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EPA Takes Final Action on Title V Monitoring "Sufficiency Review" Proposal

On January 22, 2004, EPA published its final action with regard to its proposal to authorize "sufficiency reviews" of periodic monitoring contained in applicable requirements. 69 Fed. Reg. 3202 (Jan. 22, 2004). In its action, EPA declines to adopt the proposed changes to regulatory text and announces a different interpretation of the Title V "umbrella monitoring" rules (section 70.6©)(1) and 71.6©)(1)).[1]/ Under the interpretation, EPA states that the "correct interpretation of the umbrella monitoring rules is that they do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring."

EPA's interpretation, in effect, reinstates the preamble interpretation of the monitoring provisions in the Title V rule, which made clear that EPA and permitting authorities are only authorized to require new periodic monitoring where applicable requirements do not contain such monitoring. EPA points out that "gap-filling" monitoring is authorized under sections 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B) if an applicable requirement does not provide for periodic monitoring. In addition, EPA recites the various other regulatory provisions under which monitoring can be authorized, including new source performance standards, maximum achievable control technology standards, compliance assurance monitoring requirements and other regulatory provisions.

EPA indicates that the final action on the "sufficiency review" proposal is the first step in a four-step strategy for considering programmatic improvements to existing monitoring "where necessary through rulemaking." EPA states that improving monitoring through rulemakings will reduce "resource-intensive, case-by-case monitoring review and so-called 'gap-filling' in title V permits." The three additional steps of EPA's strategy are the following:

- EPA intends to encourage states to improve monitoring requirements in certain SIP rules through guidance to be developed and published in the near term in connection with a separate rulemaking concerning the implementation of the PM 2.5 air quality standards.

- EPA also intends to publish an advance notice of proposed rulemaking in the near term to seek comments to identify inadequate monitoring in applicable

1/ For a more complete discussion of the background for EPA's action, *see* the September 2003 *Washington Report* at WR-502.

requirements and appropriate methods for upgrading such monitoring.

- EPA also expects to conduct a separate notice and comment rulemaking to address what types of existing monitoring are 'periodic' under the periodic monitoring rules and, when the periodic monitoring rules apply, what types of monitoring satisfy the monitoring criteria in the period monitoring rules.

EPA states that its action is not only reflective of the correct interpretation of the Title V rules, it also is good public policy. Among the policy grounds it cites for taking the action are the following:

- A better balance will be achieved between the responsibilities of states and other permitting authorities and EPA to improve monitoring where necessary. EPA notes that the proposed rule would have required permitting authorities to perform extensive case-by-case monitoring reviews, which would place significant burdens on state, local, and tribal permitting authorities. It also points out that such reviews are "time-consuming" and "demand permit writers with highly technical expertise."

- EPA also notes the "undue burdens" that would be placed on Title V sources. Among the burdens cited are a delay in permit issuance and renewals, and potential inequities among similarly-situated sources in different jurisdictions because of monitoring inconsistencies. The Agency points out that industry representatives have expressed significant concerns about the potential to increase the stringency of underlying emissions standards and limitations.

- EPA explains that "programmatic 'fixes'" to monitoring made through national or state rulemakings will address potential inadequacies and eliminate the need to resort to more resource-intensive, case-by-case sufficiency reviews.

- EPA also acknowledges that requiring monitoring improvements to be made through rulemaking at the national or state level will achieve greater consistency in monitoring requirements included in permits and eliminate some of the variations in monitoring determinations inherent in case-by-case reviews.

In its legal analysis, EPA points out that section 504(b) of the Clean Air Act calls for monitoring to be established "by rule" and that other provisions of the Act envision that monitoring will be adopted through rulemaking. However, EPA also states, as it did in its initial Title V rule preamble (with respect to applicable requirements for which no monitoring exists), that EPA has the "discretion to require case-by-case monitoring review," even though it concluded in this action that the correct interpretation of sections 70.6©)(1) and 71.6©)(1) is that such review of periodic monitoring in applicable requirements is not authorized under those provisions. "

D.C. Circuit Stays NSR Equipment Replacement Rule and Denies Renewed Motion to Stay 2002 NSR Reforms

On December 24, 2003, the D.C. Circuit granted motions of state and environmental group petitioners to stay the Equipment Replacement Provision (ERP) rule adopted on October 27, which establishes criteria for projects to be automatically exempted under the NSR routine maintenance, repair, and replacement exclusion.[2]/ The Court's order stated that the petitioners "have demonstrated the irreparable harm and likelihood of success on the merits required for the issuance of a stay pending review." As is typical, the order contained no elaboration on this finding. The stay will remain in effect until the Court takes final action on the ERP rule challenges, which will likely not occur until early 2005. The panel of judges that acted on the motions is the panel that was established for hearing all aspects of the challenges to the 2002 NSR rule reforms.

The panel also issued other orders in the NSR rule cases. It denied the state and environmental group petitioners renewed motion to stay the 2002 NSR rule. *See* WR-465 and WR-497. The order states that the petitioners "have not demonstrated sufficient changed circumstances to justify revisiting the order, filed March 6, 2003, denying the original motion to stay." In addition, the panel denied their motion to consolidate the 2002 and 2003 NSR rule cases; granted the request to designate itself to hear the ERP rule case, as well as the 2002 NSR reform rule case; deferred acting on the request to have oral argument in the two cases heard on the same day; and expedited, on its own motion, the ERP rule case. The order indicates that separate orders will be issued regarding briefing format for the two cases. "

[2]/ The ERP rule and the state and environmental group stay motion are discussed in more detail in the September 2003 *Washington Report* at WR-489 and the November 2003 *Washington Report* at WR-497, respectively.

Supreme Court Upholds EPA Authority to Block "Unreasonable" BACT Determinations

On January 21, 2004, the Supreme Court issued its decision in *Alaska Dep't of Envtl. Conservation (ADEC) v. EPA* upholding EPA's issuance of a stop-construction order under sections 113(a)(5) and 167. __ S. Ct. __, 2004 WL 86284 (2004). Justice Ginsburg wrote the majority opinion in this 5-4 decision. EPA's order was based upon its finding that the prevention of significant deterioration (PSD) permit issued to Teck Cominco Alaska, Inc. (Cominco) did not establish technology requirements that are consistent with the definition of best available control technology (BACT) under the PSD program. The Supreme Court's decision affirms the ruling of the U.S. Court of Appeals for the Ninth Circuit in *State of Alaska v. EPA*, 298 F.3d 814 (9th Cir. 2002).

Cominco operates a large zinc mine on the North Slope in Alaska. The company sought a PSD permit to increase capacity of one of its six generators and construct a new generator to

provide power for additional mining equipment. ADEC initially identified selective catalytic reduction (SCR) as the most stringent technology technically and economically feasible. However, Cominco proposed Low NOx burners for the new generator and all six existing generators, rather than install SCR on the proposed new generator and modified generator. EPA objected to this proposal and subsequently ADEC issued a second draft PSD permit finding Low NOx burners on the new and modified units by themselves to be BACT. In its determination, ADEC indicated that, because of a lack of data from Cominco, it could make no judgment as to the SCR's impact on the mine's operation, profitability and competitiveness. Nonetheless, it concluded that SCR imposed a "disproportionate cost" on the mine.

Majority Opinion

The first issue the majority opinion addresses is whether EPA may issue a stop-construction order if a state permitting authority's BACT selection is not reasonable. After reviewing the legislative and regulatory history of the PSD program, the Supreme Court held that EPA does have this authority. The Court ruled that EPA reasonably interpreted the Clean Air Act's BACT definition and properly concluded that the Act mandates a determination of BACT consistent with the statutory definition. The Court accepted EPA's argument that state permitting authorities' statutory discretion is constrained by the terms "maximum" and "achievable" in the BACT definition. The Court further accepts EPA's argument that sections 113(a)(5) and 167 empower the Agency to block a state agency's unreasonably lax BACT determination. The Court points out that EPA has consistently taken the position that it had this oversight authority over state BACT decisions.

The Court next explains its reasoning for rejecting ADEC's arguments that EPA's interpretation is impermissible. ADEC argued that the Clean Air Act BACT definition unambiguously gives "the permitting authority" by itself the right to make the judgment as to what technology qualifies as "best available." EPA's enforcement role should be limited to assuring that permits contain a BACT limitation and that procedural requirements are met. ADEC also made a number of policy arguments to support why permitting authorities are best positioned to make determinations regarding whether a technology is "unavailable" in a particular area. The Court acknowledges that states have the initial responsibility to make BACT determinations, but then rules that this does not mean that EPA has no authority with respect to "unreasonable" state agency BACT determinations. The Court strongly rejects the argument that EPA's authority is limited in this way. It concludes that EPA's role is to act in the unusual case in which a state permitting authority has determined BACT arbitrarily. The Court points out that EPA bears the burden of demonstrating that the Agency has acted reasonably when there is a challenge to an EPA stop-construction order, just as it does in an EPA-initiated civil action.

The Court next considered whether EPA properly exercised its statutory authority. The Court first explains that the standard of review is whether EPA's finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The Court reviews the

permitting history of Cominco's project and finds that there was no factual basis in the record to justify ADEC's switching from its conclusion that SCR is economically feasible in May 1999 to a finding that it is economically infeasible in September 1999. The Court specifically highlights ADEC's "forthrightly" acknowledging that it could not reach a judgment on SCR's economic impact on the mine because of its not having received relevant financial data from Cominco. The Court then stated, in light of that acknowledgment, ADEC could not simultaneously conclude that there would be threats to the mine's operation and competitiveness and use those reasons as the basis for finding SCR economically infeasible. Based upon its review of the record, the Court finds that EPA did not act arbitrarily.

Dissenting Opinion

In a dissent written by Justice Kennedy, the 4-judge minority reviews the same statutory provisions as the majority but reaches the opposite conclusion. The dissent rejects the majority's conclusion that EPA has a "broad oversight role" to ensure that a state's BACT determination is "reasonably moored to the Act's provisions." Instead, it finds that the statute "contemplates no such arrangement."

Justice Kennedy explains that the "permitting authority," here ADEC, is "to determine" what constitutes BACT. His opinion quotes the dictionary definition of "determine": "'[t]o decide or settle . . . conclusively and authoritatively.'"

Justice Kennedy's opinion then points out that the Act does not direct a state to "find as BACT the technology that results in the 'maximum reduction of a pollutant achievable for [a] facility' in the abstract." He recognizes that for a state "to do so without regard to the other mandatory criteria would be to ignore the words of the statute." The Act requires a "more comprehensive judgment." He points out that the permitting authority is to take into account "a set of contextual considerations," namely the "energy, environmental, and economic impacts and other costs" to identify BACT "on a case-by-case basis."

Justice Kennedy strongly takes exception to the fact that the majority opinion reached the narrow view of the scope of the state's discretion "only by wresting two adjectives, 'maximum' and 'achievable,' out of context." EPA has the authority to enforce PSD requirements, but that authority does not limit the state's "latitude and responsibility to balance all the statutory factors in making their discretionary judgments."

The minority's opinion states that EPA's authority to correct arbitrary and capricious BACT is exercised when EPA approves a state's PSD permit program, because EPA must assure that the state provides "'an opportunity for state judicial review.'" 61 Fed. Reg. 1882 (1996). The Court then reviews the other procedures that must be followed in connection with the issuance of permits, and in particular points out that any person who participated in the comment process can pursue an administrative appeal of the state's decision, followed by judicial review in state courts. In addition to ruling that EPA can seek review of a decision in state court, the minority states that EPA may have the authority to seek review of a decision in federal court, but does not reach a conclusion with regard to that "option."

The dissent also points out the anomalous result that could occur if a state court had already upheld the BACT determination made by ADEC. In that situation, under the majority's opinion, EPA could, in effect, overrule a decision of a state court. The dissent points out that this is a "serious flaw" because the arrangement would "violate the well-established rule that the judgments of Article III courts cannot be revised by the Executive or Legislative Branches." The principle that judicial decisions cannot be reopened "at the whim of the Executive or the Legislature" is essential to preserving "separation of powers and judicial independence."

The minority also finds another deficiency in the scheme the majority rules is in the Act. The opinion points out that there is nothing in the Court's analysis that would prevent EPA from issuing an order setting aside a BACT determination months, or even years, later. It concludes that "Congress cannot have intended this result." The Act explicitly provides for a "preauthorization process," which "underscores the need for finality in state permitting decisions, making implausible an interpretation of the statute that would allow a *post hoc* veto procedure." The majority had responded that the case involved preconstruction orders issued by EPA, "not post-construction federal agency directives." However, the dissent points out that this provides no assurance since the logic of the majority's reasoning would in the future allow EPA's "belated interventions." The majority dismissed this possibility by stating that "EPA, we are confident, could not indulge in the inequitable conduct ADEC and the dissent hypothesize while the federal courts sit to review EPA's actions." The dissent then points out how weak the authority the majority cites is for the proposition that EPA could not intervene belatedly. "State agencies rely on [that authority] at their own risk." "

EPA Issues Guidance On Supplemental Environmental Projects

EPA recently issued three guidance documents related to use and implementation of Supplemental Environmental Projects (SEPs). The principal issues addressed were EPA's change in policy to allow, under certain circumstances, profitable projects as SEPs and the use of third parties in the performance of SEPs. EPA also addressed the potential for SEP funds to be aggregated in limited circumstances. Finally, EPA provided a list of potential SEPs.

Guidance Related to Profitable Projects

On December 5, 2003, EPA issued a document titled "Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects." At the outset, EPA points out that its May 1998 SEP Policy states that profitable projects are generally unacceptable as SEPs. EPA further points out that it has determined that, in some instances, projects that are potentially or ultimately profitable may be allowable as a SEP. The basic criterion is that the project's environmental or public health benefit will outweigh its potential profitability to the alleged violator.

Profitable Projects and the Project Period

EPA indicates that it uses its PROJECT financial model to evaluate project costs and savings. Where the model returns a "negative" value, the proposed project will provide a positive return over the designated period of time and should be considered "profitable" for the alleged violator. EPA's guidance indicates that, for larger, more sophisticated companies, projects that would become profitable within five years cannot be considered as SEPs. However, for small businesses and small communities, the minimum period is three years.

When to Accept a Proposed Profitable Project as a SEP

EPA indicates that, for a profitable project to be accepted as a SEP, it must meet not only the criteria in the SEP Policy, it also must satisfy a higher standard, or "high hurdle," for acceptance. EPA gives the following examples of criteria that would satisfy the "high hurdle:"

- A high degree of innovation with a potential for widespread application;
- Technology that is transferable to other facilities or industries and the defendant/respondent agrees to share information about the technology;
- Exceptional environmental or public health benefits to an environmental justice community; and/or
- A high degree of economic risk for the alleged violator.

EPA also states that the maximum allowable mitigation credit is less for profitable projects than for ones that are not profitable. EPA recommends a maximum mitigation percentage of 80% for profitable pollution prevention SEPs, and a maximum mitigation percentage of 60% for all other profitable SEPs.

Using the PROJECT Model to Calculate Value of SEPs

EPA's guidance reviews the PROJECT model to be used in valuing SEPs for penalty mitigation. The description includes the types of costs to be considered and other data needed for input to the model. EPA also includes a flow chart for use in determining whether a project is profitable.

Use of Third Parties in Performing SEPs and Aggregation of SEP Funds

On December 15, 2003, EPA issued a document titled "Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds."

EPA first indicates that there are circumstances where it may be appropriate for SEPs to be aggregated by defendants/respondents. These include: (1) where defendants/respondents are jointly and severally liable for performance of a consolidated SEP; and (2) performance of complimentary, segregable SEPs. If defendants/respondents in separate cases are interested in performing discrete and segregable tasks within a larger project, EPA indicates that each discrete project (1) must have a nexus to the violation at issue in the particular settlements

and meet all conditions of the SEP policy, (2) must be itself worthwhile with environmental or public health benefits, and (3) must hold each defendant/respondent responsible for implementation and completion of a specific portion of the larger project.

With regard to EPA's role in aggregating SEP funds, EPA first makes clear that it can have no role in managing SEP funds. EPA indicates that defendants/respondents may use private, third-party organizations to manage SEPs and SEP funds. However, the defendants/respondents must be obligated to complete the project satisfactorily, expend fully the amount of funds agreed to be spent in performance of the SEP and meet all the conditions and requirements of the SEP Policy. In other words, it is not permissible for defendants/respondents to simply make a cash payment to a third party conducting a project without retaining full responsibility for implementation and completion of the project. EPA will not itself use private, third party organizations to manage SEPs and SEP funds. Use of third parties must involve a direct relationship between the defendants/respondents and the third party organization.

Recommended Ideas for Supplemental Environmental Projects

On January 5, 2004, EPA issued a memorandum that provides a list of potential SEPs to be used in settlement of enforcement actions. Among the possible SEPs listed are: (1) operation and maintenance of health clinics serving low income and minority communities and sensitive populations; (2) lead-based paint abatement in target housing or child-occupied facilities, particularly when the housing is located in an environmental justice community; (3) diesel retrofits and/or replacement of buses to reduce emissions; (4) retiring particulate matter, sulfur dioxide and NOx emissions credits; and (5) implementation of projects that create, restore and/or preserve threatened aquatic resources, including wetlands. "