



PUBLIC

Kansas Department of Health and Environment
Bureau of Air (BOA)
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**New Source Review (NSR)
Routine Maintenance, Repair, and
Replacement (RMRR) Exclusion
Technical Guidance Document – BOA 2004-06**

Purpose Statement: To establish the practice of KDHE for reviewing requests for exclusion from New Source Review based on routine maintenance, repair and replacement activities.

1. K.A.R. 28-19-350 applies to the construction and modification of major stationary sources and adopts by reference 40 C.F.R. 52.21, with exceptions as noted in the Kansas rule.
2. One of the federal rule provisions that Kansas has adopted, 40 C.F.R. 52.21(b)(2)(i) defines “major modification” as “any physical change in or change in the method of operation of a major stationary source . . .” 40 C.F.R. 52.21(b)(2)(iii)(a) then excludes “routine maintenance, repair and replacement (RMRR)” from the “physical change in or change in the method of operation” portion of the “major modification” definition.
3. The U.S. EPA has historically defined the RMRR exclusion by policy. To better define the RMRR exclusion, EPA published a final rule in the Federal Register on October 27, 2003 (68 FR 61248), also known as the Equipment Replacement Provision (ERP). The final rule provided a category of equipment replacement activities that are deemed to be RMRR activities and, therefore, are not subject to Major New Source Review (NSR) requirements under the exclusion.
4. On December 24, 2003, the U.S. Court of Appeals for the District of Columbia Circuit stayed the effective date of the October 2003 ERP NSR rule. As a result, the rule did not become effective on December 26, 2003.
5. EPA issued its final response on the reconsideration of the ERP NSR rule in the Federal Register on June 10, 2005 (70 FR 33838). This provision clarified what types of equipment replacements are exempt from major NSR requirements under the RMRR exclusion. After evaluating the comments received during the reconsideration process, EPA decided to not change any aspect of the rule at the time. However, the EPA clarified a number of its positions in support of the ERP, including the legal basis and support for selecting 20 percent for the cost criterion. The EPA continues to believe that its reforms to the NSR equipment replacement provision ensure environmental protection and provide much needed improvements to the NSR program.

6. On March 17, 2006, the U.S. Court of Appeals for the District of Columbia Circuit vacated the EPA's RMRR Equipment Replacement Provision, concluding that the provision was "contrary to the plain language of section 111(a)(4) of the Act." *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006)
7. Despite the March 17, 2006 vacatur, the affected provisions and the notes pertaining to the original stay of the ERP have to this day remained in the three NSR regulations (40 C.F.R. 51.165, §51.166, and §52.21).

KDHE Position

In accordance with 40 CFR 52.21(b)(2)(iii), RMRR is not considered a physical change or change in the method of operation. KDHE reviews RMRR exclusion requests on a case-by-case basis and considers the following factors: nature, extent, purpose, frequency, cost and other factors. EPA Region V's May 23, 2000 applicability determination relating to Detroit Edison summarizes the factors considered (copy attached-Attachment A).

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