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Tom Enneking, Editor

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## Recent Developments Have Significant Impact on NSR Rules

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[http://www.ssd.com/publications/pub\\_detail.aspx?pubid=9310](http://www.ssd.com/publications/pub_detail.aspx?pubid=9310)  
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Several recent developments, including two Circuit Court decisions last week, will have a significant impact on the Nonattainment New Source Review (NNSR) and Prevention of Significant Deterioration (PSD) (collectively NSR) rules, and will affect both permitting strategies and ongoing enforcement actions.

**"Modifications" are subject to NSR requirements only if physical or operational changes result in an increase in the hourly emission rate (*U.S. v. Duke Energy Corp.* (4th Cir. June 15, 2005))**

Under US EPA's long-standing NSR rules, a source modification was subject to NSR permitting requirements if a physical change enabled a source to operate more hours per year and would increase future annual emissions, even if the physical or operational change did not increase the hourly emission rate. In *U.S. v. Duke Energy Corp.*, the US Court of Appeals for the Fourth

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## AGRx: The Attorney General's Prescription Drug Cost Comparison Page

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It is well known that the cost of prescription drugs has skyrocketed in the United States. Prices are so high that many Americans are forced to journey to Canada for cheaper prescriptions. In Ohio, the cost for a 30 pill prescription of the cholesterol-lowering medication Lipitor® may vary by as much as \$20.00 from one pharmacy to the next. With prices so high, it is worth the effort to comparison shop.

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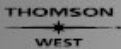
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*NSR Rules, Cont'd from page 1*

Circuit rejected this rule, finding that US EPA must use the definition of "modification" in the New Source Performance Standard (NSPS), which covers only physical or operational changes that cause an increase in the hourly rate of emissions. The Fourth Circuit reasoned that the Clean Air Act does not permit US EPA to use a different definition for "modification" in the NSPS and NSR rules. Unless and until US EPA goes through rulemaking to change the NSPS definition to be consistent with the NSR definition, the NSPS definition controls.

Although we do not yet know how US EPA will react, we anticipate that the decision will have the following near-term effects:

- The government is expected to petition for a rehearing before the entire Fourth Circuit panel.
- The decision directly affects projects in the Fourth Circuit states (West Virginia, Virginia, Maryland, North Carolina and South Carolina). Although the Court's rationale is not geographically limited, the agency may attempt to limit its application to those states.
- In making NSR applicability decisions or in defending enforcement claims, you will be able to take into account the Court's finding that existing sources should not trigger NSR unless a change increases the hourly rate of emissions.
- According to the Fourth Circuit decision, US EPA could, through rulemaking, revise the NSPS interpretation of "modification" if it wanted to use the previous NSR

approach for both programs. In the meantime, the less inclusive NSPS applicability test applies.

- The decision could have a chilling effect on future NSR enforcement actions relying on the Past-Actual-to-Future-Potential Test to show that a change should have triggered NSR. Even if it does not deter US EPA enforcement, defense positions will be strengthened.

### **U.S. EPA's 2002 NSR Reform Rules are Largely Upheld**

On June 24, 2005 the D.C. Circuit Court of Appeals rejected most of the challenges to US EPA's first round of New Source Review Reform rules in *New York, et al. v. U.S. EPA*, Case No. 02-1387 (D.C. Cir. 2005).

The Court accepted the primary elements of the NSR reform rule's Actual-to-Projected-Actual Test over the objections of New York and the other state and public interest petitioners. The Court accepted the following NSR Reform Rule components:

- US EPA *can* allow industry to use a 10-year look back (five years for utilities) to find the 24-month baseline period representing the highest annual utilization rate for establishing past actual emissions.
- US EPA *can* exclude from the post-change emissions all increases associated with production demand unrelated to the change that the source could have achieved during the baseline period (the so-called "demand growth exclusion").
- US EPA *can* use the Plantwide Applicability Limit (PAL) procedure in the NSR Reform Rule to give sources greater flexibility to make

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AGRx, cont'd from page 1

For example, have you ever wondered about the fluctuation in the prices of prescription drugs? AGRx (<http://www.agrx.ag.state.oh.us/secured/Landing.aspx>) provides you with the necessary tools to research the cost of prescription medication in the state of Ohio.

You may search AGRx by either region or specific drug. Simply click on one of eleven regions on the Ohio map and select one of 30 medications. Once you have made your selections, click the Search button and your results will be displayed in order from the least expensive to the most expensive.

**Search For Rx Pricing**

Please click on a region from the map below. Then select the prescription drug on which you wish to search.



Please Pick A Prescription

NEXTIUM

Search

Cincinnati Region

- Butler
- Clermont
- Clinton
- Hamilton
- Warren

As useful as it is, AGRx is not without its drawbacks. First, it is updated every three months. Drug prices change frequently and the prices listed on the webpage may not match those at the pharmacy. Because drug prices may change at any time, you should call ahead for the exact price. Second, not all pharmacies list their prices on AGRx – it is on a volunteer basis. You may recommend to your pharmacist that he participate in the program.

AGRx allows interested consumers to easily compare the prices of prescription drugs. They may then discuss their findings with their pharmacists and health care professionals to find less expensive alternatives or generic equivalents.

## New Titles at the Law Library

- Richard A. Revell and Alan T. Slyn. *Kentucky Divorce*. Rochester, NY: Thomson West, 2005.
- John A. Combs. *Kentucky Foreclosure and Repossession*. Eau Claire, WI: National Business Institute, 2005.
- James T. O'Reilly. *Food and Drug Administration*. Eagan, MN: Thomson West, 2005.
- Kenneth P. Abbarno. *Advanced Trial Advocacy in Ohio*. Eau Claire, WI: National Business Institute, 2005.
- Amelia A. Bower. *Ohio Foreclosure and Related Bankruptcy and Title Issues*. Eau Claire, WI: National Business Institute, 2005.
- State of Kentucky. *Kentucky Session Laws, 1792-present* [microfiche]. Louisville, KY: State of Kentucky, 2005.
- William T. Wolff. *Anderson's Appellate Practice and Procedure in Ohio*. Newark, NJ: Lexis Nexis, 2005.
- John A. Hollister. *Fundamentals of Bankruptcy Law and Procedure in Ohio*. Eau Claire, WI: National Business Institute, 2005.
- Elliott Manning. *Partnerships – A Conceptual Overview*. Washington DC: Tax Management, Inc., 2005.
- David W. Hardyman. *Legal Aspects of Condominium Development and Homeowner's Associations in Ohio*. Eau Claire, WI: National Business Institute, 2005.

## Where In The World Are We? Google Earth

Tom Enneking

In June, Google released its latest research tool, one that combines local search capabilities with satellite imagery from around the globe. Google Earth (<http://earth.google.com/>) is a free application and allows users to “fly” to locations nearly anywhere on the planet. It has images from the U.S., Canada, the U.K., and several major cities in other countries.

Google Earth has three search features:

1. Fly To: you type an address, place name, or latitude and longitude, and the program takes you to the specified location. Another tool allows you to overlay roads, borders, 3D buildings, and locations of hotels, restaurants and other points of geographic interest.
2. Local Search: this feature allows you to geographically search businesses. The results are displayed as icons on the map and as a list beneath the search box to the left of the screen. Clicking a result accesses more information about the business, including address, driving directions, and a printable view.
3. Directions: this offers you driving directions to and from locations within the U.S., Canada and Western Europe. A feature “flies” you from your starting point to your endpoint, which portrays exactly what your route looks like.

You may attach notes and brief descriptions to specific places with “placemarks.” Other features permit you to save searches as “My Places;” you may even create a My Places folder in which you collect all information on a specific location and easily recall that information.

You can also save your searches and share them with others using an XML format known as KML. If you download Keyhole Community, also available from Google, you can check out the views created by other members of the community.

If you’re interested in paying a \$20.00 annual fee, you can upgrade to Google Earth Plus, which offers higher resolution imagery, GPS support, and more sophisticated annotation capabilities.

Google Earth lends itself well to legal research, especially to as a readily available online tool. It is best viewed, however, with high-speed Internet.

### Did You Know Our Members Receive:

- ❖ Free Westlaw Access in the Library
- ❖ Free Internet Access in the Library
- ❖ Free Access to CD-ROM law libraries and forms
- ❖ Free Reference Assistance, in person, by phone, or via e-mail
- ❖ Extensive Ohio and Federal primary law collection in print and electronic formats
- ❖ Practice materials, including:
  - handbooks
  - rules
  - treatises
  - jury verdicts
- ❖ Borrowing privileges to nearly all materials in the Library’s collection, including CLE materials.



*NSR Rules, Cont'd from page 3*

changes without triggering NSR, provided that they do not exceed a facility-wide emissions cap.

The Court determined that the NSR Reform Rule exceeded US EPA authority in the following ways:

- US EPA *cannot* excuse a source from recordkeeping based on the mere representation that no reasonable possibility exists for the source to exceed its projected future emissions. This portion of the rule was remanded to US EPA with instructions to revise the provision or improve the justification.
- US EPA *cannot* excuse Clean Units from NSR based on their previous status as state-of-the-art-controls because the Clean Air Act requires that NSR applicability be triggered based on actual emissions resulting from a change. This provision has been vacated by the Court, which strikes it from the rule.
- US EPA *cannot* excuse Pollution Control Projects from NSR based on the net environmental benefit of the project because the Clean Air Act requires that NSR applicability be triggered based on actual emissions resulting from a change. This provision has been vacated by the Court, which strikes it from the rule.

This is a national rule affecting all major stationary sources undergoing physical or operational changes. While most states may implement more stringent NSR requirements, states may not be less stringent. Therefore, the Clean Unit and

Pollution Control Project exclusions stricken by the Court will not be available under state rules. Some states are expected to develop and implement more stringent NSR requirements, which will further complicate NSR applicability determinations.

The central pieces of the NSR Reform Rule have been affirmed by the DC Circuit. Fewer physical changes are likely to trigger NSR with the 10-year look back for establishing baseline emissions and the ability to use future projected actual emissions instead of future potential emissions to determine whether the project's emission increase is significant. The Court has made clear that the Clean Unit exclusion and the Pollution Control Project exemption will require a legislative change to the Clean Air Act. Recent attempts to revise the Clean Air Act have been stymied by deep divisions in Congress, which are likely to discourage near-term attempts to address these issues.

The Court decisions both clarify and complicate NSR applicability determinations. While these Court decisions address similar territory, the DC Circuit in *New York v. US EPA* expressly declined to confront the hourly emission rate issue that was before the Fourth Circuit in *Duke Energy*. As such, the DC Circuit leaves the door open for sources to use *Duke Energy* to support a determination that NSR is not required for a change that will not increase an hourly emission rate. US EPA will be looking for ways to close that door.

### **Other NSR Developments**


On June 6, 2005 US EPA completed its "reconsideration" of the Routine Replacement Rule and concluded that no substantive changes to the rule are needed. In this rule, US EPA defined for the first time the NSR

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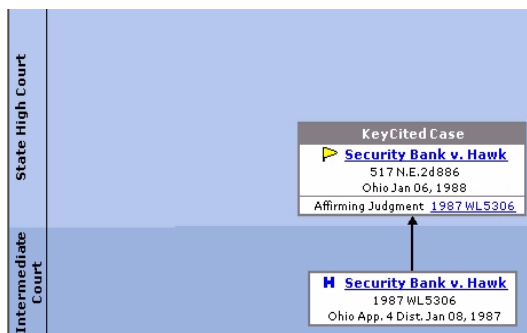
## What's New with WestLaw: Graphical KeyCite

Within the last month, WestLaw launched a new tool that allows you to easily view the direct history of a case and see how it moved through the court system. Called Graphical KeyCite, it consists of a visual display of the direct history of a case.

WestLaw envisions this tool as a timesaver, cutting the amount of time spent scrolling through lists of KeyCite text to a minimum. With its new interface, one click of the mouse takes you to an understandable visual display.

When you KeyCite a case, it brings up the procedural history cases in a text list. By accessing the Graphical Display (by clicking either the  button, or the "Direct History link), you get a picture of the direct on one screen.

Graphical KeyCite depicts how a case moved through the court system, with the lowest courts at the bottom of the screen, the highest at the top. All documents are directly linked to WestLaw and can be easily accessed with a simple click. With yet another click, you can return to the text view.



Graphical KeyCite provides an interesting view of a case as it moved through the courts. The graphical display becomes cumbersome when you examine a case with lengthy history, such as *Miranda v. Arizona*, 384 U.S. 436 (1966). Nonetheless, Graphical KeyCite provides a unique view of the judicial process.

## CLEs . . . Near You!

The Law Library is not always the most convenient location for research or for CLE. We are working hard to make as many of our services remotely accessible: e-mail reference requests and document delivery, HeinOnline journal access, and so on.

Now we're adding CLE to the list of resources you will be able to access without coming downtown. The live CLE seminar will be held in 4 locations around Cincinnati and we are currently seeking accreditation from both the Ohio Supreme Court and Kentucky Bar Association for **High Octane Internet Legal Research**. The 3.5 hour seminar, given by David Whelan, our Law Librarian, will walk you through Internet search techniques, free primary law resources and services, and other practice-oriented sites and databases.

So mark your calendar for the location nearest you:

- September 23, 2005, 7:45 – noon, Clarion Hotel & Suites, Blue Ash;
- September 28, 2005, 7:45 – noon, Cincinnati Law Library, Downtown;
- September 20, 2005, 7:45 – noon, Comfort Inn & Suites, Eastgate;
- October 7, 2005, 7:45 – noon, Lee's Inn & Suites, Forest Park.

Each seminar is \$35 for members, and \$90 for non-members. To reserve your spot, call Madonna @ 946-5301 or e-mail [mstoneki@cms.hamilton-co.org](mailto:mstoneki@cms.hamilton-co.org).

Look for more information about the CLE in our September newsletter.

*NSR Rules, Cont'd from page 6*

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exemption for routine replacements. A replacement is routine if: (1) the new equipment is functionally equivalent to the equipment that is being replaced; (2) the new equipment does not significantly increase the capacity of the unit, and (3) the fixed capital cost of the replacement is less than 20 percent of the cost of a comparable

new emissions unit. This "safe harbor" has been stayed by the DC Circuit until the Court can decide the merits. US EPA's decision on reconsideration clears the way for this NSR Reform provision to be briefed and decided by the Court (projected for 2006).

*Editor's note:* The contents of this article are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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ADDRESS CORRECTION REQUESTED

**INSIDE THIS MONTH**

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- CLEs Around the City
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**AUGUST 2005 LIBRARY NEWSLETTER**

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