

13 States Try Again To Block NSR Rule

BY CHRIS HOLLY - **The Energy Daily**

August 22, 2003

New York and a dozen other states have taken a second stab at blocking the Bush administration's Clean Air Act new source review rule, asking a federal court this week to stay the rule in light of "significantly altered circumstances" surrounding the controversial regulation.

The states' action comes as eight members of Congress, including two contenders for the 2004 Democratic presidential nomination, sent a letter Wednesday to acting EPA Administrator Marianne Horinko urging her to "issue and allow public comment on a supplemental proposal providing details and the substance and legal rationale" for a proposed rule recently issued by EPA that offers a new definition for "routine maintenance and repair" activities that are exempt from the program's stringent air pollution control requirements.

In addition, two environmental organizations, Natural Resources Defense Council (NRDC) and U.S. Public Interest Research Group (USPIRG), Thursday released a letter the groups sent to Utah Gov. Mike Leavitt (R)- who was recently nominated by Bush to take over the reins at EPA-urging Leavitt to take "immediate steps" to review the new source review (NSR) proposal on the routine maintenance and repair definition.

The flurry of activity underscores the impact of a recent decision handed down August 7 by Judge Edmund Sargus of the U.S. District Court for the Southern District of Ohio, Eastern Division, which found FirstEnergy Corp. affiliate Ohio Edison violated the NSR program.

Sargus found that Ohio Edison undertook 11 construction projects at one of its coal-fired power plants from 1984 to 1998 without obtaining necessary air pollution permits and installing modern pollution controls on the facility.

Sargus' ruling has energized opponents of Bush's efforts to rewrite the NSR program, who say the final and proposed rules would harm public health and the environment by allowing far more pollution from utilities and manufacturers than the law now permits.

The states late last year filed suit against the rule, and asked the court to block the regulation's taking effect until their suit is decided. The court refused, but agreed to expedite action on the

challenge given the health and other concerns the states raised.

In their new brief requesting a stay of the final rule, the 13 states-joined by six California air pollution control agencies-noted that EPA, in response to stakeholder petitions, recently announced it would "reconsider" several provisions in the rule as well as an accompanying analysis of its environmental impacts. But the states also said EPA's moves have made expedited briefing on the suit "impossible."

The states also pointed to a recent draft analysis by the Council of State Governments that concludes the new rule would allow "large emission increases" in 12 eastern states.

In their letter to Horinko, three U.S. senators and five U.S. representatives said Sargus' ruling in the Ohio Edison case underscored concerns that EPA's routine maintenance proposal would undermine the Clean Air Act.

The proposal, among other things, would allow construction activities at a power plant that cost less than 20 percent of the plant's book value to be exempt from NSR's pollution control requirements. If the rule were in place in 1984, when Ohio Edison undertook the first of its 11 construction projects, all of the projects would have been exempt from NSR.

"The court strongly endorsed the view that the [Clean Air Act] allows only a narrow exemption from the NSR requirements," the congressional letter said. "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 rule would violate the Clean Air Act."

Signing the letter were Sens. Joseph Lieberman (D-Conn.), James Jeffords (I-Vt.) and John Edwards (D-N.C.) and Democratic Reps. Henry Waxman (Calif.), Edward Markey (Mass.), Thomas Allen (Maine), Lois Capps (Calif.) and **Janice Schakowsky (Ill.)**. Lieberman and Edwards are contending for their party's 2004 presidential nomination.

In their letter, NRDC and USPIRG referred to recent press reports that EPA was rushing to finalize its routine maintenance rule by as early as next week, ostensibly to allow Leavitt to avoid pointed questions on the proposal during his confirmation hearing before the Senate Environment and Public Works Committee.

"We urge you to call upon administration officials not to finalize the rule changes, so you may have an opportunity to review both the substance and the process of the rulemaking...."

The Bush administration, backed by utilities and manufacturers, repeatedly has said that the NSR program has hurt the environment because it acts as a disincentive for companies to modernize their older facilities.

But sources told *The Energy Daily* Thursday that the General Accounting Office may release a report as soon as today that concludes EPA had no factual basis for claiming that the NSR rules will be environmentally beneficial or neutral and no evidence that NSR has impeded investments in energy production or efficiency.

