

Clean Air Act Litigation Developments 1999

Citizen Suits

Anderson v. Farmland Industries, Inc., 45 F. Supp.2d 863 (D.Kan. 1999)

In a citizen suit brought under section 304 of the Clean Air Act, a federal district court addressed several significant issues in denying the defendant's motion for summary judgment. The case involved allegations that the defendant company had violated various emissions limitations and reporting requirements at its petroleum refinery. The citizen suit plaintiffs – certain individuals who live near the refinery – sought to compel the company to pay civil penalties and also sought injunctive relief.

The court rejected the company's argument that the plaintiffs' 60-day notice of intent to file the citizen suit was inadequate under section 304(b)(1)(A) of the Act as to one claim because the notice failed to identify what pollutants were involved. The court concluded that the notice had sufficiently advised the company of the alleged violations because the notice identified the SIP provision in question; stated that violations had occurred during periods of startup, shutdown, and malfunction; and provided dates on which the alleged violations had taken place.

The court further concluded that there was no reason to "abstain" from ruling on plaintiffs' claims based on the doctrine of primary jurisdiction. (Under the administrative law doctrine of primary jurisdiction, a reviewing court will refrain from ruling on an issue that falls within the special competence of an administrative agency so that the agency can first address the issue.)

With regard to the issue of standing, the court ruled that, until additional discovery has been completed, it was not possible to determine whether plaintiffs' claims were redressable under *Steel Co. v. Citizens for a Better Environment*, 118 S.Ct. 1003 (1998). Citing the *Steel Co.* decision, the district court stated that, to establish standing in this case, the plaintiffs must show either that the company was in violation of the Act when the suit was filed or that future violations were imminent at that time.

Of particular significance, the court expressly rejected plaintiffs' argument that the redressability requirement for standing could be satisfied based on section 304(g)(2) of the Act, which authorizes a court to order that civil penalties imposed as a result of a citizen suit be used for "beneficial mitigation projects" rather than being paid to the U.S. Treasury. Plaintiffs had sought to distinguish this case from *Steel Co.* because the citizen suit provision

in EPCRA, the statute involved there, contained no such authorization. However, the district court ruled that “such relief would not remedy the injuries suffered and, accordingly, is insufficient to establish standing.”

Finally, the court stated that, even if the plaintiffs are found to have standing to raise particular claims, they must also establish that the claims have not become moot since the complaint was filed. The court indicated that the company’s voluntary cessation of a violation would not, by itself, cause a claim to be moot. Instead, a claim would become moot only if the violation in question has ceased and there is no reasonable expectation that it will be repeated.

Anderson v. Farmland Industries, Inc., 70 F. Supp.2d 1218 (D.Kan. 1999)

In the second phase of *Anderson v. Farmland Industries, Inc.*, the district court issued an opinion addressing several additional issues. In a summary judgment motion, the refinery contended primarily that plaintiffs lack Article III standing because it had taken corrective action with regard to all alleged violations and therefore the plaintiffs’ claims could no longer be redressed by a favorable decision. The refinery also maintained that exceedances involving several emissions units were not violations because the exceedances in question occurred during “startup, shutdown, or malfunction” conditions.

The court’s principal rulings are summarized below:

With regard to excess emissions from the refinery’s Radco heater, Claus sulfur recovery unit, and FCCU catalyst regenerator, the court ruled that plaintiffs satisfied the injury-in-fact and causation prongs of the Article III standing test. Although the refinery stated that excess emissions from the facility were not currently drifting over plaintiffs’ houses, the refinery failed to deny plaintiffs’ allegations that such emissions *in the past* had drifted over the houses, interfered with plaintiffs’ use and enjoyment of their houses, and adversely affected the quality of the air breathed.

As to the redressability requirement for Article III standing, the court ruled that, under *Steel Co.*, the test is whether “a reasonable fact finder could conclude either that defendant was in fact violating the act at the time plaintiffs filed their complaint or that future violations of the act were imminent.” The court then rejected the refinery’s contentions that plaintiffs had not satisfied the redressability requirement because all the alleged violations had been corrected or all exceedances occurred during “startup, shutdown, or malfunction” conditions.

The court concluded that plaintiffs had standing to challenge the refinery’s erroneous reporting of excess emissions because certain reports had still not been corrected when the citizen suit was filed. With regard to redressability, the court distinguished this situation from that in *Steel Co.*, where the company had corrected all its reporting violations *before* the suit was filed.

The court ruled that plaintiffs lacked standing to raise claims alleging violations by a coal-fired boiler that was used intermittently because plaintiffs could not satisfy the redressability element of the standing test. After the boiler had last been operated, the refinery had repaired the boiler’s pollution control system. According to the

court, the plaintiffs had not met their burden of showing that at the time the complaint was filed a few months later, violations were either ongoing or imminent.

The court held that plaintiffs had standing to pursue their claim that the refinery has violated the requirement in 40 C.F.R. § 60.11(d) that “good air pollution control practices for minimizing emissions” be followed. The court concluded that there was evidence of excess SO₂ emissions and that the refinery could not claim that the emissions resulted from malfunctions because a source must meet “good air pollution control practices” at all times, including during malfunctions.

The court ruled that it would largely deny the refinery’s motion for summary judgment with regard to the refinery’s mootness arguments because the refinery had not met its burden of showing that plaintiffs’ claims based on excess emissions are moot. In particular, the court found that the evidence was unclear regarding whether the malfunction exception applied.

Criminal Liability

United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 860 (2000)

The U.S. Court of Appeals for the Ninth Circuit ruled that ordinary negligence on the part of a supervisor was enough to trigger criminal penalties under the Clean Water Act. By a 2 to 1 vote, a panel of judges upheld the conviction of the supervisor of a workman who accidentally ruptured an oil pipeline. The panel rejected the defendant’s argument that the word “negligently” in the criminal enforcement provisions of the Clean Water Act should be read to entail more than ordinary negligence. Because the relevant statutory language is essentially identical to the language of section 113(c)(4) of the Clean Air Act, the reasoning of the court would presumably apply also to criminal enforcement actions under that provision of the Clean Air Act.

EPA charged the defendant with violating section 309(c)(1) of the Clean Water Act, which makes it a crime to “negligently” discharge pollutants into a navigable waterway. The defendant contended that, rather than applying the ordinary negligence standard of “failure to use reasonable care,” the trial court should have applied a heightened criminal negligence standard based on a “gross deviation from the standard of care a reasonable person would observe in the situation.” The defendant further maintained that applying the ordinary negligence standard under the circumstances in this case would constitute a denial of due process.

The Ninth Circuit ruled that, because Congress had not specifically defined the word “negligently” in the statute, the court would presume that the word should have its ordinary meaning. The court rejected the due process claim, concluding that the defendant was aware of the location of the pipeline and should have foreseen that it would be subject to strict regulatory measures.

Environmental Justice

In re: Knauf Fiber Glass, GmbH, PSD Appeal Nos. 98-3 through 98-20 (EAB, Feb. 4, 1999), 1999 WL 64235 (E.P.A.)

In a PSD permit challenge, EPA's Environmental Appeals Board (EAB) concluded, for the first time, that states that are delegated authority to administer the federal PSD program have a duty to undertake an environmental justice analysis. Under the decision, state or local agencies with delegated authority to implement federal programs are obligated to undertake such an analysis in accordance with federal Executive Order 12,890 as if they were federal agencies. Executive Order 12,890 requires federal agencies to identify and address, as appropriate, "disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations"

The EAB ruled that the state permitting agency had an obligation to ensure that the federal executive order was implemented and that an environmental justice analysis was conducted. At the same time, the EAB acknowledged that because the permitting is not a federal agency, the executive order does not apply directly to it. The EAB concluded that it was significant that EPA's general permit appeal regulations provide that a state or local agency delegated to administer and enforce the federal PSD program "stands in the shoes of" EPA for purposes of determining whether legal requirements have been carried out.

The EAB also ruled that the permitting agency had not adequately supported its determination of BACT for control of particulate emissions. The EAB rejected numerous other challenges to the permit raised by the petitioners.

Justiciability

See Anderson v. Farmland Industries, Inc., 45 F. Supp.2d 863 (D.Kan. 1999) (Citizen Suits).

See Anderson v. Farmland Industries, Inc., 70 F. Supp.2d 1218 (D.Kan. 1999) (Citizen Suits).

See NRDC v. EPA, 194 F.3d 130 (D.C. Cir. 1999) (Monitoring).

MACT Standards/Section 112

***Sierra Club v. EPA*, 167 F.3d 658 (D.C. Cir. 1999)**

The D.C. Circuit ruled that EPA had failed to support its MACT floor determinations in setting the performance standards for medical waste incinerators. The court made clear that EPA must explain with sufficient detail how it determines what constitutes the MACT floor for a category and may not simply base the MACT floor on existing regulatory and permit limits.

First of all, the court rejected the Sierra Club's argument that, as a matter of statutory construction, the Act forecloses EPA from relying on regulatory data in any situation. The court ruled that "the use of such information is permissible as long as it allows a reasonable inference as to the performance of the top 12 percent of units."

However, the court concluded that EPA had failed to justify in the record its MACT floor determination for existing sources. The court stated that EPA, in using permit limits to calculate the MACT floor, had not considered the possibility that medical waste incinerators were "substantially overachieving the permit limits." The court noted that it appeared that, relying on permit limits, the best performing 12% of sources actually emitted twice as much pollution as the units that were uncontrolled—a result that the court believed was irrational.

The Sierra Club attacked EPA's approach to determining the MACT floor for new sources on two principal grounds: (1) that EPA should have identified the best performing unit in the subcategory rather than considering the performance of other units using that same technology; and (2) that EPA further erred by basing the floor on the emissions of the worst-performing unit that it examined.

The D.C. Circuit ruled that, in order to determine what is "achieved in practice," EPA could examine the performance of a unit under the worst foreseeable circumstances. However, the court stated that the record contained no explanation that this was the path the Agency had actually followed. Moreover, the court stated that EPA had failed to explain why the phrase "best controlled similar unit" could encompass all units using the same technology as the unit with the best performance, rather than just that unit alone. The court additionally noted that there was no adequate explanation for the method by which EPA had increased observed levels by 10% and rounded them upward.

Despite the deficiencies identified by the court, it did not vacate the standards because it believed that "an explanation might be possible." The court simply remanded the standards to EPA so that it could explain the basis for its MACT floor determinations.

Monitoring

***NRDC v. EPA*, 194 F.3d 130 (D.C. Cir. 1999)**

On October 29, 1999, the D.C. Circuit issued its decision in the consolidated challenges to EPA's Compliance Assurance Monitoring (CAM) Rule. The decision upholds EPA's fundamental approach in promulgating the CAM Rule and rejects NRDC's arguments that the rule is not sufficiently stringent and fails to satisfy the statutory requirement that EPA provide for "enhanced monitoring." However, the court also ruled that the compliance certification provision established under the CAM Rule, which provides that a source is required to state whether its method for determining compliance provides "continuous or intermittent data," conflicts with the statute and must be remanded to require that a source state whether its compliance is "continuous or intermittent."

The court unanimously rejected all of NRDC's arguments attacking the fundamental approach taken by EPA in promulgating the rule as well as the implementation methods chosen by the Agency. Specifically, the court concluded that NRDC's argument that the CAM Rule did not constitute "enhanced monitoring" under section 114 was a challenge to the reasonableness of EPA's statutory interpretation – an interpretation that is entitled to significant deference. The court pointed out that the term "enhanced monitoring" did not have a specified meaning under the statute, and therefore it rejected NRDC's position that only continuous or direct emissions monitoring could be regarded as "enhanced."

NRDC additionally argued that the compliance certification provision in the rule is invalid because it does not require that a source certify that compliance is "continuous or intermittent" and instead only requires that a source certify whether the method for determining compliance is based on "continuous or intermittent data." The court agreed with NRDC that EPA's approach could not be squared with the language of the statute and remanded the provision to EPA. The court found that the relevant statutory language – a source's "compliance certification shall include . . . whether compliance is continuous or intermittent" – was unambiguous and did not permit EPA's interpretation. Accordingly, the court ruled that a source must certify whether its compliance is "continuous or intermittent," not merely whether, as the rule provides, its method of determining compliance is based on "continuous or intermittent data."

Finally, the court held that the utility petitioners' separate challenge to the compliance certification provisions was not ripe for review. The utility petitioners had challenged EPA's requirement that compliance certifications be based on "any other material information," including any "credible evidence." The court stated that EPA itself now agreed that "nothing precludes an owner from adding a caveat to its certification to the effect that, while it is providing other evidence which EPA might find material, the submitter disputes its materiality and reserves the right to challenge the use of the evidence in court."

NAAQS

American Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999)

In a decision that will likely have far-reaching impacts on many of EPA's Clean Air Act regulatory programs, a three-judge panel of the D.C. Circuit ruled on May 14 that EPA's revised national ambient air quality standards (NAAQSs) for ozone and particulate matter are unlawful. As a result, the court remanded the revised standards to EPA and additionally vacated the coarse particulate standard.

The court concluded that the rules were deficient in four separate respects:

By a 2-1 vote, the panel ruled that EPA's construction of the statutory provisions governing the promulgation of NAAQSs effected an unconstitutional delegation of Congress' legislative powers to the Agency. The court remanded the ozone standard and the PM-2.5 standard to EPA so that it could attempt to develop a statutory construction that provides "intelligible principles" governing EPA's selection of specific primary standards that are "requisite to protect the public health" with an "adequate margin of safety." Judge Tatel, the dissenting judge, maintained that the majority had applied an overly demanding test and that the statute provided sufficiently specific criteria to be followed by EPA in setting NAAQSs. He also argued that the Supreme Court has upheld delegations of power in other contexts where the statutory criteria were even less specific than in section 109. Finally, he contended that the record adequately supported EPA's selection of the levels in question.

The court concluded that Congress intended that a revised ozone standard be implemented and enforced pursuant to the designation scheme and deadlines set forth in Subpart 2 of Title I, Part D, which was added by the 1990 amendments, not the more general provisions of Subpart 1. As a result, the court stated that the revised ozone standard – the 8-hour standard – is currently not enforceable.

The court ruled that EPA had erred by not considering all health effects from ambient, ground-level ozone, including potentially beneficial impacts in screening out ultraviolet radiation. The court based its conclusion primarily on the language of section 108(a)(2), which provides that EPA is to consider "all identifiable effects" of a pollutant in developing a NAAQS. The court directed EPA to consider such health effects on remand.

The court concluded that EPA had been arbitrary and capricious in deciding to use PM-10 as an indicator pollutant for coarse particulates rather than using PM-10-2.5 (a measure that would include particles larger than PM-2.5 but smaller than PM-10). Because any PM-10 measurement necessarily will also include an arbitrary amount of fine particulates, i.e., particles that are less than 2.5 microns in size, the court determined that PM-10 will be an arbitrary indicator of coarse particulates and will result in "double regulation" of the PM-2.5 component. The court's decision expressly vacated the PM-10 standard.

In addition to ruling that the standards are deficient for the reasons discussed above, the court also rejected other challenges by petitioners to the standards. Among other things, the court ruled that EPA could not consider costs in any manner in promulgating NAAQSs; that EPA had complied with the National Environmental Policy Act, the Unfunded Mandates Reform Act, and the Small Business Regulatory Enforcement Fairness

Act (SBREFA); that PM-2.5 was not a “new pollutant” and therefore that EPA need not satisfy additional statutory requirements; and that EPA need not demonstrate the specific biological mechanism causing adverse health effects before regulating a pollutant.

***American Trucking Ass'ns v. EPA*, 195 F.3d 4 (D.C. Cir. 1999)**

On October 29, the D.C. Circuit denied in large part EPA’s petition for rehearing *en banc* in the *American Trucking Ass'ns* case, which involves the consolidated challenges to EPA’s revised ozone and particulate matter (PM) standards. As a result, the Court essentially left intact its May 14, 1999 decision remanding the revised standards to EPA on various grounds.

The Court’s decision addressing the petition for rehearing consisted of four separate opinions either disposing of the petition or providing dissenting views. The original panel issued an opinion denying the petition in most respects but granting it in part with regard to implementation and enforcement of revised ozone standards. That opinion contained the following rulings:

The panel stated that, although government counsel had sought to provide “intelligible principles” for standard-setting in the petition for rehearing, those principles had not been adequately set forth during the rulemaking proceeding and therefore could not provide a basis for upholding the standards.

With regard to implementation of revised ozone standards, the panel denied the petition in large part but modified the original opinion to clarify its holding and address conflicting language in the opinion. The panel found that it had jurisdiction to review EPA’s plans for implementing the revised standard and stated that it was not persuaded by EPA’s interpretation of Subpart 2. However, it revised the opinion to clarify that a revised standard must be enforced “in conformity with Subpart 2,” not – as the original opinion implied – that a revised standard could not be enforced at all.

The panel denied outright EPA’s contentions that it was not required to consider beneficial effects of pollutants in setting standards.

Judge Tatel – one of the members of the three-judge panel – wrote a separate opinion concurring in part and dissenting in part with regard to the Subpart 2 issue. He concurred in the modification of the opinion “because, as modified, the opinion now leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with Subpart 2’s classifications and attainment dates.” However, he dissented from other aspects of the Subpart 2 portion of the opinion because he now believes that EPA’s interpretation of the statute is reasonable and should receive deference.

On the key question of whether to grant rehearing *en banc*, the judges denied EPA’s request. The vote was actually 5-4 in favor of granting rehearing, but under the Court’s rules 6 votes were needed to grant the request.

Judge Silberman wrote a separate opinion dissenting from the denial of rehearing *en banc* on the nondelegation doctrine issue. In his opinion, he stated that, although he was

sympathetic to the constitutional concerns voiced by the panel majority, he did not believe that the nondelegation doctrine could be used to invalidate the standards. He indicated that the validity of the standards should have been determined under the traditional “arbitrary and capricious” test.

Judge Tatel also dissented from the denial of rehearing *en banc* on the nondelegation doctrine issue and wrote a dissenting opinion in which three other judges joined. In that opinion, he maintained that Supreme Court precedents require that the Court rule that the statute does not improperly delegate authority to EPA. The dissenting opinion also argued that the nondelegation holding involves an issue of “exceptional importance” under the Court’s rules and therefore should have been reheard by the Court sitting *en banc*.

As a result of the October 29 rulings, the revised ozone and PM standards remained remanded to EPA and apparently cannot as a practical matter be enforced. Petitions for certiorari were filed before the Supreme Court in January 2000.

PSD Requirements

In re: RockGen Energy Center, PSD Appeal No. 99-1 (EAB, August 25, 1999), 1999 WL 673224 (E.P.A.)

EPA’s Environmental Appeals Board (EAB) ruled that the Wisconsin Department of Natural Resources (WDNR) erred by including a provision in a PSD permit that allows a source to rely on a separate “startup and shutdown” plan during startup or shutdown periods. The EAB’s opinion reflects heavy reliance on non-binding Agency guidance and a stringent approach to addressing a source’s compliance obligations during startup or shutdown periods.

In relevant part, the permit provided that RockGen could exceed the permit’s emission limits if the emissions are “temporary and due to startup or shutdown of operations carried out in accord with a plan and schedule approved by the Department” The petitioner contended, among other things, that the permit was unlawful because the startup and shutdown plan was not federally enforceable.

In its decision, the EAB gave great weight to three EPA guidance documents that address compliance with emission limits during startup, shutdown, or malfunction conditions. According to the EAB, those guidance documents indicate that, although it is likely that emission limits will be exceeded during startups or shutdowns, “such exceedances are common and can be reduced or eliminated with careful planning.” The EAB ruled that it appeared from the record that WDNR had not given sufficient consideration to design changes or other possible changes to the proposed facility to address the issue of whether the exceedances could be prevented. Furthermore, the EAB believed that the permit was deficient because it did not indicate what conditions must be included in a startup/shutdown plan or what criteria would be used to determine the plan’s validity. Based on this reasoning, the EAB remanded the relevant part of the permit to WDNR for

an “on-the-record determination as to whether compliance with existing permit limitations is infeasible during startup and shutdown, and, if so, what design, control, methodological or other changes are appropriate for inclusion in the permit to minimize the excess emissions during these periods.”

In re: Encogen Cogeneration Facility, PSD Appeal Nos. 98-22 through 98-24 (EAB, March 26, 1999), 1999 WL 198914 (E.P.A.)

EPA’s Environmental Appeals Board (EAB) first rejected contentions that the PSD permit must restrict the future ability of the permittee to modify the permit’s fuel use restrictions. The petitioners argued that the permit should expressly prevent the permittee from seeking modification of the permit to use more polluting fuels. However, the Board concluded that the PSD regulations “do not require that future operational changes, which require modification of a permit, be considered as part of the initial application process.”

Second, the EAB ruled that the state permitting agency was not required to include a provision contained in the draft permit which would have required the permittee to provide notification when switching among the three allowable types of fuel. The Board explained that the petitioners’ concerns were “speculative” and that they had failed to show that more frequent switching would increase sulfur emission levels so long as the permit provision limiting sulfur content to less than .05% was met.

See In re: Knauf Fiber Glass, GmbH, PSD Appeal Nos. 98-3 through 98-20 (EAB, Feb. 4, 1999), 1999 WL 64235 (E.P.A.) (Environmental Justice).

Title V Permit Program

In the Matter of Roosevelt Regional Landfill, Regional Disposal Co., Permit No. DE 98AOP-C242.

On May 4, 1999, the EPA Administrator signed an order denying a petition requesting that EPA exercise its authority under section 505(b) of the Act to object to a Title V permit as not being in compliance with the “applicable requirements” of the Act. Section 505(b)(2) of the Act provides that “any person” may request that the Administrator object to a Title V permit by filing a petition within 60 days of the end of EPA’s review period for the permit. The order in question is one of the first orders formally denying such a petition.

The case involved a Title V permit issued by the Washington Department of Ecology to Roosevelt Regional Landfill. A competitor, TPS Technologies, sought to have EPA object to the permit based on four separate allegations: (1) the state had failed to explain why the controls for this landfill were different from those at another landfill; (2) the permit did not identify all emissions units; (3) calculations for VOC emissions were inaccurate; and (4) the permit did not reflect EPA Region IX’s comments regarding possible noncompliance with NSR requirements.

EPA ruled that the claim alleging unexplained differences in control requirements as compared to another landfill had not been properly raised during the public comment period on the draft permit and therefore could not be raised in the petition. However, EPA went further and concluded that, even if the issue had been properly raised, petitioners' arguments lacked merit. EPA stated that it believed it had the authority to review the validity of minor NSR permit terms in determining whether to object to a Title V permit.

With regard to the claim that not all emissions units were adequately identified, the Administrator concluded that, with one exception, the petitioner had not specified what units had not been identified. As to that unit, EPA stated that, because the unit was adequately covered by facility-wide applicable requirements and no other applicable requirement applied uniquely to it, the generic grouping of that emissions unit was proper.

Addressing the claim that VOC emissions had been improperly calculated, EPA stated that the petitioner had not shown that any applicable requirement had been omitted from the permit because of the alleged errors. In other words, the petitioner had failed to show that the errors had any significant impact on the final permit.

Finally, because the petitioner had failed to specify precisely which of Region IX's comments concerning NSR issues had not been reflected in the permit, EPA denied the petitioner's remaining claim that the facility's permit did take account of alleged NSR noncompliance problems.

See NRDC v. EPA, 194 F.3d 130 (D.C. Cir. 1999) (Monitoring).

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