

DC. Circuit Upholds Revised Ozone and Particulate Matter Standards on Remand from Supreme Court

In a unanimous decision, a three-judge panel of the D.C. Circuit has upheld EPA's revised national ambient air quality standards (NAAQSs) for ozone and particulate matter against the remaining challenges by industry, state, and environmental petitioners. *American Trucking Ass'n v. EPA*, Nos. 97-1440 *et al.* (D.C. Cir. March 26, 2002). The panel, which consisted of the same judges who had initially invalidated the standards on constitutional grounds, rejected petitioners' arguments that EPA's actions in setting the levels for the standards are "arbitrary and capricious."

The consolidated cases were remanded from the Supreme Court to the D.C. Circuit to allow that court to consider previously unaddressed arguments that certain elements of the standards are "arbitrary and capricious." *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001). The Supreme Court had reversed the D.C. Circuit's earlier decision that EPA's interpretation of the Act resulted in an unconstitutional delegation of legislative authority from Congress to the Agency. The D.C. Circuit had found that EPA's approach in setting the standards violated this nondelegation doctrine because it was not based on a set of "intelligible principles." The D.C. Circuit had remanded the standards to EPA so that it might identify principles that would limit its standard-setting authority and concluded that it was unnecessary at

that time to address petitioners' arguments that the standards were also "arbitrary and capricious." Because the Supreme Court reversed the court's unconstitutional delegation ruling and additionally rejected industry petitioners' argument that EPA was required to consider implementation costs in setting such standards, the Supreme Court remanded the cases to the D.C. Circuit so that it could address all "preserved challenges" to the standards.

On remand to the D.C. Circuit, the various petitioners raised three broad sets of issues. First, certain industry and state petitioners urged the court to vacate the revised PM standard – a new PM2.5 standard – because EPA allegedly had failed to articulate and apply the Act's requirement that primary NAAQSs be "requisite to protect" the public health. They pointed to the Supreme Court's language that EPA is to "set air quality standards at the level that is 'requisite' – that is, not lower or higher than is necessary – to protect the public health with an adequate margin of safety." Those petitioners further raised specific claims as to why the PM2.5 standard is "arbitrary and capricious." Second, environmental petitioners maintained that the revised PM standard is too lenient to protect against known adverse health effects. Third, industry and state petitioners challenged the revised ozone standard on the same general basis as they challenged the revised PM standard.

Before evaluating the petitioners' "arbitrary and capricious" claims, the D.C. Circuit addressed industry and state petitioners' related argument that the D.C. Circuit's prior decisions in the litigation already establish that EPA failed to apply the "requisite to protect" requirement in setting the primary standards. According to those petitioners, EPA's failure to appeal this holding to the Supreme Court meant that the holding is controlling, i.e., it was "law of the case," and governs the disposition of the remaining "arbitrary and capricious" claims.

The panel disagreed with the position that its prior decisions had established such a holding. It explained that the statements relied upon by petitioners were made in the context of determining whether EPA could show that "intelligible principles" governed its NAAQS rulemaking authority, i.e., whether EPA had perhaps relied upon the "requisite to protect" requirement to limit its authority to set NAAQSs and thereby avoid constitutional problems. The court indicated that its statements did not apply to the narrower issue of whether EPA reasonably exercised its authority to promulgate standards that are not "arbitrary and capricious."

Industry and State Petitioners' Challenges to the Revised PM Standard

The industry and state petitioners raised a number of specific arguments that EPA acted in an "arbitrary and capricious" manner in promulgating the PM2.5 standard. We summarize below the court's rulings on each of the principal arguments.

C The court rejected petitioners' contentions that EPA failed to apply a permissible legal standard or any legal standard at all in setting the PM2.5 standard. The petitioners relied upon a statement by EPA that it was not

required to establish a "safe level" of PM2.5 before adopting a standard and EPA's statement that its approach would "go beyond" what was needed to protect public health. The court concluded that both statements were being quoted out of context and did not support petitioners' position that EPA had failed to apply the "requisite to protect" requirement.

C The court disagreed with petitioners' assertion that EPA must quantify in some detail its decisionmaking process. In particular, it explained that EPA is *not* required to "establish a measure of the risk to safety it considers adequate to protect public health every time it establishes a [NAAQS]."

C The court held that EPA was not required to consider whether PM2.5 emissions might increase ozone levels or levels of a different PM component. According to the court, such a requirement would "hamstring" the Agency in setting protective NAAQSs.

C The court rejected petitioners' "confounder" argument, i.e., the argument that various factors such as other pollutants, temperature, and humidity might account for the associations in studies that EPA attributed to PM2.5. The court stated that it had already decided that issue in EPA's favor in its first decision and that, in any event, the record established that the results were consistent in a number of different studies.

C The court declined to consider petitioners' argument that the daily PM2.5 standard (as opposed to the annual PM 2.5 standard) was "arbitrary and capricious." The court concluded that the petitioners had failed to challenge

the daily standard in their briefs in the initial case and therefore could not belatedly raise the issue.

- C Finally, the court disagreed with petitioners' position that EPA was obligated to obtain and make public the data underlying certain key studies relied upon by EPA. It ruled that the Act itself contains no requirement that underlying data be obtained and made public and that such a requirement "would be impractical and unnecessary."

Environmental Petitioners' Challenges to the Revised PM Standard

The environmental petitioners claimed EPA should have set a stricter *daily* primary PM2.5 standard rather than relying almost exclusively on the *annual* PM2.5 standard. They contended that EPA set the daily standard at the highest level it considered in the record and that such a lenient standard will do little to prevent harmful, short-term pollution events.

In addressing the environmental petitioners' arguments, the court deferred to EPA's expertise in analyzing the relevant studies concerning the health effects of PM. EPA explained that existing data are insufficient to allow EPA to separate the health effects of long-term average PM2.5 concentrations from those of short-term peak concentrations. The court specifically deferred to EPA's conclusion that setting a relatively stringent annual PM2.5 standard will most effectively ensure that adverse health effects are minimized.

The environmental petitioners also challenged the validity of the *secondary* PM2.5 standard, contending that the standard is inadequate to improve visibility in the western United States. However, the court noted that in its first decision it had concluded that Congress

did not intend for the secondary NAAQSs to eliminate all adverse visibility effects and that the Agency could properly rely on the regional haze program to mitigate visibility effects caused by PM2.5.

Industry and State Petitioners' Challenges to the Revised Ozone Standard

These petitioners argued, first of all, that EPA had failed to apply "any legal standard" in setting the ozone NAAQS. However, the court disposed of this argument in the same way that it disposed of the similar argument raised in the challenge to the PM standard. According to the court, "EPA has no obligation either to identify an accurate 'safe level' of a pollutant or to quantify precisely the pollutant's risks prior to setting primary NAAQS."

The petitioners additionally raised two specific arguments regarding the primary ozone NAAQS: (1) that EPA had failed to determine whether attainment of the old one-hour ozone standard would leave an unacceptable public health risk and (2) that none of the alternative eight-hour standards considered by EPA (0.07 ppm, 0.08 ppm, or 0.09 ppm) is significantly more protective than the old standard.

With regard to the argument regarding EPA's failure to find that the old standard is inadequate, the court referred to several places in the record where EPA or the Clean Air Scientific Advisory Committee (CASAC) stated that the old one-hour standard was inadequate. Although the court believed that the petitioners' criticism of EPA's selection of a final standard had "some force," it nevertheless concluded that EPA had "engaged in reasoned decision-making" in selecting the 0.08 ppm level. Among other things, the court found that, because there were no human clinical studies at ozone concentrations below 0.08 ppm, it was reasonable for EPA to set

the standard at a somewhat higher level, at least until additional studies become available.

Finally, the petitioners challenged the secondary ozone NAAQS because EPA allegedly failed to account for factors other than ozone that affected crop yields. However, the court rejected this approach, stating that EPA is to protect public welfare from the adverse effects of ozone regardless of whether other factors such as temperature, rainfall, and pests may cause more crop damage.

At the conclusion of its opinion, the court denied all the petitions for review except to the extent that any of the prior judicial opinions requires further action by EPA. In particular, EPA must still develop a new interpretation of the Act for implementation of the revised ozone standard, and it must address any possible health benefits resulting from ground-level ozone. "

EPA Amends Air Toxics General Provisions and Section 112(j) Rules

On March 5, 2002, the EPA Administrator signed a rulemaking package that amends the Section 112 General Provisions and Section 112(j) Rules in several key respects. The amendments were published on April 5. 67 Fed. Reg. 16,582. Among other things, the final rule establishes a two-part permit application process for implementing section 112(j) of the Act and provides that the Part 2 permit application is due 24 months after the Part 1 permit application is submitted.

The amendments to the two rules resulted from litigation brought in 1994 in the D.C. Circuit by a number of industry parties, including the American Chemistry Council and the Clean Air Implementation Project. EPA and the industry petitioners subsequently entered into

extensive settlement negotiations, and the parties signed settlement agreements in the two sets of cases in October 2000. Under the settlement agreements, EPA agreed to publish proposed rules for public comment in March 2001 that set forth numerous changes to the original rules and to sign a final rule taking action on the proposed rule by February 26, 2002. The parties subsequently agreed to extend the deadline by one week to provide EPA with additional time to finalize the rule.

We summarize the key changes in the rules below.

Changes to the Section 112(j) Rule

The statute provides that section 112(j) requirements are triggered for major sources in a source category if EPA fails to promulgate the MACT standard for that category by the "MACT hammer date," i.e., the date 18 months after the deadline for promulgating the standard established under section 112(e). (For source categories whose MACT standards were to have been promulgated by November 15, 2000, the MACT hammer date is May 15, 2002.) Section 112(j)(2) provides that, "beginning" on the MACT hammer date, a source subject to section 112(j) is to apply for a permit from the state permitting agency. The state permitting agency is to issue a permit to the source containing a case-by-case MACT determination.

The final rule substantially changes the process contained in the original 1994 rule for submitting section 112(j) permit applications. Under the original rule, a source subject to section 112(j) was required to submit a complete permit application to the state permitting authority by the MACT hammer date. However, the proposed rule provided that a source must submit a relatively simple Part 1 application on the MACT hammer date that would provide basic information about the source and must submit a

more detailed Part 2 application 6 months later. In the final rule, EPA provides that the Part 2 application is due 24 months after the Part 1 application is submitted.^{1/}

In explaining the basis for the 24-month period between submission of the Part 1 and the Part 2 applications, EPA noted the expense and futility of requiring sources to prepare detailed applications for source categories where EPA will promulgate final standards before state permitting agencies make case-by-case MACT determinations. (The Agency stated that, under the 6-month approach contained in the proposed rule, more than 80,000 sources would have been required to prepare and submit Part 2 applications.) EPA also noted that it had received no adverse comments concerning the two-part application process and that certain commenters had stated that the 6-month period between the applications in the proposed rule should be extended.

The changes to the section 112(j) permit application process are particularly significant in light of the fact that EPA will miss the May 15, 2002 MACT hammer date for promulgating MACT standards for more than 60 source

categories – standards that were to have been promulgated by November 15, 2000. As a result, section 112(j) requirements will be triggered for numerous sources.

In related developments, the Sierra Club sent a letter to EPA on February 28, 2002, in which it threatened to challenge the final amendments to the Section 112(j) Rule and argued that both the two-part application process and the 24-month period between submission of the two parts are unlawful. On April 9, the Sierra Club sent a letter to the Administrator requesting an administrative stay of EPA's action in providing for a 24-month period between the MACT hammer date and the deadline for submitting a Part 2 permit application. In addition, in July 2001, the Sierra Club brought a citizen suit seeking to compel EPA to promulgate all the MACT standards that were due on November 15, 2000 but have not been promulgated. EPA and the Sierra Club have been attempting to negotiate a settlement of that litigation.

In addition to revising the permit application process, the final rule contains other significant amendments to the Section 112(j) Rule. For example, under the revised rule, a source that is subject to section 112(g) requirements need not meet new limits if it becomes subject to section 112(j) so long as its limits under section 112(g) are “substantially as effective as” the limits that would be adopted under section 112(j). Similarly, if a section 112(d) or (h) standard is promulgated after the case-by-case limits are determined under section 112(j), the standard need not be incorporated into the source's section 112(j) permit so long as the section 112(j) limits are “substantially as effective as” the promulgated standard.

1/ Facilities should be aware that certain state permitting programs will not be automatically changed by EPA's revisions to its section 112(j) regulations. For example, some states have included the language of the original Section 112(j) Rule in their regulations rather than referring to EPA's regulations, and some states have completely independent language governing the submission of section 112(j) permits. In those states, the state permitting agencies might require the submission of complete permit applications by the May 15 MACT hammer date, notwithstanding the change in EPA's regulations, unless the regulations are revised or are interpreted in a way that is consistent with the revised section 112(j) regulations.

Changes to the General Provisions Rule

Some of the key changes made in the General Provisions Rule are set forth below:

- C In place of the previous presumption that all General Provisions requirements apply unless an individual MACT standard contains a conflicting provision or specifically states that they do not, EPA is now required to identify which General Provisions apply and which do not. This change should make it much easier for plant officials to determine which specific requirements govern their plant and should reduce the likelihood that plants are cited for violations simply because it was too difficult to determine which requirements applied.
- C Under the revised regulations, the definitions of “affected source” and “new affected source” include all the equipment in the source category unless EPA justifies a narrower definition in individual MACT standards, pursuant to criteria listed in the revised regulations. As a result, EPA cannot provide that the addition of a single small piece of equipment or a small collection of equipment will trigger new source MACT requirements without including a detailed justification. This change should limit the extent to which more stringent new source MACT requirements are triggered.
- C The previous requirement in the General Provisions that sources notify EPA and maintain a record of non-applicability determinations for each MACT standard is now limited to sources in the relevant source category. This change will reduce the recordkeeping burden on sources and will significantly reduce the likelihood

that a source would be found in violation because it inadvertently failed to make non-applicability determinations for certain MACT standards.

- C The revised rule clarifies that startup, shutdown, and malfunction (SSM) plans will not be incorporated into Title V permits by reference and that changes to SSM plans will not require a Title V revision (although contemporaneous notice will sometimes be required). This approach allows sources to amend their SSM plans expeditiously to address new circumstances without being compelled to follow burdensome and time-consuming Title V permit revision procedures.
- C Under the revised rule, the general duty to minimize emissions during SSM conditions is tied to compliance with the SSM plan, not to compliance with applicable emissions limits or emissions reductions generally. The revised rule also makes clear that a source is not required to act in an unsafe manner to meet its general duty to minimize emissions. These changes will provide greater certainty regarding what a source must do to remain in compliance during SSM conditions.
- C The revised rule provides significantly increased flexibility for sources that must request an extension of the compliance deadline for a MACT standard. Under the original rule, a source needing a compliance extension “for the installation of controls” was required to apply for it no later than 12 months before the compliance deadline. Under the revised rule, a source may seek such a compliance extension up to 120 days before the compliance deadline.

Moreover, the revised rule allows a source to request a compliance extension after the 120th day before the deadline if the need for the extension arises after that date and is “due to circumstances beyond reasonable control of the owner or operator.” EPA’s response to comments confirms that such circumstances may include “strikes, transportation delays, acute labor shortages, software glitches, and natural disasters” – events that may not directly involve the installation of controls. In addition, the revised rule provides that the submission of any “non-frivolous” request for an extension automatically stays the source’s compliance obligation until the permitting agency or EPA acts on the request. ”

EPA Issues Rulings on Petitions for Objections to New York Title V Permits

On January 16, 2002, the EPA Administrator issued three related decisions responding to petitions for objection to Title V permits filed by the New York Public Interest Research Group (NYPIRG). The rulings, which granted the petitions in part and denied them in part, addressed a wide range of Title V issues, including compliance certification requirements, periodic monitoring requirements, and compliance during startup, shutdown, or malfunction (SSM) conditions. *In the Matter of the Albert Einstein College of Medicine of Yeshiva University*, Pet. No. II-2000-01; *In the Matter of Action Packaging Corp.*, Pet. No. II-2000-02; *In the Matter of Kings Plaza Total Energy Plant*, Pet. No. II-2000-03.^{2/} Among other

2/ The three decisions are located on the Network’s web site under Title V Operating Permits – Policy and Guidance Documents – (continued...)

things, EPA ruled that a state permitting authority is to conduct a sufficiency review of the periodic monitoring provided in applicable requirements and that EPA is not authorized to overturn SSM permit conditions that reflect approved SIP provisions.

NYPIRG’s challenges to the three permits in question are a part of its overall strategy of attempting to demonstrate that key portions of New York’s Title V program are unlawful and should be revised. Indeed, NYPIRG has also sought judicial review of EPA’s final approval of New York’s Title V program in the U.S. Court of Appeals for the Second Circuit. In its administrative petitions for objection to the three permits filed pursuant to section 505(b) of the Act, NYPIRG primarily raised issues concerning the validity of the permit application form, New York’s Title V program, and New York’s policies in issuing permits.

In its orders responding to the petitions, EPA for the most part denied NYPIRG’s requests – either because EPA disagreed with NYPIRG’s position or in some instances because the permits had already been revised to address the concerns in question. Most of the issues raised by NYPIRG were general issues that pertained with equal force to each facility. Accordingly, EPA used identical language in each decision to address these general issues. Each decision additionally addressed “facility-specific” issues that varied somewhat from permit to permit. The key general rulings in the three decisions are summarized below:

C EPA rejected NYPIRG’s contentions that New York had provided inadequate notice of the right to a public hearing on the proposed permits and that New York

2/(...continued)
Decisions on Petitions for Objections.

had applied an unlawful standard in denying NYPIRG's request for a public hearing. Among other things, EPA concluded that NYPIRG had failed to show that it was harmed by the alleged errors.

C EPA ruled that NYPIRG's attacks on the permit application form as not providing for a "complete" application are without merit. In particular, although EPA conceded that the application form did not require the applicant to include a compliance plan as required by the regulations, it ruled that this was a "harmless error." EPA reasoned that, because the permits required immediate compliance with all applicable requirements, the absence of compliance plans which might have given the applicants more time to comply did not injure NYPIRG. Moreover, EPA relied on White Paper No. 1 to reject NYPIRG's argument that the permit application form unlawfully allowed the applicants to provide citations to applicable requirements, rather than submitting descriptions of the applicable requirements.

C EPA ruled that New York's failure to submit a "statement of basis" with each of the draft permits did not warrant objections to them. EPA stated that, although statements of basis are to accompany all draft permits, the absence of such statements under the circumstances of these cases did not affect the final permits. EPA concluded that NYPIRG was able to provide detailed comments without the statements of basis.

C The Agency rejected NYPIRG's contentions that the permits distort the

annual compliance certification requirement by supposedly requiring that a permittee certify compliance only with certain terms labeled in the permits as "compliance certification" terms. EPA ruled that the permits should be read as requiring that annual compliance certifications address all permit terms and conditions and stated that New York would modify its general permit language to eliminate this possible ambiguity in future permits.

C EPA rejected NYPIRG's arguments that the permit terms addressing SSM conditions were too lenient and were inconsistent with a September 1999 EPA policy memorandum discussing the approval of SIP provisions dealing with SSM events.^{3/} The permit terms give the State discretion in determining whether exceedances during SSM conditions should be excused because they are "unavoidable." EPA concluded that the permit terms were consistent with New York's approved SIP provisions by providing discretion to the State without automatically excluding exceedances during SSM events. EPA also pointed out that the 1999 policy memorandum applies only to the approval of proposed SIP provisions and does not allow the Agency to object to permit terms that reflect approved SIP provisions. In this regard, EPA also cited a November 2001 memorandum which clarified that the policy set forth in the September 1999 memorandum does not apply to

3/ "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (Sept. 20, 1999). The memorandum is set forth on the Network's web site under Enforcement – Enforcement Policies and Guidance Documents.

approved SIP provisions or permit terms based on such provisions.^{4/}

- C EPA agreed with NYPIRG's argument that New York was required to conduct a sufficiency review of the periodic monitoring required by applicable requirements to determine whether that periodic monitoring is sufficient to assure compliance with permit terms and conditions. According to EPA, even though the court in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), ruled that 40 C.F.R. 70.6(a)(3) did not authorize such periodic monitoring sufficiency reviews, the Agency can rely on the more general language in 40 C.F.R. 70.6(c)(1) to justify such reviews. In attempting to support this position, EPA expressly relied on its prior permit objection decisions in *In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Pet. No. VIII-00-1 (Nov. 16, 2000), and *In re Fort James Camas Mill*, Pet. No. X-1999-1 (Dec. 22, 2000).^{5/} Although it embraced NYPIRG's argument that the State was required to undertake sufficiency reviews of the periodic monitoring in applicable

4/ That clarification memorandum was issued in settlement of judicial challenges to the September 1999 policy memorandum by the Clean Air Implementation Project and other industry petitioners. The memorandum (revised version dated December 5, 2001) is set forth on the Network's web site under Enforcement – Enforcement Policies and Guidance Documents.

5/ EPA's decision in the *Fort James Camas Mill* case is currently under review in *Utility Air Regulatory Group v. EPA*, No. 01-1204 (D.C. Cir.). The Clean Air Implementation Project has intervened on behalf of the petitioner in that case.

requirements, the Agency denied NYPIRG's petitions with regard to each specific instance in which NYPIRG claimed that the periodic monitoring in the permits was insufficient to assure compliance. "

EAB Rules That State May Not Base BACT Analysis Primarily on Incremental Costs of Control Technologies

On March 6, EPA's Environmental Appeals Board (EAB) issued a decision in which it remanded a PSD permit to the Michigan Department of Environmental Quality (MDEQ) after concluding that the MDEQ had given "excessive" weight to the incremental costs of different control technologies in making its BACT determination. *In re: General Motors, Inc.*, PSD Appeal No. 01-30 (March 6, 2002). The EAB also rejected additional arguments made by the MDEQ in supporting its decision not to require add-on controls for the painting operation involved.

Background

The case arose from General Motors' efforts to obtain a PSD permit for the construction of a new vehicle assembly plant, including a painting operation. In June 2000, General Motors submitted a PSD permit application to the MDEQ, which has been delegated the authority to administer the federal PSD program in the State of Michigan. The MDEQ issued a PSD permit to General Motors in September 2001. In that permit, the MDEQ did not require the installation of add-on pollution controls to reduce VOC emissions from the painting operation. It instead required that General Motors use low VOC-emitting coatings and electrostatic applicators.

Two environmental groups (the Ecology Center and the Michigan Environmental Council) sought review of the permit before the EAB. (Because the MDEQ administers a delegated federal program, such a permit is deemed to be an EPA-issued permit, and administrative review must be sought before the EAB.) The petitioners argued that the MDEQ's BACT analysis was unlawful and that the basecoat operation should have been required to use add-on controls. General Motors intervened in the case to support the issuance of the permit. EPA's Office of General Counsel, representing EPA Region V and the Office of Air and Radiation, filed an amicus brief supporting the environmental group petitioners.

The EAB's Decision

The EAB ruled that General Motors' PSD permit should be remanded to the MDEQ because the BACT determination was not adequately supported by the record. The EAB's principal ruling was that the MDEQ's cost-effectiveness analysis, as reflected in the record, was insufficient to support foregoing the installation of add-on controls for the basecoat portion of the painting operation. The EAB concluded that, in conducting its cost-effectiveness analysis, the MDEQ gave undue weight to "incremental costs" as compared to "average costs." ("Average costs" are the total annualized costs of control divided by annual emission reductions, or the difference between the baseline emission rate and controlled emission rate. The "incremental costs" calculation compares the costs and emissions performance level of a particular control option to those of the next most stringent option.)

In reaching its conclusion, the EAB relied primarily on its reading of EPA's 1990 Draft NSR Manual. The EAB explained that, according to the Manual, the economics impact component of a BACT analysis may include examination of both

the average costs and the incremental cost-effectiveness of a control option. It further stated that the Manual, "while allowing for both average and incremental cost-effectiveness analysis, places primary stress on the average cost measure." According to the EAB, an "undue focus" on incremental costs can obscure the fact the average costs of an option are well within the range of acceptable BACT costs.

The EAB concluded that, although the MDEQ argued that it considered both incremental and average costs in rejecting a requirement to use add-on controls, the record did not contain an adequate explanation of how the MDEQ considered average costs. The EAB stated that "[a]lthough a permitting authority may take incremental costs into account in rejecting a control technology . . . , such a determination must ordinarily be supported by a reasoned explanation, including some consideration of average cost-effectiveness. MDEQ's response, however, is simply not sufficiently detailed to support its determination in this case." However, the EAB expressly rejected petitioners' argument that incremental costs are irrelevant where average costs are well within the historic cost-effectiveness range. It emphasized that the MDEQ must explain how both types of costs were factored into the process. The EAB remanded the permit to the MDEQ to "provide further analysis of this issue, and to make any revisions to the BACT determination that the additional analysis may warrant."

The EAB also rejected the MDEQ's alternative arguments in support of its BACT determination.

C The EAB ruled that the fact that other facilities in the automobile industry are not required to apply add-on controls for such an operation is not "determinative." It explained that such evidence can only be "corroborative" of the agency's cost

analysis for the specific facility in question.

C The Board ruled that the MDEQ's reliance on high engineering costs for installing add-on controls is not sufficient to support the BACT analysis. According to the EAB, although concerns about engineering costs are appropriate, the MDEQ did not quantify any such engineering costs, and therefore those costs may not provide an independent basis for rejecting add-on controls.

C The EAB also rejected the MDEQ's position that "secondary impacts" from the installation of add-on controls justified the BACT determination. The MDEQ maintained that it is "uncontroverted" that the control of VOCs from the spray booth exhaust would result in increased NOx emissions. Although the EAB agreed that such secondary impacts should be considered, it stated that the MDEQ had not attempted to quantify the amount of such emissions increases. Accordingly, the EAB concluded that MDEQ's consideration of secondary impacts was not sufficient to justify rejection of add-on controls. "

Don't forget to sign up for the **Annual Meeting of the Clean Air Act Information Network, May 9-10, 2002, in Washington, DC.** Send your registration form to Linda Eaton, phone her at 202.739.5314, e-mail her at leaton@morganlewis.com, or send a fax to 202.739.3001. You will not want to miss this conference!