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NEWS RELEASE

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GROUPS SEEK TO USE EPA PACT TO SET MERCURY LIMITS FOR NEW SOURCES

from Clean Air Report via InsideEPA.com -- Environmental groups say they plan to use a new consent agreement with EPA imposing deadlines for reviewing new source performance standards (NSPS) to force the agency to address mercury emissions from power plants. But EPA is not committing to address mercury in the NSPS program, and industry says it would likely oppose such a move.

Environmental groups say the proposed consent decree is also significant for already regulated pollutants because, in some cases, EPA has not reviewed certain NSPS categories for 20 years. Since NSPS is technology based, environmentalists expect the agency to require much more stringent standards when it finalizes its revision in 2005, as the legal agreement requires.

NSPS is limited to new construction, and one environmentalist attorney says the review is a way to require stringent mercury reductions from new sources for the first time. "NSPS will force EPA to look at all pollutants . . . and we think that should include mercury. EPA may argue that mercury isn't warranted since it is addressed elsewhere, but that is something that could be further litigated."

The Clean Air Act requires EPA to review and potentially revise NSPS every eight years. But environmentalists and others sued, charging in *Our Children's Earth Foundation, et al. v. United States Environmental Protection Agency, et al* that EPA had failed to conduct the reviews.

In a Nov. 12 proposed consent decree filed in U.S. District Court for the Northern District of California, EPA acknowledges that the agency "has failed to perform [its] non-discretionary duty to review and, if appropriate, revise the new source performance standards ('NSPS') for fossil fuel-fired generating facilities and gas turbines." Relevant documents are available on InsideEPA.com.

Initially, groups pursuing the lawsuit wanted to require EPA to address carbon dioxide (CO₂) in the NSPS case as part of a broad strategy to force agency action on that issue. But since EPA responded to a separate petition claiming it lacks authority to regulate CO₂, the issue in this case became moot, sources explain. The agency's authority over CO₂ is being litigated separately.

"The meat of the case is [requiring] review of the standards," one environmentalist says, calling the agreement a "slam dunk" for environmentalists. "The basic mandate under the Clean Air Act is for EPA to review the standards every eight years and they simply didn't do it." The case, filed in April, was resolved quickly because EPA "capitulated immediately," the source adds.

Environmentalists say they plan to press EPA to mandate a stricter NSPS as part of the agreed-upon review. "Do they build 2003 model year cars with 1980s technology?" one activist asks. "No, and it makes no sense to do so with power plants. . . . A significant ratcheting down of emissions is what we expect."

But a utility industry source says the only real change the NSPS revision is likely to require is a reduction in sulfur dioxide emissions for certain sources, as stipulated by the decree. The source adds it will be "interesting" to see how the groups press for mercury to be addressed. The source says the groups did not convince the judge to include mercury specifically in the consent decree. "If that's what they think, we'll see. The mercury regulation is under Title III, not Title I in the Clean Air Act."

An EPA source says it would be "speculative" to say whether the agency would address mercury in NSPS. EPA and the industry source do not dispute that the agency failed to review NSPS as required, but they question the difference that the pending review will make. The EPA source says the agency "was not aware of a commercially available technology that would have justified a change to the standards. Instead, we decided to focus on other priorities where we could yield more significant pollution reductions."

The industry source says, "This, in a way, is a tempest in a teapot because NSPS is the minimum of what you need for a new plant. They also have to go through NSR and [changes to NSPS] won't make a darn bit of difference." The source adds that the industry is relieved EPA has two years to revise the program. "A faster time would have concerned us because then you get a half-baked rule that is not well supported."

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