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D.C. Circuit Rules That EPA's Approach for Determining MACT Floors and Setting Section 112(d) Standards Is Unlawful

In a decision that appears to broadly affect EPA's promulgation of section 112(d) standards, the D.C. Circuit has held that EPA's general approach to determining the "MACT floor" is unlawful and that it may result in standards that are not sufficiently stringent. The decision came in the context of challenges to the hazardous waste combustor MACT standard. *Cement Kiln Recycling Coalition v. EPA*, Nos. 99-1457 *et al.* (D.C. Cir. July 24, 2001).

In sustaining a challenge by the Sierra Club, the court ruled that EPA, in determining the "emissions floor" for existing sources in a category, must ensure that the floor reflects the emissions levels achieved in practice by the best performing existing sources – not merely the emissions levels achieved by all existing sources in the category that use the control technology identified as the "maximum achievable control technology" (MACT). Because the decision addresses EPA's general approach to setting section 112(d) standards, it may have a significant impact on certain MACT standards that have not yet been promulgated and may raise issues regarding already-promulgated standards.

The litigation involved numerous challenges to the hazardous waste combustor MACT standard by the Sierra Club and by various industry petitioners. The Sierra Club argued that: (1) the MACT floor approach used by EPA resulted in standards that are inconsistent with the statute because they fail to reflect emission levels achieved in practice by the best-performing sources in the category; (2) EPA improperly based the standards on RCRA test data generated under

worst case conditions; and (3) in making "beyond-the-floor" determinations, EPA failed to consider certain "non-air quality health impacts" as required by the Act and refused to consider more stringent standards based on additional controls for some HAPs. The industry petitioners contended that EPA had erred by basing the floors on actual emissions data, rather than existing regulatory requirements such as RCRA permit limits. They also argued that various individual standards and certain monitoring and implementation regulations are invalid.

To develop the challenged standards, EPA began by setting "MACT floors" for new and existing sources in the category. After assembling a database of sources and their emission levels recorded primarily during RCRA compliance tests, the Agency went through the following steps for each HAP. For existing sources, EPA identified the best-performing 12 percent of sources, creating what it called the "MACT pool." EPA then identified the primary emission control technology used by sources in the MACT pool with emission levels equivalent to or lower than the pool's median. It labeled that technology the "MACT control." EPA next expanded the MACT pool to include all sources using the MACT control and set the MACT floor at the worst emission level achieved by any source in that expanded pool. For new sources, EPA used the same methodology but chose as the MACT control the technology used by the best-performing source for which it had information.

Rulings on Sierra Club Challenges

The Sierra Club maintained that, although section 112(d)(2) states that EPA is to require the “maximum emissions reduction” that it determines is achievable, the scope of the word “achievable” is limited by the language of section 112(d)(3)(A). That provision states that “emission standards promulgated . . . for existing sources . . . shall not be less stringent . . . than the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information)” According to the Sierra Club, regardless of what technology is identified as MACT or whether all those sources using MACT could meet the final standard, EPA must set a final standard based on the emissions levels actually achieved by the best-performing sources.

EPA argued in response that section 112(d)(3) did not alter section 112(d)(2)’s achievability requirement and that its MACT floor approach reasonably assured that the final standard would be achievable through use of MACT. EPA also contended that its approach is a reasonable means of addressing the “inherent process variability in pollution control devices.”

The D.C. Circuit agreed with the Sierra Club that EPA had misconstrued the language of section 112(d) in determining the “emissions floors” for MACT standards. According to the court, Congress had clearly spoken, and “EPA may not deviate from section 112(d)(3)’s requirement that floors reflect what the best-performing sources actually achieve by claiming that floors must be achievable by all sources using MACT technology.” The court further stated that its ruling is required by its decisions in *National Lime Ass’n v. EPA*, 233 F.3d 625 (D.C. Cir. 2000), and *Sierra Club v. EPA*, 167 F.3d 658 (D.C. Cir. 1999).^{1/} In the *Sierra Club* case, the court held that

1/ The *Sierra Club* case is discussed in the March 1999 *Washington Report* at WR-236, and the *National Lime Ass’n* case is discussed in the January 2001 *Washington Report* at WR-350.

the virtually identical language in section 129 requires EPA “to make a reasonable estimate of the performance of the top 12 percent of units.” In rejecting EPA’s “variability” argument, the court concluded that “because factors other than MACT technology affect emissions, emissions of the worst-performing MACT sources may not reflect what the best-performers actually achieve.” Thus, “if factors other than MACT technology do indeed influence a source’s performance, it is not sufficient that EPA considered sources using only well-designed and properly operated MACT controls.”

The court gave EPA general directions concerning how it is to promulgate section 112(d) standards in the future. “[N]othing in the statute requires the Agency to use the MACT approach. Section [112](d)(3) requires only that EPA set floors at the emissions level achieved by the best-performing sources. If EPA cannot meet this requirement using the MACT methodology, it must devise a different approach capable of producing floors that satisfy the Clean Air Act.”

With regard to the Sierra Club’s other arguments, the court rejected the contention that EPA violated the Act by relying on “worst-case data” to develop the standards. The court pointed out that the Act states that EPA is to set emission floors based on the “emissions information” it has regarding the best-performing sources and that EPA has “wide latitude” in determining what data-gathering is necessary to solve a problem. In addition, because the court ruled that EPA’s approach to setting emissions floors was unlawful, it concluded that it was unnecessary to address the Sierra Club’s argument that EPA’s “beyond-the-floor” approach was also unlawful.

Rulings on Industry Challenges

Certain industry petitioners argued that section 112(d)(3) requires that standards be based solely on RCRA or other permit limits rather than on emissions data. They pointed out that section 112(d)(3) states that standards are to be based on the “average emission limitation” achieved by the best-performing sources. Those petitioners then relied upon section 302(k) of the Act, which provides that “emission limitation” is defined as a “requirement established by the state or Administrator which limits

the quantity, rate, or concentration of emissions of air pollutants” However, the court concluded that petitioners had failed to raise this issue during the rulemaking proceeding and therefore could not raise it before the court.

Because the court ruled that EPA’s basic approach to setting the standards was invalid, the court decided that it need not reach the industry petitioners’ challenges to individual standards and regulations.

Relief Granted by the Court

The court noted that the Sierra Club wanted the challenged standards to be left in place until EPA can develop new standards consistent with the court’s opinion. However, the court decided that it would vacate the standards in light of the fact that industry petitioners have “potentially meritorious claims” that the court did not rule upon. The court invited the parties to file motions addressing questions concerning whether the current standards should instead be left in place or EPA should be allowed additional time to develop interim standards. ‘

Federal District Court Rules on Key Issues in PSD Enforcement Case Against Refinery

A federal district court in Wisconsin has issued a decision addressing a number of issues concerning enforcement of PSD and other Clean Air Act provisions. *United States v. Murphy Oil USA Inc.*, No. 00-C-0409-C (W.D. Wisc. May 18, 2001). In the 131-page opinion, the court ruled, among other things, that the general federal statute of limitations barred certain EPA claims,^{2/} that the company’s state permit could bar EPA enforcement claims so long as relevant information had been fully disclosed to the state, and that EPA is generally required to exhaust its administrative remedies if it believes that state permit terms may be unlawful. However, the court also ruled that EPA may engage

^{2/} The district court’s ruling on the statute of limitations issue was discussed in the May 2001 *Washington Report* at WR-370. This article discusses many of the court’s other rulings.

in “overfiling” under the Clean Air Act and that, under the facts of this case, EPA could use the “actual-to-potential” test in determining PSD applicability.

The case involved an enforcement action by EPA against the company to obtain civil penalties and injunctive relief for alleged past and present violations of the Clean Air Act, the Clean Water Act, RCRA, and EPCRA at the company’s refinery in Superior, Wisconsin. The court’s opinion addressed cross motions for summary judgment filed by the parties regarding all 24 counts contained in the complaint. We summarize the court’s Clean Air Act rulings below.

EPA’s Ability to Engage in Overfiling

The company argued that certain EPA claims that PSD requirements had been violated are barred because the company and the Wisconsin Department of Natural Resources (WDNR) had entered into a settlement resolving those alleged violations. According to the company, the state court-approved settlement barred EPA from re-litigating the claims under the doctrine of res judicata (claims involving particular parties that are resolved by a court cannot be re-litigated by those parties). For purposes of deciding the motions, the court assumed that the federal and state claims in question were identical. However, the court ruled that res judicata did not apply because it found that the interests of EPA and the WDNR were not sufficiently similar to conclude that the WDNR’s actions should be binding on EPA.

In addition, the court expressly rejected the company’s argument that the reasoning of the Eighth Circuit in *Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999) (language of RCRA prohibits EPA from overfiling), should apply here. The court concluded that the Clean Air Act does not contain the kind of language relied on by the Eighth Circuit in *Harmon* and that Congress intended that EPA be able to bring enforcement actions under the Clean Air Act where state enforcement had been inadequate.

Effect of Permit Shields

The company argued that, because a state operating permit issued in 1992 specifically stated that

PSD requirements did not apply to certain projects, both federal and state permit shields barred EPA from now contending that the projects triggered PSD. Before addressing legal issues concerning the permit shield argument, the court stated that the company could not prevail unless it could establish as a factual matter, that it had fully disclosed all relevant information to the WDNR in connection with the 1992 permit. Although that factual issue could not be resolved without a trial, the court went ahead to address the permit shield question.

The court ruled that the company could not rely on the Title V permit shield provision because the 1992 permit was not issued under the authority of Title V – Wisconsin’s Title V program was not approved until 1994. However, the court concluded that the separate state permit shield, which is contained in the Wisconsin SIP, should apply and that it “prohibits plaintiff from prosecuting defendant for alleged violations of [PSD] standards,” assuming that the company can meet its burden of showing as a factual matter that the permit is based on accurate information.

Whether the Sulfur Recovery Unit Is a Control Device and Is Therefore Not Subject to PSD Requirements

The company argued that the sulfur recovery unit (SRU) at the facility is not a “stationary source” but is instead a control device and therefore that modifications to the SRU are not subject to PSD requirements. In support of its position, the company relied on a 1976 EPA memorandum stating that, in most cases, the addition of an SRU to an existing refinery will constitute installation of control equipment and result in lower emissions, thereby exempting it from PSD requirements. The judge stated that, on the motions for summary judgment, he could not resolve factual disputes to determine whether the SRU is a stationary source or a control device. The court did indicate that, if the SRU is a control device, modifications to it would not be subject to PSD.

Whether EPA Failed to Exhaust Administrative Remedies

The company maintained that the WDNR notified EPA regarding a 1990 PSD non-applicability determination and the issuance of the 1992 operating permit but that EPA failed to appeal either of those decisions. According to the company, EPA is now foreclosed from challenging the determination and permit because it failed to “exhaust its administrative remedies” as required by applicable regulations.

The court agreed with the company that EPA was required to exhaust its administrative remedies under Wisconsin regulations. The court relied primarily on *United States v. AM General Corp.*, 34 F.3d 472 (7th Cir. 1994). In that case, the Seventh Circuit dismissed an EPA enforcement action because EPA had failed to exercise alternative remedies – such as appealing the issuance of a permit by a local agency – before initiating an action against a source that relied on that permit. The court ruled that, if the company can show that the basis for the permit is valid, it will rule that EPA is barred from pursuing the claims.

EPA’s Reliance on the “Actual-to-Potential” Test

The court ruled that, based on the facts of this case, EPA could permissibly use the “actual-to-potential” test – rather than the “actual-to-actual” test urged by the company – to determine whether changes to the SRU triggered PSD requirements. Citing the preamble to the 1992 WEPCO final rule, the court stated that the question is whether the changes were sufficiently significant so that “normal operations” had not begun before the changes. The court then distinguished the decision in *Wisconsin Electric Power Co. v. EPA*, 893 F.2d 901 (7th Cir. 1990), by stating that *WEPCO* involved “like-kind replacements” of components, whereas the instant case involved an increase in the capacity of the SRU and other functional changes. According to the court, “[u]sing a literal definition of ‘normal operations,’ I conclude that each set of the changes was significant enough to make the post-construction unit effectively a new unit that had not begun normal operations at the start of construction.” In addition, the court stated that the company’s alternative position that a “potential-to-potential” test should be used conflicted with the regulatory language.

In short, the court did not adopt EPA's current position that the "actual-to-potential" test applies to all modified units. Instead, the court ruled that the particular changes to the SRU were so significant that the modified unit should be regulated as a new unit. Thus, the court essentially found that the facts in this case made it similar to the situation in *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989), in which the First Circuit upheld use of the "actual-to-potential" test where a cement kiln was redesigned so that it effectively became a new unit.

Trial in this case commenced in June. '

EPA Publishes Proposed BART Guidelines for Public Comment

After delays resulting from additional review by the Bush Administration, EPA published its proposed regional haze guidelines on July 20. 66 Fed. Reg. 38,108. The guidelines, which are to be used by states in carrying out EPA's regional haze program, focus on procedures and criteria for determining which sources will be subject to "best available retrofit technology" (BART) limits and how the BART limits will be determined for those sources. It is expected that sources found to be subject to BART requirements – major sources placed into operation between 1962 and 1977 that satisfy certain criteria – will be required to adopt stringent control measures.

The proposed guidelines were originally approved by the Clinton Administration in January 2001. However, the proposed guidelines were not published before the Clinton Administration left office and were subjected to additional scrutiny by the incoming Bush Administration in accordance with a White House directive that all unpublished rules and proposed rules undergo review before publication. The Office of Management and Budget subsequently reviewed the proposal to assess its impact on the nation's energy supply and production in accordance with a May 18 Executive Order. Only minor changes were made to the proposal following the review processes. EPA Administrator Whitman signed the proposal on June 22.

EPA stated that it is proposing the guidelines to carry out section 169A(b)(1) of the Act, which provides that EPA's visibility protection regulations for class I Federal areas are to contain "guidelines" providing "techniques and methods" that states are to follow in implementing those regulations. The proposed guidelines primarily address BART determinations to be made pursuant to section 169A(b)(2). That provision states that sources that satisfy all the following criteria are to be subject to BART requirements, unless an exemption is granted:

- C the source falls within one of the 26 source categories set forth in section 169A(g)(7) of the Act
- C the source was "in existence" on August 7, 1977, but was not "in operation" before August 7, 1962
- C the source has the potential to emit 250 tpy of "any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such [class I Federal] area

The proposed guidelines set forth a detailed set of procedures and criteria for determining whether a particular source is subject to BART requirements and, if so, how BART requirements should be determined for that source. For a detailed review of those procedures and criteria, see the January 2001 *Washington Report* at WR-347.

As also discussed in that article, the proposed guidelines raise a number of important legal and policy issues. For example, the proposed BART guidelines – as currently drafted – would apply to all of the 26 types of major sources listed in the statute. However, the language of the Act and the legislative history of the BART provisions strongly indicate that the scope of EPA's authorization to promulgate BART guidelines is strictly limited to large power plants. Thus, there is a compelling argument that the proposed guidelines are invalid because they contain no such limitation.

The deadline for submission of comments on the proposal is September 18. '

D.C. Circuit Upholds Certain Challenges to State Emissions Budgets in NOx SIP Call Rule

On June 8, the D.C. Circuit issued an opinion directing EPA to reconsider the growth factors for electric generating units (EGUs) that it used in arriving at the state emissions budgets contained in its NOx SIP call rule. *Appalachian Power Co. v. EPA*, No. 99-1268 (D.C. Cir. June 8, 2001). The case involved challenges by industry and state petitioners to certain “technical amendments” promulgated by EPA in 1999 and 2000 which revised the original 1998 NOx SIP call rule. In upholding the challenge to the growth factors for EGUs, the court relied in large part on the reasoning in its May 15, 2001 decision remanding portions of EPA’s Section 126 rule – a rule in which EPA had taken a similar approach to regulating NOx emissions.^{3/}

The court’s decision appears to cast additional doubt on EPA’s ability to implement the current May 2004 deadline by which sources in states subject to the SIP call are to have installed controls. A change in the growth factors will presumably result in revised state NOx budgets and will mean that some states will require additional time in which to develop appropriate SIP revisions.

In addition, as described below, certain petitioners in the related Section 126 case recently filed a motion with the D.C. Circuit requesting that the court reconsider the relief granted in its May 15 decision in that litigation. The motion requests that the D.C. Circuit either vacate the Section 126 Rule as it applies to EGUs or suspend the three-year period for achieving compliance with the rule until EPA has completed a remand proceeding.

Ruling on EGU Growth Factors in the NOx SIP Call

In developing an emissions budget for each state subject to the 1998 NOx SIP call, EPA

3/ *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001). That decision is discussed in the May 2001 *Washington Report* at WR-363.

determined projected emissions for each state for 2007 using a computer model. The projected emissions for 2007 were calculated by applying growth factors for different types of sources to an emissions database. After determining what emissions reductions could be achieved by the use of “cost-effective” controls, EPA subtracted those reductions from the projected emissions for 2007 to arrive at the allowable emissions budget for each state.

Following the promulgation of the 1998 NOx SIP call rule, EPA requested additional public comments on the state emissions budgets contained in the rule so that it could correct any errors and update information used to calculate the budgets. In May 1999 and March 2000, EPA published two sets of “technical amendments” to the rule. The technical amendments involved adjustments to the emissions budgets to reflect updated information and corrections to baseline inventories and growth factors for certain non-EGU sources. Numerous petitions were filed challenging the two sets of technical amendments.

In challenging the growth factor methodology used in the technical amendments and the 1998 rule, the petitioners argued: (1) that the 2007 projections reflect the unreasonable assumption that EGU utilization growth will be linear; (2) that EPA arbitrarily used 2001-2010 growth rates to estimate growth over a 1996-2007 period; and (3) that EPA’s growth factors resulted in unrealistic utilization estimates. With regard to the last argument, the petitioners pointed out that EPA projected that EGU utilization rates in certain states would be lower in 2007 than in 1998. The petitioners also maintained that EPA had ignored more representative estimates for particular states that were available.

EPA argued in response that the petitioners could not challenge the growth factor methodology used in the technical amendments because the identical growth factor methodology in the 1998 rule had not been challenged. EPA specifically maintained: (1) that the petitioners’ challenge was untimely in that it should have been brought within 60 days of the promulgation of the 1998 rule; and (2) that petitioners’ claim was barred by the doctrine of res judicata because the methodology was implicitly upheld in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir.

2000), the decision involving review of the 1998 rule.^{4/}

The D.C. Circuit rejected both of EPA's arguments. The court concluded that the issue of whether the growth factors were lawful was reopened when EPA sought public comment on the accuracy of the state emissions budgets set forth in the 1998 rule and subsequently issued the technical amendments. According to the court, consideration of the state budgets necessarily included consideration of growth factors because projected emissions were the product of a growth factor and current emissions levels. The court concluded that, because the growth factor issue had been reopened by the Agency, EPA's timeliness and *res judicata* arguments were not applicable.

With regard to the merits of the challenges to the growth factors, the D.C. Circuit agreed that the 2007 growth factors should be remanded to EPA because they are arbitrary and capricious. The court indicated that, although there might be a reasonable basis for EPA's growth factor methodology, the Agency had failed to explain what it was. Quoting from its previous decision addressing the Section 126 Rule, the court stated that

EPA has not . . . addressed what appear to be stark disparities between its projections and real world observations. . . . As a result, we have no choice but to remand the EPA's EGU growth factor determinations so that the agency may fulfill its obligation to engage in reasoned decisionmaking on how to set EGU growth factors and explain why results that appear arbitrary on their face are, in fact, reasonable determinations.

In a related argument, petitioners claimed that EPA's findings that sources in the states subject to the SIP call "contribute significantly" to nonattainment problems in downwind states should be remanded because those findings were also based on unsupported growth factors. However, the court

4/ That decision is discussed in the May 2000 *Washington Report* at WR-291.

concluded no party had raised this specific significant contribution issue during the public comment period provided by EPA. The court ruled that, therefore, petitioners were foreclosed from raising the issue in this judicial challenge.

Ruling on Arguments Raised by Non-EGU Petitioners

Certain non-EGU, i.e., industrial, petitioners separately attacked the growth factors and emissions calculations for non-EGU sources on two grounds. First, they argued that EPA had failed to provide notice regarding possible errors in the factors for non-EGU sources before finalizing them in the technical amendments. Second, they argued that the budgets used in the technical amendments are unlawful because they are still based on definitions of EGUs and non-EGUs remanded by the court in the *Michigan* decision.

The court stated that the errors in the non-EGU growth factors constituted "harmless errors" and thus did not warrant additional notice. With regard to the unlawful definitions, the court agreed with petitioners that EPA had continued to rely on the remanded definitions in promulgating the technical amendments. Accordingly, the court remanded those portions of the technical amendments to EPA for further action consistent with the *Michigan* decision.

Motion for Reconsideration in the Section 126 Case

In a related development, on June 29, electric utility petitioners in the litigation challenging EPA's Section 126 rule filed a motion with the D.C. Circuit asking the three-judge panel in that case to reconsider a portion of its May 15, 2001 decision. Among other things, petitioners in that case challenged the lawfulness of the EGU growth factors used in the Section 126 Rule – essentially the same factors used in the NO_x SIP call. After concluding that the growth factors were not based on "reasoned decisionmaking," the court remanded the growth factors to EPA so that the Agency could either support the existing factors or develop new ones.

The petitioners' motion requests that, rather than merely remanding the factors to EPA, the court should also vacate the emissions limitations based on

the unlawful factors. Alternatively, the motion requests that the court extend the three-year period for achieving compliance with the rule based on EPA's completion of the remand proceeding. According to the petitioners, the remand by itself does not provide a strong incentive for EPA to correct the problem, and there is currently no deadline by which EPA must complete a remand proceeding. The petitioners argue that, until sources know precisely what their obligations are under the Section 126 rule, they cannot intelligently plan for taking the steps to achieve compliance. If the court did extend the compliance period, the current May 2003 compliance date would be lengthened accordingly. '

Third Circuit Stays Lower Court Orders in Camden Environmental Justice Case

On June 15, a three-judge panel of the U.S. Court of Appeals for the Third Circuit issued a short order staying injunctive orders issued by the federal district court in the Camden, New Jersey, environmental justice case until the appellate court can review the district court's decision. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, No. 01-2224 (3rd Cir. June 15, 2001). The district court's orders vacated and remanded air permits issued by the New Jersey Department of Environmental Protection (NJDEP) to a cement company for the construction of a new plant and enjoined the company from operating the plant. The district court had concluded that the plaintiffs could rely on 42 U.S.C. § 1983 to bring an action to enforce EPA's environmental justice regulations and that plaintiffs had established that the challenged permit issued by the NJDEP violated EPA's regulations.^{5/} As explained below, the Third Circuit's stay order casts doubt on the legal theory relied on by the lower court.

The case arose when the plaintiffs filed a district court action challenging a clean air permit issued by the NJDEP authorizing the construction of

5/ The district court's May 10 decision was discussed in the May 2001 *Washington Report* at WR-368.

a new cement plant in Camden. The plaintiffs alleged that the NJDEP had failed to consider certain impacts from the operation of the new plant, such as increased truck traffic in the surrounding minority community. In April, the district court issued a decision holding that plaintiffs could bring such an environmental justice action under Title VI of the 1964 Civil Rights Act. However, in May, the U.S. Supreme Court ruled in *Alexander v. Sandoval*, 121 S.Ct. 1511 (2001), that Title VI provides no basis for individuals to enforce disparate impact regulations promulgated by federal agencies under Title VI. Following that decision, the district court allowed plaintiffs to amend their complaint to rely instead on 42 U.S.C. § 1983 – a theory suggested by the dissenting opinion in the *Sandoval* case. The district court subsequently issued a decision concluding that section 1983 provided a jurisdictional basis for such an action and that the plaintiffs had established that the NJDEP's issuance of the permit violated EPA's environmental justice regulations.

The cement company, which had intervened in the district court case, appealed the district court's decision to the Third Circuit. The company also immediately moved for a stay pending appeal of the district court's orders granting injunctive relief.

In addressing the stay motion, the Third Circuit applied a standard four-part test to determine whether temporary relief should be granted: (1) whether the moving party – here the cement company – is likely to succeed on appeal; (2) whether the moving party will suffer irreparable injury absent relief; (3) whether granting relief will cause harm to other interested parties; and (4) whether granting or denying the motion would best serve the public interest.

With regard to the likelihood of success on the merits, the court of appeals noted that section 1983 applies only if a plaintiff can assert the violation of a "federal right, not merely a violation of federal law." The court of appeals, referring to the majority opinion in *Sandoval*, suggested that plaintiffs will have difficulty in showing that an alleged violation of EPA's environmental justice regulations constitutes a violation of a federal right. Thus, although the Third Circuit will not rule on the merits of the plaintiffs' legal theory until the case has been fully briefed and argued, the court has indicated that it has significant doubts that they will ultimately prevail.

As to “irreparable injury” being suffered by the company, the court of appeals found that the company will likely lose more than one-half million dollars per week because the district court orders prevent it from operating the new cement plant. Because this money cannot later be recovered from the plaintiffs, the economic loss qualifies as an “irreparable injury.”

The court of appeals also indicated that other parties will not be substantially harmed if a temporary stay is granted because the plant must comply with the permit issued by the NJDEP until the court reaches a decision on the merits of the appeal. Finally, with regard to the public interest, the court of appeals concluded that the district court’s orders would result in a loss of jobs and other harm in the Camden area.

In granting the company’s stay motion, the court of appeals also provided that the appeal will be briefed on an expedited basis and that oral argument will be held during the week of July 30. ‘

Federal District Court Rules That Americans With Disabilities Act Does Not Apply to Disparate Impacts from Implementation of the Clean Air Act

In a decision addressing novel issues under the Clean Air Act and the Americans with Disabilities Act (ADA), a federal district judge in Washington State has ruled that the ADA cannot be used to challenge a state agency’s implementation of the Clean Air Act unless a party can demonstrate that intentional discrimination has occurred. *Save Our Summers v. State of Washington Dept. of Ecology*, No. CS-99-269-RHW (E.D. Wash. June 15, 2001). The ruling is significant in that it prevents parties from relying on the ADA to compel state agencies to develop more stringent standards and permits than

required by the Clean Air Act because certain sensitive individuals will otherwise be disparately impacted by current provisions.

The case arose when the plaintiff organization, Save Our Summers (SOS), which consists of individuals with asthma and other respiratory ailments, brought suit against the Washington Department of Ecology (Department), claiming that the agency’s regulation of agricultural burning practices violates the ADA.^{6/} SOS specifically challenged the Department’s issuance of permits authorizing the seasonal burning of wheat stubble. SOS’s complaint alleged that the Department’s permits authorizing such burning denied disabled individuals the use of public facilities such as schools and parks in contravention of their rights under the ADA. The ADA provides in relevant part that a public entity must make “reasonable modifications” to a program to ensure that disabled persons are not denied benefits.

In its June 15 decision, the court concluded that the Department’s “failure to control or eliminate agricultural burning did not constitute discrimination against the plaintiffs on the basis of their disabilities.” At the same time, the court found that SOS had indeed established that “agricultural burning disproportionately impacts Plaintiffs because of their disabilities.” The court concluded that the ADA and the Rehabilitation Act “do not create a substantive right in disabled persons to adequate health protection from air pollution; instead, the statutes just create a right to be free from discrimination.” The court stated that, even though agricultural burning may have a disparate impact on disabled persons, that impact is being caused by third persons, not by the Department’s conduct. In other words, proof of a disparate impact from regulatory actions or inactions involving air pollution is not sufficient to establish a violation of the ADA. To establish such a violation, a plaintiff must show an intent to discriminate – not merely that the plaintiff is affected more severely than the general public.

The court then concluded that “there is no evidence that the disparate impact [of the burning practices] is caused by discriminatory animus or any

^{6/} The case was discussed in the September 2000 *Washington Report* at WR-324.

other deliberate or reckless action taken because Plaintiffs are disabled.” According to the court, “although the manner in which Defendants are operating their permitting program might *result* in harm to Plaintiffs, there is no evidence that this program is being operated as it is *because* Plaintiffs are disabled.” Because the court concluded that SOS had failed to establish a violation of the ADA, the court granted summary judgment in favor of the Department.

Some observers believe that the court’s reasoning regarding what must be proven to establish a valid ADA claim would apply also in the context of environmental justice claims brought under Title VI of the Civil Rights Act and/or EPA’s environmental justice regulations. In other words, that same reasoning would dictate that a showing that a state action results in a disparate impact under Title VI or the environmental justice regulations would not be sufficient to establish a valid claim – a showing of intentional discrimination would be necessary.

It is likely that the district court’s decision will be appealed to the U.S. Court of Appeals for the Ninth Circuit. ‘

Administrator Upholds Challenged Title V Permit in Most Respects

In a matter involving numerous petitions for objections to a Title V permit for a waste disposal/chemical processing facility, Administrator Whitman issued a decision rejecting almost all the petitioners’ challenges. *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, Petition No. II-2000-07 (May 2, 2001). Among other things, the Administrator ruled that the New York State Department of Environmental Conservation (NYSDEC) had properly determined that construction of the new facility would not trigger PSD requirements and that petitioners’ environmental justice claims should be denied.

The matter involved NYSDEC’s issuance of a permit under its combined Title V/ NSR permitting program to Pencor-Masada Oxynol (“Masada”) authorizing the construction of a new facility. The facility will process municipal solid waste and, through

use of a novel technology, produce ethanol for commercial use. In issuing the permit, NYSDEC determined that the facility should be considered a refuse disposal facility for PSD purposes and that potential emissions from the new facility would not exceed the applicable threshold levels for any regulated pollutant.

A total of 35 petitions were filed by individuals and a corporation requesting that the Administrator object to the issuance of the permit pursuant to section 505(b)(2) of the Clean Air Act. The petitions raised numerous procedural and substantive claims concerning the validity of the permit.

We summarize two key rulings of the Administrator below.

Non-Applicability of PSD Requirements

In finding that the construction of the facility did not trigger PSD requirements, the Administrator addressed three principal issues: (1) whether the “primary activity” of the facility will be refuse disposal or chemical manufacturing (which determines the PSD major source threshold level); (2) whether the facility will contain an “embedded source,” i.e., a chemical process plant, that could separately trigger PSD requirements; and (3) whether the facility’s potential to emit (PTE) will be properly limited so that the relevant PSD major source threshold will not be exceeded.

With regard to the “primary activity” issue, the petitioners claimed that the facility will be primarily a “chemical process plant” because it will utilize various chemical processes to produce ethanol. Under the statute and regulations, a “chemical process plant” has a major source cutoff of 100 tpy, while a refuse disposal plant has a cutoff of 250 tpy. The Administrator determined that there was no basis for overturning NYSDEC’s finding that the primary activity will be refuse disposal. Both the Administrator and NYSDEC relied principally on evidence indicating that 70 percent of the facility’s revenues are projected to result from refuse disposal fees and 30 percent from chemical product sales.

The Administrator then analyzed the situation in light of EPA’s “embedded source”

interpretation of the PSD regulations. Under this interpretation, a facility whose primary activity makes it subject to a 250 tpy cutoff should be analyzed to determine whether a portion of the facility – an “embedded source” – could be classified as falling into one of the categories with a 100 tpy cutoff. The Administrator concluded that, although there is an “embedded” chemical process plant at the Masada facility, the emissions from that source would not exceed the 100 tpy cutoff.

The petitioners also argued that the PTE limits upon which the permit is based are speculative for a number of reasons and are not likely to be met. They specifically contended that the permit improperly relies upon after-the-fact monitoring, rather than engineering practices, test data, or vendor guarantees, to assure that emissions stay below major source cutoff levels. The approach taken in the permit is a “rolling cumulative total” method. Under this approach, continuous emission monitors (CEMs) are used to track daily emissions and to determine a rolling, 365-day total. The Administrator ruled that such an approach is an effective way to limit the facility’s PTE and rejected petitioners’ contrary claims.

Environmental Justice Claims

Certain petitioners alleged that the permit should be overturned because NYSDEC and EPA did not comply with Executive Order 12898, which directs federal agencies to make environmental justice part of their missions by addressing any adverse effects of their programs, policies, or activities on minority and low-income populations. The Administrator stated that the Order applies only to actions of federal agencies and therefore does not apply to NYSDEC’s actions. Accordingly, she concluded that the Order provides no basis for EPA to object to NYSDEC’s issuance of the permit. However, the Administrator further stated that petitioners are free to raise environmental justice concerns by filing a complaint under Title VI of the 1964 Civil Rights Act and EPA’s Title VI regulations if they believe NYSDEC discriminated against them in violation of those laws. ‘