernized units will be operated for longer hours. Ambient air quality will suffer, with corresponding impacts on human health and the environment in nearby as well as distant, transport-impacted, communities alike.

² In comments filed by NACAA on August 3, 2007, the association stated that CAIR could not and should not compensate for the loss of utility NSR because CAIR did not apply to all of the states; did not require installation of Best Available Control Technology or Lowest Achievable Emissions Reduction; addressed only NO_x and SO_x (and required no controls at all for the first five years that it was in effect); exempted EGUs that complied with CAIR from Reasonably Available Control Technology requirements; and imposed on those utilities purchasing credits from others no independent pollution control requirements whatsoever if the EGU Hourly Test were promulgated. Adverse local impacts resulting from market-based, allowance trading were also expected to result from CAIR. The association also stated in its comments, and continues to believe, that statutory provisions enacted by Congress, such as NSR, should not be traded off against each other or against regulatory programs such as CAIR. Congress did not intend that programs enacted under the Clean Air Act be abandoned or modified out of existence because EPA suddenly and arbitrarily deems them unnecessary.

Additionally, as NACAA has pointed out repeatedly in comments and testimony on this proposal, allowing EGUs to modify, and increase their actual annual emissions will frustrate state and local air agencies' efforts to attain and maintain the annual National Ambient Air Quality Standards (NAAQS). If the rule is finalized, utilities will be able to increase their actual, annual emissions without knowledge of our agencies, without installation of pollution controls, and without air quality analysis. Nor will air agencies be able to ascertain whether or not emissions increases from utility modifications are violating annual clean air increments. Planning and implementing control strategies to attain the more stringent PM_{2.5} and 8-hour ozone NAAQS will be severely undermined if the EGU Hourly proposal is finalized.

Moreover, NACAA continues to question the fairness of a proposal that allows the largest sources of pollution to escape control requirements and requires smaller and smaller businesses to reduce their emissions. Focusing on smaller sources and ignoring utilities is not only unfair, but is inefficient as well: If utility emissions are, in effect, exempt from NSR, states and localities will face an ever more daunting task in locating and controlling numerous smaller sources, which will not, at any rate, be sufficient to offset EGU emissions since utilities emit hundreds of thousands of tons per year of uncontrolled NO_x, SO_x and VOCs.

Finally, NACAA believes that finalizing the EGU Hourly Test would exceed the bounds of discretion afforded to EPA under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* As the D.C. Circuit Court of Appeals stated in its June 2007 opinion in *South Coast Air Quality Management District v. EPA*, "...under *Chevron*, agency action must constitute a reasonable interpretation of the statute." EPA's substitution of an hourly test for the NSR actual annual emission test would virtually exempt the nation's largest-emitting sector from important statutory requirements. Because the rule would frustrate the Congressional purpose of enacting NSR, it is not a reasonable interpretation of the Clean Air Act. Finalizing the rulemaking would, therefore, be arbitrary, capricious and an abuse of discretion.

For these reasons, NACAA urges EPA to abandon the EGU Hourly Test proposal. If you have any questions or desire further information, do not hesitate to contact one of us or Mary Stewart Douglas of NACAA.

Sincerely yours,



William O'Sullivan
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Co-Chair, NSR Committee



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