

CLEAN AIR ACT

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D.C. Circuit Denies Emergency Motion to Stay EPA's NSR Reform Rule

On March 6, the D.C. Circuit issued an order denying an emergency motion to stay EPA's final NSR reform rule filed by ten Northeastern State petitioners.^{1/} *State of New York, et al. v. EPA*, No. 02-1387. The NSR reform rule was promulgated on December 31, 2002. 67 Fed. Reg. 80,185. The petitioning States' motion, which was filed on February 6, requested that the court stay the rule in its entirety pending a judicial decision on the merits.

The court's two-paragraph order stated that the petitioners had not met the requirements for the granting of a stay motion. As is typical for such orders, the judges did not elaborate on the reasons for denying the motion. The order also provided that the cases met the court's standards for expedition and directed the Clerk to give the cases expedited treatment. It is presently unclear how that will specifically affect the briefing of the cases.

Because the court refused to stay the rule, the NSR reform measures became effective on March 3. The 12 States that had been delegated authority to administer the federal PSD program became responsible for implementing the new PSD provisions on that date. Otherwise, States with approved SIP provisions implementing PSD requirements have until January 2, 2006 to submit SIP revisions to implement the new PSD provisions, and all States have until January 2, 2006 to submit SIP revisions to implement the new nonattainment NSR measures.

1/ The petitioning States are New York, Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, Maryland, and Pennsylvania.

Arguments in the Stay Motion

In their stay motion, the petitioning States contended, among other things, that there was a substantial likelihood that they would prevail on the merits and that they and their citizens would suffer irreparable harm in the absence of a stay. With regard to the likelihood of success on the merits, the States first argued that the "actual-to-projected-actual" emissions methodology is not enforceable or supported by the record because post-change emissions attributable to demand growth are to be excluded and a source must submit information to the permitting authority only if there is a "reasonable possibility" that a change may cause a significant net emissions increase. Second, the petitioning States contended that the regulatory changes involving baseline emissions, plantwide applicability limitations (PALs), and "clean units" unlawfully allow sources to cause significant emissions increases without meeting NSR requirements. Third, they argued that the NSR reform rule violates the "anti-backsliding" provisions in section 193 of the Act.

EPA and industry intervenors, including the NSR Manufacturers Roundtable and the Clean Air Implementation Project, filed responses strongly opposing the petitioners' arguments in their stay motion and addressing each of the points raised by the petitioners.

Other Developments

A total of 19 petitions for review challenging the NSR reform rule were filed in the D.C. Circuit. Those cases have been consolidated for all purposes. Although most of the petitions were filed by States,

local governmental bodies, or environmental groups, three of the petitions were filed by industry organizations challenging certain aspects of the final rule.

In addition to the petitions for review in the D.C. Circuit, three administrative petitions for reconsideration of the rule have been submitted to EPA pursuant to section 307(d)(7)(B) of the Act. That provision states that objections to a rule that allegedly could not have been raised during the public comment period must be presented to the Agency before judicial review can be sought. A group of environmental organizations filed a detailed, 148-page petition for reconsideration while the Northeastern States and the South Coast Air Quality Management District filed two separate, shorter petitions.

It is presently unclear how or when EPA will address the administrative petitions for reconsideration. There is no statutory deadline by which EPA must take action on such petitions, and the Agency has not indicated how it plans to proceed. Moreover, it is unclear how or when the issues raised in the petitions for reconsideration will be briefed in the D.C. Circuit. "

Supreme Court Agrees to Review Decision Involving BACT Determination by State of Alaska

On February 24, the U.S. Supreme Court granted a petition by the Alaska Department of Environmental Conservation (ADEC) seeking review of a Ninth Circuit decision addressing the validity of a BACT determination made by ADEC. *Alaska Department of Environmental Conservation v. EPA*, No. 02-658 (S.Ct.). In that decision, the Ninth Circuit upheld EPA administrative orders overturning ADEC's BACT determination in connection with a project at a zinc mine on the North Slope. *State of Alaska v. EPA*, 298 F.3d 814 (9th Cir. 2002).

In its petition to the Supreme Court, ADEC stated that the issue presented is "[w]hether the Ninth Circuit erred in upholding the EPA's assertion of authority to second-guess a permitting decision made by the State of Alaska – which had been delegated

permitting authority under the Clean Air Act" This case will be the first case in which the Supreme Court addresses the question of whether, and under what conditions, EPA can overturn a BACT determination made by a State with delegated authority to issue PSD permits. It also may shed light on the legality of EPA's second-guessing other State environmental decisions.

The case involved a PSD permit issued by ADEC to the company so that it could increase the capacity of one of its six generators and construct a new generator to power additional mining equipment. In issuing the permit, ADEC determined that the use of Selective Catalytic Reduction (SCR) technology for the modified generator and the new generator would be economically infeasible and that BACT for the project should be based on the installation of low NOx burner technology on all of the company's generators.

Upon reviewing the proposed permit, EPA concluded that BACT for the modified and new generators must be based on SCR. As a result, EPA issued three administrative orders directing ADEC to withhold issuance of the proposed permit and prohibiting the company from beginning construction until EPA determined that the permit complied with the Act and the SIP. ADEC and the company subsequently sought review of EPA's orders in the Ninth Circuit.

In its decision, the Ninth Circuit concluded that although the state has discretion to make BACT determinations as the permitting authority, the Act provides for EPA enforcement when the state issues a permit based on an improper determination and that EPA has the ultimate authority to decide whether the state has complied with the BACT requirements of the Act and the state SIP. The court then rejected petitioners' arguments (1) that EPA may not overrule a state's BACT determination on projects where the state is to exercise discretion and (2) that EPA's authority is limited to enforcing Aobjective requirements, e.g., that the source obtain a permit, that the state permitting authority make a BACT determination, and that the state permitting authority consider the statutory factors in making the BACT determination. Instead, the court ruled that EPA had

authority to decide whether ADEC had adequately justified each element of its BACT determination. Finally, the court found that EPA's decision that ADEC's BACT determination was unsupported was itself not arbitrary and capricious and would be affirmed.

ADEC's opening brief is due in April. It is likely that the oral argument in the case will take place this fall. "

D.C. Circuit Rules That It Lacks Jurisdiction to Review EPA's New Periodic Monitoring Interpretation

The D.C. Circuit declined to address the merits of a challenge to EPA's new interpretation of its Part 70 permitting regulations authorizing permitting agencies to conduct sufficiency reviews of the periodic monitoring contained in "applicable requirements." *Utility Air Regulatory Group v. EPA*, No. 01-1204 (Feb. 28, 2003). The court ruled that the petitioner lacked standing to challenge the actions in question and that, in any event, the claims raised by the petitioner were not ripe for review.

Background

The case arose when the Utility Air Regulatory Group (UARG) filed a petition for review challenging EPA's new interpretation of its permitting regulations as set forth in two decisions by the Administrator addressing petitions for objections to Title V permits and in an instruction manual for permit application forms. The Clean Air Implementation Project (CAIP) intervened in the case in support of UARG's position.

In all the challenged actions, EPA interpreted general language in section 70.6(c)(1) of its regulations as authorizing permitting agencies to conduct sufficiency reviews of the periodic monitoring contained in "applicable requirements." Section 70.6(c)(1) states in relevant part that "[c]onsistent with [section 70.6(a)(3)]," all Part 70 permits shall contain "monitoring . . . requirements sufficient to assure

compliance with the terms and conditions of the permit." Under EPA's interpretation of section 70.6(c)(1), which the Agency had not previously advanced, permitting agencies can impose more stringent periodic monitoring in Title V permits even though the applicable requirement itself already sets forth periodic monitoring requirements.

UARG and CAIP argued that the new interpretation was an impermissible attempt to evade the D.C. Circuit's decision in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).^{2/} In that decision, the court ruled that EPA's regulations did not authorize such "wide-ranging sufficiency reviews" by permitting agencies. The court went on to overturn EPA's Periodic Monitoring Guidance, which purported to authorize such sufficiency reviews, as an unlawful attempt to revise EPA's regulations without complying with notice and comment requirements. EPA never attempted to rely on section 70.6(c)(1) in unsuccessfully defending the Period Monitoring Guidance.

In this case, EPA contended, among other things, that the *Appalachian Power* decision dealt only with section 70.6(a)(3), which specifically addresses periodic monitoring. According to EPA, this meant that the Agency was free to interpret section 70.6(c)(1) as authorizing permitting agencies to conduct sufficiency reviews.

Ruling of the Court

In its decision, the D.C. Circuit concluded that UARG lacked standing to challenge the actions in question because it could not show that it or any of its members had been injured by EPA's new interpretation. The court stated that UARG had not shown that the two permit objection decisions adversely affected any UARG member or that the instruction manual had been applied to any UARG member. Moreover, the court stated that UARG had not shown that the manual was binding in any sense on state permitting agencies.

2/ See the May 2000 *Washington Report* at WR-299 for a discussion of the *Appalachian Power* decision.

The court also concluded that UARG's claims are not ripe because EPA's actions are not sufficiently final. In this regard, the court relied on a rulemaking proceeding involving proposed revisions to section 70.6©)(1) which EPA instituted on the eve of the oral argument. According to the court, it would be a waste of judicial resources to rule on EPA's regulatory interpretation when the Agency is considering revising the regulation in question.

Because the court ruled that it lacked jurisdiction over UARG's challenge, it expressed no view on the merits of EPA's interpretation. However, at the oral argument, the judges recognized that EPA was engaging in "gamesmanship" in an effort to avoid the results of the *Appalachian Power* decision.

UARG, CAIP, and other industry parties have also challenged the interim final rule that EPA promulgated in connection with the new rulemaking proceeding. The interim final rule suspended the language in section 70.6©)(1) stating that the provisions of that subsection are to be "consistent" with the provisions of section 70.6(a)(3). The challenges to the interim final rule will be briefed later this year. Although EPA had previously indicated that it would take final action to revise section 70.6©)(1) more than four months ago, no final action has yet been taken. "

District Court Rejects Utility's Fair Notice Defense in NSR Enforcement Case

On February 13, a federal district court judge issued an opinion denying an electric utility company's motion for summary judgment on the issue of whether the utility had received "fair notice" of EPA's interpretation of the "routine maintenance, repair, and replacement" (RMRR) exclusion from the definition of "major modification." *United States v. Southern Indiana Gas and Electric Co.*, No. IP-99-1962 (S.D. Ind.). In his 49-page opinion, the judge concluded that the utility "had fair notice of the EPA's interpretation of routine maintenance."

The court's decision is the first detailed judicial ruling on the issue of whether EPA has

provided fair notice to regulated parties of its interpretation of the RMRR exclusion. Although the ruling was based on the particular evidence presented, the timing of the specific projects involved, and the legal arguments presented by the defendant, the ruling is a troublesome precedent for other companies that are defendants in NSR enforcement actions.

Background

In its complaint filed in 1999, EPA alleged that equipment replacement projects undertaken by the Southern Indiana Gas and Electric Company (SIGECO) in 1991, 1992, and 1997 were modifications that triggered PSD and NSPS requirements and that SIGECO had filed to obtain necessary PSD permits before commencing construction. SIGECO maintained that all the projects constituted "routine maintenance, repair, and replacement" and therefore were exempt from PSD and NSPS requirements. The court's opinion addressed SIGECO's motion for summary judgment in which it argued that it had not received "fair notice" of EPA's changed interpretation of the RMRR exclusion prior to undertaking the projects and therefore that EPA could not enforce its changed interpretation. Under the fair notice doctrine, an agency is responsible for ensuring that a regulated party acting in good faith can identify with "ascertainable certainty" how the agency is interpreting a particular regulation.

The Court's Decision

In his opinion, the judge stated that SIGECO did not dispute that EPA's RMRR exclusion analysis involves "a fact intensive, case-by-case determination, taking into account factors such as the project's nature, extent, frequency, and cost." According to the judge, the key issue before him involved the scope of the frequency factor within the routine maintenance analysis. EPA contended that it has always looked at the unit itself to determine if the activity in question occurred frequently with regard to that particular unit. In contrast, SIGECO maintained that EPA has until recently looked at the relevant industry as a whole to see if the types of activities at the unit in question occur frequently throughout that industry.

The first step taken by the judge to determine whether SIGECO received fair notice was to determine whether EPA's interpretation was "reasonable." The judge concluded that EPA's interpretation, in which the Agency focuses on the frequency of the activity for the unit in question rather than on the frequency in the industry as a whole, was "reasonable and persuasive." According to the judge, EPA's narrow interpretation of the exclusion is consistent with the regulatory language, which applies only to "routine" activities, and with the fact that Congress defined "modification" very broadly. Finally, the court concluded that deference to EPA's interpretation was appropriate because of its technical expertise.

The judge thought it was significant that SIGECO admitted that it had notice that EPA interpreted the exclusion as involving a case-by-case, multi-factor test but was contending only that it did not have fair notice regarding how one of the factors – frequency – was being interpreted. The judge then discussed the language of the RMRR exclusion and EPA's public statements interpreting the exclusion to determine what notice the utility had received before undertaking the projects. The judge found that the language of the exclusion is ambiguous and that a regulated party would not know with "ascertainable certainty" how EPA was interpreting the exclusion based solely on its text. However, he also found that reading the exclusion in context gave notice that it will not be construed broadly.

The judge concluded that EPA's most important public statement interpreting the RMRR exclusion came in the decision in *Wisconsin Electric Power Co. (WEPCO) v. Reilly*, 893 F.2d 901 (7th Cir. 1990). Quoting from a 1988 EPA memorandum discussing the WEPCO projects ("the Clay Memo"), the Seventh Circuit had stated that "EPA makes a case-by-case determination [regarding whether an activity is routine] by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other factors, to arrive at a common-sense finding." After analyzing the WEPCO decision, the judge concluded that it "supports the view that the frequency of the project at the particular unit and the frequency of the project within [the] industry are *both* relevant considerations" (emphasis in original).

The judge also concluded that the Clay Memo notified the regulated community that the frequency with which activities occur in a unit's expected life cycle is very significant in determining whether an activity is routine maintenance. In determining whether the regulated community understood the interpretation in the Clay Memo, the judge relied on a 1989 letter sent by the Utility Air Regulatory Group (UARG) to the Department of Energy. Among other things, that letter stated that EPA had "redefined" what constitutes routine maintenance and was including as "routine" only those activities that "are frequently done at that plant." According to the judge, the UARG letter indicated that the utility industry – and most likely SIGECO – had notice of the narrow, unit-focused interpretation of routine maintenance that EPA is advancing in this enforcement case.^{3/}

The judge also examined two additional public statements made by EPA after the 1992 project but before the 1997 project. In the preamble to the 1992 WEPCO rule, EPA explicitly indicated that it was clarifying the RMRR exclusion by stating that "the determination of whether the repair or replacement of a particular item of equipment is 'routine' under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category." Although the statement seems to indicate that whether an activity is "routine" is to be based on whether that activity is commonly undertaken within the industry in question, the court read the statement as merely indicating, for example, that it is more "instructive" to look at the utility industry for a utility source rather than the "textile" industry. The judge gave the statement essentially no weight because the judge believed that it was so brief, was contained in a preamble to changes that did not address the RMRR exclusion, and, in the judge's view, did not establish that the Clay Memo interpretation had changed.

3/ Because the Clay Memo was written in 1988 and the WEPCO decision was issued in 1990, the judge's reasoning that SIGECO had fair notice of EPA's interpretation would not apply to projects commenced by sources prior to 1988.

Furthermore, the judge ruled that a determination by the state permitting authority that the 1997 project did not trigger NSR requirements was not entitled to any weight. According to the judge, because the non-applicability determination was not received until 1998, it could not be used to establish that SIGECO lacked fair notice of EPA's interpretation with regard to the 1997 project.

Based on the foregoing, the judge concluded that SIGECO had fair notice before undertaking the projects that the factors set forth in the Clay Memo would be considered in EPA's routine maintenance analysis and that due weight would be given to each factor. In particular, the judge believed that SIGECO had fair notice that the frequency factor would not necessarily be the most important factor and that EPA would focus on the frequency of an activity with regard to a particular unit, not with regard to industry practices in general.

Additional Order

In a separate order issued on February 18, the judge granted EPA's motion for summary judgment regarding the applicable legal test for routine maintenance based on the February 13 opinion discussed above. In addition, the judge granted summary judgment for EPA on 13 defenses raised by SIGECO in its pleadings, including waiver by EPA, violation of the Administrative Procedure Act, retroactive rulemaking, and lack of substantive due process.

The trial in the case is currently scheduled to begin on March 31. "

Court of Appeals Upholds EPA's Approval of New York's Title V Program But Overturns EPA's Decision Not to Object to Specific Permits

On February 27, the U.S. Court of Appeals for the Second Circuit issued a decision addressing the validity of EPA's approval of

New York's Title V permitting program as well as the Agency's decisions not to object to three particular Title V permits. *New York Public Interest Research Group v. Whitman*, Nos. 02-4033 *et al.* (2d Cir.). The appellate court made three principal rulings: (1) it upheld EPA's full approval of New York's program despite the fact that certain deficiencies existed; (2) it ruled that EPA was not required to issue a notice of deficiency (NOD) with regard to the fully approved program; and (3) it vacated EPA's decisions not to object to three Title V permits where EPA had acknowledged that the permits contained deficiencies. The court's decision is significant in that it contains extensive discussions of EPA's authority in reviewing and approving states' Title V programs and in responding to petitions for objections to Title V permits.

Background

In 1996, EPA granted New York "interim approval" of its submitted program in accordance with section 502(g) of the Act. When EPA granted interim approval, it identified eight deficiencies that needed to be addressed before full approval could be granted. Although the Act provides that interim approval shall expire in no later than two years, EPA repeatedly extended the interim approval for New York's program and for the programs of many other states. To settle litigation subsequently brought by the New York Public Interest Research Group (NYPIRG) and the Sierra Club, EPA agreed to begin administering federal programs in all states whose programs were not fully approved by December 1, 2001.

In response to a notice from EPA inviting comments on deficiencies in state programs, NYPIRG identified nine additional deficiencies in New York's program and requested that an NOD be issued. However, EPA granted full approval of New York's program in February 2002. EPA indicated that the newly identified deficiencies, which it characterized as "implementation" deficiencies rather than substantive program deficiencies, did not prohibit full approval. EPA subsequently responded to NYPIRG's request for an NOD by stating that, although NYPIRG had identified additional deficiencies in the program, New York had committed itself in a November 2000 letter to rectifying those problems and therefore an NOD would not be issued.

NYPIRG also petitioned EPA to object to various Title V permits that had been issued by New York pursuant to its interim approval authority. In its petitions for objection, NYPIRG alleged the existence of deficiencies that paralleled the deficiencies raised in its comments on the New York program. Three permits are involved in this litigation. EPA denied the petition regarding one permit entirely and denied all but a few claims involving the other two petitions. EPA maintained that, in declining to object to the petitions, it was entitled to invoke a “harmless error rule” implicit in the statutory scheme.

NYPIRG separately sought judicial review of EPA’s full approval decision, its decision not to issue an NOD, and its denial of the petitions for objection. The cases were subsequently consolidated before the court of appeals.

EPA’s Full Approval of New York’s Program

EPA maintained that its full approval of the New York program was valid despite the fact that additional “implementation” deficiencies existed. According to EPA, once a state receives interim approval, it need only correct the specific deficiencies already identified in order to receive full approval. NYPIRG contended that any deficiency of any kind in a program prevents it from receiving full approval.

The court concluded that the relevant statutory provisions are ambiguous and deferred to EPA’s interpretation as a “permissible” reading of the statute. The court found that section 502(g) of the Act is ambiguous because it does not clearly describe the process by which a state with interim approval is to receive full approval. The court further concluded that EPA’s interpretation is permissible because section 502(g) refers to “the changes” that must be made to gain full approval, EPA’s position is consistent with the two-year timetable for obtaining full approval, and the Act provides a separate mechanism in section 502(I) for correcting deficiencies in fully approved programs. The court concluded that, because EPA’s interpretation is entitled to deference, EPA’s decision to fully approve the New York program should be affirmed.

EPA’s Decision Not to Issue an NOD

NYPIRG argued that the same deficiencies that allegedly should have prevented full approval obligated EPA to issue an NOD. EPA acknowledged the existence of these “implementation” deficiencies but maintained that it had discretion to determine whether New York’s commitment to addressing the problems excused the need for a formal NOD.

The court agreed with EPA that the key language in section 502(I) is “[w]henver the Administrator makes a determination” that a state is not adequately administering and enforcing a program, the Administrator “shall” provide notice to the state. According to the court, “[b]ecause the determination is to occur whenever the EPA makes it, the determination is necessarily discretionary.” Moreover, the non-discretionary duty to provide notice arises only after EPA has made its discretionary determination. The court further concluded that, because EPA’s decision whether to provide notice to a state is a completely discretionary enforcement determination, prior precedents establish that NYPIRG cannot obtain judicial review of such a decision.

EPA’s Denial of Petitions for Objection to Title V Permits

With regard to the three permits addressed in NYPIRG’s petitions for objection, NYPIRG argued that if a permit is deficient in any respect, EPA has a non-discretionary duty to object to it. EPA’s position was that a “harmless error rule” applied in such instances. In other words, if the deficiency had not caused any demonstrable harm to the petitioner, e.g., the petitioner commented on a draft permit even though public notice was inadequate, then EPA was not required to object to the permit.

The court concluded that nothing in the statute supports EPA’s reliance on a “harmless error rule” in determining whether to object to a Title V permit. According to the court, although EPA has discretion in deciding whether a permit is deficient, once it decides that a deficiency is present, the Act provides that EPA “shall” issue an objection. Because here EPA acknowledged that each of the three permits

contained some deficiencies but did not object, the court vacated EPA's denial of NYPIRG's petitions for objection. However, the court declined to provide specific instructions regarding how EPA is to conduct the remand. "

Court of Appeals Finds Jurisdiction for Union's PSD Citizen Suit Against Steel Company

On March 3, the U.S. Court of Appeals for the Tenth Circuit issued a decision reinstating a citizen suit brought by a labor union in which the union alleged that a steel company had violated NSPS and PSD requirements. *United Steelworkers of America v. Oregon Steel Mills, Inc.*, No. 01-1379 (10th Cir.). The court of appeals reversed a decision by a federal district court dismissing the union's complaint for lack of jurisdiction. First, the court of appeals ruled that the union could bring a citizen suit to enforce the NSPS even though the company had already sought judicial review of EPA's ruling that the NSPS applied to its facility. Second, the court of appeals ruled that the union was not required to provide 60 days notice to the company before filing the citizen suit.

The case arose when the union filed a citizen suit in district court under section 304(a) of the Clean Air Act in which it alleged that an electric arc furnace at the company's facility in Colorado had violated both NSPS and PSD requirements and sought to enforce those requirements against the company. The district court dismissed the case on jurisdictional grounds. It ruled that it lacked jurisdiction over the NSPS claim because the company had already challenged an EPA ruling that the NSPS applied to the electric arc furnace in the Tenth Circuit and that court had exclusive jurisdiction to review the ruling. The district court dismissed the separate PSD claim because the union had not provided 60 days notice that it was bringing suit against the company pursuant to section 304(b).

On appeal, the Tenth Circuit overturned both of the district court's rulings. The court of appeals concluded that, because the union was supporting EPA's NSPS ruling rather than attacking it, the union's citizen suit did not interfere with the court's exclusive jurisdiction to review EPA's ruling. The court of appeals explained that, on remand, the district court could consider staying proceedings in the citizen suit case until the company's challenge to EPA's ruling has been resolved.

The Tenth Circuit further ruled that the 60-day notice requirements in section 304(b) do not apply to an action brought under section 304(a)(3) to enforce PSD/NSR permitting requirements. Since the union's citizen suit involved allegations that the company should have obtained a PSD permit, the court of appeals ruled that the district court had jurisdiction over the PSD claim. "