

New Source Review Rulemaking Package Does Not Move Forward

Over the past eight years, EPA has repeatedly undertaken efforts with the stated purpose of “reforming” the current new source review (NSR) program. Those efforts have included working extensively with various stakeholder groups and advisory subcommittees. In 1996, the Agency published a proposed NSR reform rule, and it has attempted since then to finalize a rule addressing at least some of the key issues arising under the NSR program. In the closing days of the Clinton Administration, EPA recognized that these efforts had not resulted in its development of a rulemaking package that had wide support. As a result, EPA’s Assistant Administrator decided not to send the staff’s recommendations to the Office of Management and Budget (OMB) for its review and approval.

Throughout 1999 and 2000, EPA officials indicated that the Agency was strongly committed to finalizing comprehensive changes to its NSR regulations. By the fall of 2000, EPA staff had prepared a rulemaking package to be sent to OMB for its review prior to promulgation as a final rule. During this period, EPA staff held a number of briefings with industry representatives and other stakeholders to discuss the Agency’s latest plans to revise its NSR regulations. However, the regulatory package being considered by EPA was widely viewed by industry representatives as not improving the NSR program but instead making it even more complex and unworkable. In particular, the rulemaking package apparently would have included provisions expressly narrowly the scope of

the exclusion for “routine maintenance, repair, and replacement” activities and imposing a more stringent emissions calculations test than the current regulations.

As the end of the Clinton Administration approached, it became increasingly clear that a comprehensive “NSR Reform” package would not be finalized by that administration. However, uncertainty remained regarding whether a comprehensive rulemaking package might be sent to OMB for its review before the end of the administration. In recent weeks, EPA officials raised the possibility that they might send OMB a package limited to provisions addressing plantwide applicability limits (PALs) and Class I areas. Industry representatives asked to review the draft preamble and regulatory language in the package before indicating whether they would support that approach. Because EPA declined to share the language with stakeholders, there was no consensus among stakeholders that the PAL/Class I area package should go forward.

In a January 19 memorandum to NSR stakeholders, outgoing Assistant Administrator Perciasepe provided his views as to the status of the NSR rulemaking and the reasons why no NSR reform rule had been finalized. He stated that “[d]ue the array of policy and legal issues that arose on the vast number of areas we attempted to tackle in one very large rulemaking, we were not able to complete the regulatory packages in this Administration.” He further observed that “[o]ne

of the lessons that we have learned through our ongoing efforts is that it would be difficult, if not impossible, to improve NSR in one large rulemaking. Instead, I believe it is best to make incremental changes that will provide flexibility and certainty without sacrificing the benefits of the current program.” He also stated that “it is essential that this program have greater incentives for companies to employ the most effective emission reduction techniques voluntarily and give greater flexibility when companies take these voluntary actions.”

The Assistant Administrator’s memorandum then listed the following concepts that EPA and stakeholders had developed and which he supports:

- C **Voluntary Alternative NSR Program for the Electric Power Generating Industry** – Owners of power plants could commit to specific, verifiable emissions reductions across all units over a defined period of time. Such plants could avoid the need to obtain an NSR permit when making changes.
- C **Plantwide Applicability Limits** – Sources would be able to make changes without obtaining a major NSR permit so long as emissions do not exceed the plantwide limit. Source owners must commit to installing best controls on large new units and, over time, large existing units.
- C **Clarifications of Roles, Responsibilities, and Time Frames for Class I Area Reviews** – Process for review of NSR permit applications by Federal Land Managers (FLMs) would be clarified with regard to the roles of the source, the permitting authority, and the FLM where changes might affect air quality near Federal Class I areas (national

parks and wilderness areas) with confirmation that the final decision would be made by the permitting authority.

- C **Clean Unit Exemption** – Owner of an emissions unit that meets certain minimum criteria to be considered “clean” could make most changes to these units without triggering NSR for a specified period of time, such as ten years.
- C **Innovative Control Technology Waiver** – Waiver is intended to provide more flexibility for sources which risk trying innovative technologies that have not yet been proven effective.
- C **Pollution Control Project Exclusion** – Exclusion would codify existing policy providing that a plant change that primarily reduces one or more targeted air pollutants, but collaterally increases other pollutants, is excluded from NSR if certain conditions are met.
- C **Control Technology Review Requirements** – EPA would (1) add a definition of “demonstrated in practice,” (2) provide a “cut off” date for consideration of additional control technologies, (3) add provisions that specify when applications are deemed “complete,” and (4) require that control technology determinations be entered into clearinghouse.

Assistant Administrator Perciasepe’s memorandum also indicated that he hopes that the new administration will consider finalizing the concepts listed above. In addition, he suggested that continued discussions should take place on “other issues, such as applicability for the base program, that also need resolution.”

One of the major priorities for industry in the coming days will be to convince the Bush administration that the NSR program must be improved. In this regard, it seems clear that the current provisions of the base program, as presently interpreted by EPA, do not provide a suitable foundation for an improved program. At this time, the next steps to be taken are unclear.

EPA Plans to Issue Direct Final Rule Amending Part 70 Compliance Certification Provisions

EPA has made publicly available a direct final rule that would amend its Part 70 compliance certification provisions in response to the D.C. Circuit's decision resolving challenges to the Compliance Assurance Monitoring (CAM) Rule (*NRDC v. EPA*, 194 F.3d 130 (D.C. Cir. 1999)). The direct final rule would amend the compliance certification provisions to provide that the responsible official involved must include in a source's annual compliance certification a statement indicating whether compliance during the period was "continuous or intermittent."^{1/}

In its D.C. Circuit challenge to the CAM Rule, NRDC had argued, among other things, that the compliance certification language promulgated by EPA in 1997 in connection with the CAM 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 accepted NRDC's argument 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

1/ The draft direct final rule can be found under "Recent Updates" on the Network's website.

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 provided, its method of determining compliance is based on "continuous or intermittent data."

In the direct final rule, EPA would revise the relevant language in Parts 70 and 71 to read as follows:

Permits shall include . . . [a] requirement that the compliance certification include all of the following . . . : The status of compliance with the terms and conditions of the permit for the period covered by the certification, *including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in paragraph (c)(5)(iii)(B) of this section.*

The italicized text indicates the revisions made in response to the court's decision. All other language in the provisions would remain the same.

The language change contained in the direct final rule will probably not have a large practical impact on most sources. EPA's original Part 70 regulations provided that a permittee's compliance certification is to state "[w]hether compliance was continuous or intermittent." Because most states have not yet revised the original language in their Part 70 programs to reflect the different language in the 1997 CAM Rule, it is likely that the compliance certification provisions in most state programs are already consistent with the new language in the direct final rule.

Because EPA believes that the language change set forth above is not controversial in light of the court's decision, it intends to issue the change in the form of a direct final rule. If no adverse comments on the direct final rule are received within the 30-day comment period, the direct final rule would become effective 60 days after the publication date. To provide for the circumstance if adverse comments were to be received, the Agency also made publicly available a draft proposed rule that would make the same changes. Any adverse comments would be considered in finalizing the proposed rule.

The direct final rule was posted on EPA's OARPG website on January 18. However, the incoming administration has decided to review all unpublished, but signed, rulemaking notices before they may be published in the *Federal Register*. (On January 20, Andrew Card, White House Chief of Staff, sent a memorandum to all department and agency heads stating, among other things, that no proposed or final regulations should be sent to the Office of the Federal Register until they are reviewed by an official from the incoming administration. 66 Fed. Reg. 7702 (Jan. 24, 2001).) As a result, it is unclear when the direct final rule and the accompanying proposed rule will be published.

Administrator Denies Petitions for Reconsideration of Regional Haze Rule

On January 10, the EPA Administrator issued a decision in which she denied two petitions for reconsideration of the final regional haze rule. Numerous industry parties^{2/} had joined in filing the

2/ The parties filing the petitions for reconsideration include the Center for Energy and Economic Development, the Utility Air Regulatory Group, and the National Mining (continued...)

two petitions with EPA after the final rule was promulgated on July 1, 1999. Because judicial challenges to the regional haze rule have been held in abeyance pending EPA's resolution of the two petitions, the Administrator's decision will have the effect of allowing that litigation (*American Corn Growers Ass'n v. EPA*, Nos. 99-1348 *et al.* (D.C. Cir.)) to move forward.

July 1999 Final Regional Haze Rule

The Act provides that EPA is to promulgate regulations that "assure reasonable progress" in meeting the statutory goal of eliminating visual impairment in Class I areas and that contain "criteria for measuring reasonable progress." In the proposed rule, EPA provided that each state must meet a uniform "presumptive target" in order to achieve reasonable progress. The presumptive target for each state would have been a one deciview improvement in visibility in either 10 or 15 years.

In the final rule, EPA promulgated what it characterizes as a more flexible approach for achieving "reasonable progress" than set forth in the proposed rule. Under the final rule, each state is to determine what progress is needed to achieve the statutory goal in 60 years or less. Under this different approach, each state is to meet its own "reasonable progress goal" – one that is intended to result in visibility improvement in Class I areas on the haziest days and prevent degradation on the clearest days. EPA's approach is based on its conclusion that it is reasonable to expect states to reach natural background levels for visibility in 60 years.

Section 169A(b)(2) of the Act states that EPA's visibility protection regulations are to provide that certain major stationary sources – those placed in operation between August 1962 and

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August 1977 that emit pollutants that “may reasonably be anticipated to cause or contribute to” visibility impairment in Class I areas – must apply the “best available retrofit technology” (BART). The July 1997 proposed rule stated that such sources must be identified and that the states must determine BART for each identified source within three years of promulgation of the final rule.

In the final rule, EPA rejected contentions that it was not required to specially regulate BART sources. In deciding whether a potential BART source “may reasonably be anticipated to cause or contribute to” visibility impairment in Class I areas, a state is to determine whether such sources, when considered collectively over a broad area, would impair visibility. EPA provided additional time for states to develop source-specific BART requirements.

Petitions for Reconsideration

The industry parties filed the two petitions for reconsideration under section 307(d)(7)(B) of the Act, which authorizes the filing of such petitions where it was not possible to raise an objection within the public comment period and the objection is “of central relevance to the outcome of the rule.” The petitioners maintained, among other things, that the final rule should be reconsidered because (1) EPA cannot issue regional haze regulations until visibility transport commissions (VTCs) have been established for the regions in question and EPA has acted upon their recommendations; (2) the D.C. Circuit’s decision in *American Trucking Ass’ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), changed important assumptions made by EPA in promulgating the regional haze rule; (3) the definition of the key term “reasonable progress” in the final rule is substantially different from the proposed definition; and (4) the provisions addressing “best available retrofit technology” (BART) requirements for certain sources are substantially different from the proposed provisions.

The Administrator concluded that each issue raised in the petitions was either one that could have been raised during the comment period or one that was not “of central relevance to the outcome of the rule.” She interpreted the “central relevance” requirement to mean that the objection must provide “substantial support” for the argument that the rule should be revised. Consequently, rather than focusing on the actual relevancy of the objection (assuming that the objection could not have been raised earlier), the decision discusses whether EPA agrees with the objection involved and constitutes a summary denial of the merits of each of the petitioners’ legal and factual arguments. There is a strong argument that the approach taken by the Administrator in interpreting the “central relevance” requirement is inconsistent with the statutory language, Congressional intent, and past Agency practices.

Establishment of Visibility Transport Commissions

The petitioners contended that EPA must establish visibility transport regions and VTCs before it can undertake rulemaking to create a regional haze program. However, the Administrator concluded that the petitioners had failed to demonstrate that this argument could not have been presented during the comment period. In fact, according to the Administrator, the petitioners “concede[] that [their] arguments in support of these points are not new, but were raised in comments and that EPA responded to [their] arguments on this issue.” The Administrator additionally concluded that this argument was not “of central relevance to the outcome of the rule” because, in her opinion, the statutory language does not mandate that EPA establish VTCs and receive their recommendations before promulgating a national regional haze rule.

Effect of the *American Trucking Ass'n's* Decision

The petitioners argued that the regional haze rule should be reconsidered since many of the fundamental assumptions underlying the rule are now invalid in light of the *American Trucking* decision. They specifically contended that states cannot begin development of regional haze implementation plans under the rule without knowing what PM standard will be in place and that the D.C. Circuit's overturning of the PM-2.5 standard makes their task impossible.

In response, the Administrator ruled that petitioners' objections did not satisfy the "central relevance" test. Because the Supreme Court is currently reviewing the D.C. Circuit's decision, she concluded that it would be "premature" to grant reconsideration even if petitioners were correct as to the decision's relevance. (However, the decision ignored the question of why the Administrator denied the reconsideration petition outright rather than taking the more reasonable action of granting the petition and staying the reconsideration proceedings until the status of the PM-2.5 standard becomes clear.) The Administrator further stated that, if the Supreme Court does uphold the invalidation of the PM-2.5 standard, the regional haze rule as currently written provides that states would not be obligated to submit regional haze plans unless and until a valid PM-2.5 standard is in place. The Administrator also ruled that petitioners had not met their burden of showing that states are unable to begin developing the technical information needed for regional haze plans.

Requirements for Establishing Reasonable Progress Goals

The petitioners contended that the definition of "reasonable progress" in the final rule is substantially different from the definition proposed by EPA. For example, they maintained that, unlike the proposed rule, the final rule requires

the states to demonstrate that a SIP based on a 60-year rate of progress approach is "unreasonable" before an alternative SIP could be adopted.

The Administrator stated that the proposed rule contained the same "core" approach with regard to presumptive reasonable progress targets and asserted that petitioners had an opportunity to comment on the reasonableness of that approach. However, the Administrator did not specifically explain how parties could have foreseen that the final rule would be based on each state achieving natural background levels in 60 years when the proposed rule was based on each state being required to achieve a one deciview improvement in visibility in either 10 or 15 years. The Administrator additionally ruled without elaboration that, in any event, the "central relevance" test had not been met because petitioners' suggested changes to the rule "would erroneously suggest that States could adopt progress targets that provide for less than the maximum improvement in visibility that the States determine, with EPA's approval, to be reasonable."

BART Requirements

The petitioners sought reconsideration of various elements of the final rule's provisions addressing BART requirements. In particular, they called into question provisions that indicate that a state is to consider the collective effects of all sources in a given area in determining both (1) whether an individual source emits a pollutant "which may reasonably be anticipated to cause or contribute to any impairment of visibility" in a Class I area and (2) with regard to individual BART determinations, "the degree in improvement in visibility which may reasonably be anticipated to result from the use of such technology." Petitioners further contended that the BART provisions in the final rule differed substantially from the corresponding proposed provisions.

The Administrator ruled that the preamble discussion in the proposed rule gave interested parties adequate notice regarding the approaches

that EPA might take and therefore that petitioners' objections could have been raised during the comment period. In ruling that the objections were not of central relevance, the Administrator stated that the Act "establishes an extremely low threshold for triggering the requirement to install BART" and that there is no requirement that states demonstrate that an individual source impairs visibility before it is required to install BART controls. The decision also states that "EPA believes it is reasonable to interpret the CAA to require States to consider the cumulative impact of applying retrofit controls to BART sources."

EPA Plans to Propose Guidelines for BART Determinations Under Regional Haze Program

EPA has made publicly available its draft proposed guidelines for ascertaining (1) which sources will be subject to best available retrofit technology (BART) requirements under its previously promulgated regional haze program regulations and (2) how BART is to be determined for such a source.^{3/} According to EPA, state and local agencies must follow the guidelines, when finalized, in implementing the Act's BART requirements. Among other things, the proposed guidelines set forth detailed procedures for determining what constitutes BART for individual sources.

The draft proposed guidelines were posted on EPA's OARPG website on January 12. However, as discussed in an earlier article on Title V compliance certification requirements, the incoming administration has decided to review all unpublished, but signed, rulemaking notices before they may be published in the *Federal Register*. As a

3/ The draft proposed guidelines can be found on the Network's website under "Recent Updates."

result, it is unclear when the draft proposed guidelines will be published and whether they will be changed before publication.

Background

Section 169A(a)(1) of the Act sets forth a national visibility goal calling for "the prevention of any future, and the remedying of any existing impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution." Under section 169A(a)(4), EPA is to promulgate regulations which "assure . . . reasonable progress toward meeting the goal" set forth above. To carry out the visibility protection goal, EPA promulgated final regional haze regulations on July 1, 1999. 64 Fed. Reg. 35,714.^{4/} See May 1999 *Washington Report* at WR-248.

Section 169A(b)(1) of the Act provides that EPA's regulations are to include "guidelines" to the states on appropriate techniques and methods for implementing visibility protection requirements. In addition, the promulgated guidelines are specifically to address the establishment of emissions limitations for "fossil-fuel fired generating powerplant[s] having a total generating capacity in excess of 750 megawatts." EPA did not include these guidelines as a part of the July 1999 regulations and indicated then that it would promulgate the guidelines at a later time.

The statutory provisions addressing BART requirements for certain sources are found in section 169A(b)(2). EPA's visibility protection

4/ Several industry and environmental petitioners challenged the regional haze rule in the D.C. Circuit. *American Corn Growers Ass'n v. EPA*, Nos. 99-1348 *et al.* (D.C. Cir.). The Clean Air Implementation Project intervened in support of the industry petitioners and in opposition to the environmental petitioners. The consolidated cases have been held in abeyance pending EPA's resolution of petitions for reconsideration of the final rule. As discussed in a separate article above, EPA denied the petitions on January 10.

regulations are to provide that certain major stationary sources must apply the “best available retrofit technology.” The sources that are to apply BART are those major stationary sources in 26 listed categories that were placed in operation between August 1962 and August 1977 and emit pollutants that “may reasonably be anticipated to cause or contribute to visibility impairment in Class I areas.” A state is to apply the following factors in making a BART determination: costs of compliance, energy and non-air quality environmental impacts, any existing pollution control technology in use at the source, the remaining life of the source, and the degree of improvement in visibility that may be anticipated to result. Section 169A(g)(2).

In the July 1999 rule, EPA rejected contentions that the BART provisions were simply an artifact of the 1977 Amendments to the Act and that it was not required to promulgate special provisions dealing with BART sources. The Agency promulgated regulatory language setting forth BART procedures and requirements but deferred the details until it proposed and promulgated the state guidelines.

The Draft Proposed Guidelines

The draft proposed guidelines elaborate on the BART requirements contained in the July 1999 rule and closely follow the basic approach used in that rule. Under the proposal, the guidelines would constitute an appendix to 40 C.F.R. Part 51, and the regulatory test would be amended to provide that states are required to apply the guidelines. The proposed guidelines contain the following main elements:

- C *Identification of Sources Subject to BART* – The proposed guidelines contain detailed step-by-step procedures that states are to use in determining which sources must apply BART. Among other things, the proposed guidelines state that, in deciding whether a potential BART source “may

reasonably be anticipated to cause or contribute to” visibility impairment in Class I areas, a state is to determine whether such sources, *when considered collectively over a broad area*, would impair visibility.

- C *Engineering Analysis* – For each source subject to BART, the state is to conduct an engineering analysis of emissions control alternatives. The state is to identify available, technically feasible, retrofit technologies and for each technology analyze the cost of compliance and the energy and non-air quality environmental impacts, taking into account the remaining useful life and existing control technology present at the source. Based on this analysis, the state is to select the “best system of continuous emission reduction.”
- C *Cumulative Air Quality Analysis* – The proposed guidelines require that each state undertake a cumulative analysis of the degree of visibility improvement that would be achieved in each Class I area as a result of the emissions reductions achievable from all sources subject to BART.
- C *Establishment of Emissions Limits* – Based on the engineering analysis and cumulative air quality analysis, states are to establish enforceable limits and compliance deadlines for each source subject to BART.
- C *Trading Program Alternative* – The proposed guidelines provide that states may utilize alternatives to source-specific BART requirements such as regional emissions trading systems. In order to use an alternative approach, a state must demonstrate that the approach will achieve reasonable progress greater than would be achieved by imposing source-specific BART limits.

The proposed guidelines raise a number of important legal and policy issues, some of which are summarized below.

- C The Act explicitly provides that emissions limits for fossil-fuel fired generating powerplants with a capacity of 750 megawatts or more are to be based on the guidelines. However, EPA states in the proposal that the guidelines will be used for setting emission limits not just for these powerplants but *for any BART source in any of the 26 listed source categories.*
- C The proposed guidelines provide that, in a determination of what constitutes BART, the statutory factor of “the degree of improvement in visibility which may reasonably be anticipated to result from the use of [BART] technology” is to be based on an analysis of *the cumulative impacts of all BART sources in a geographic area* that contributes to visibility impairment in a Class I area. However, Congress intended that BART be determined on a “source-by-source” basis, and the proposed guidelines apply all the other factors contained in section 169A(g)(2) on a source-by-source basis.
- C The proposal states that, in determining whether a source’s “potential to emit” exceeds the 250-ton threshold and thus makes it a “major source” for purposes of the regional haze regulations, a state may only consider emission limits that are “federally enforceable.” According to EPA, this language is identical to the “potential to emit” language in the PSD program regulations. Thus, EPA either ignores or misapplies the D.C. Circuit’s decision in *Chemical Manufacturers Ass’n v. EPA*, No. 89-1514 (D.C. Cir. Sept. 15, 1995), in which the court expressly vacated the “potential to emit” definitions in the PSD regulations.

D.C. Circuit Rules That MACT Standard Must Regulate HAPs Even If “MACT Floor” Is “No Control”

In challenges to EPA’s MACT standard for Portland cement manufacturing, the D.C. Circuit ruled that EPA’s approach was not sufficiently stringent. It agreed with the Sierra Club that a MACT standard must impose emission limits for listed hazardous air pollutants (HAPs) even where EPA has determined that the “MACT floor” for those HAPs is “no control.” *National Lime Association v. EPA*, Nos. 99-1325 *et al.* (D.C. Cir., Dec. 15, 2000). The effect of this ruling is to invalidate EPA’s longstanding practice of not imposing limits for HAPs where its MACT floor analysis shows that the best performing source or sources did not utilize controls for the HAP in question.

The D.C. Circuit also remanded the standards for HAP metals to EPA because the Agency failed to consider “non-air quality health effects” in deciding not to set “beyond-the-floor” standards for that HAP, i.e., standards more stringent than the MACT floor level.

In addition, the court upheld the rule against other challenges made by the Sierra Club and by the industry petitioner, the National Lime Association (NLA). The court rejected the Sierra Club’s arguments that EPA had erred by basing the standards for dioxin/furans and PM solely on technology and that the rule’s monitoring requirements are inadequate. The court likewise rejected arguments made by the NLA that EPA had unlawfully used PM as a surrogate for HAP metals and that the testing method for HCl for determining “major source” status is arbitrary and capricious.

We summarize the rulings below.

Invalidation of EPA's "No Control" Approach

The Sierra Club challenged EPA's determination not to set emission limits for HCl, mercury, and total hydrocarbons (a surrogate for organic HAPs other than dioxin/furans). After conducting its MACT floor analysis, EPA concluded that no cement plants were using control technologies for those pollutants. Therefore, EPA concluded that the MACT floor for the pollutants was "no control" and did not set limits for those HAPs in the rule.

However, the court agreed with the Sierra Club that section 112(d)(1) requires that EPA establish standards for each of the listed HAPs and that nothing in the Act suggests that EPA may set emission limits only for those listed HAPs that are controlled by technology. It concluded that both sections 112(d)(1) and (d)(2) indicate that every listed HAP be regulated and that EPA cannot focus solely on what can be accomplished by a control technology. Under section (d)(2), EPA is to consider pollutant-reduction measures including "process changes, substitution of materials or other modifications." The court read the legislative history of this provision as making clear that EPA is to set emissions standards for all listed HAPs emitted within a source category even in the absence of technology-based pollution control devices.

Remand for Consideration of Beyond-the-Floor Standards

The Sierra Club challenged EPA's decision not to set beyond-the-floor standards for mercury, total hydrocarbons, and HAP metals. Under section 112(d)(2), in determining whether to set beyond-the-floor standards, EPA is to consider "the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements." The Sierra Club maintained that EPA violated the statute by failing to consider "non-air quality health and

environmental impacts" in setting the limits in question.

The court concluded that, although EPA had expressly considered costs and energy requirements, the record indicated that EPA had not considered "non-air quality health and environmental impacts" in determining whether to set beyond-the-floor limits. As a result, the court remanded this portion of the case to EPA for new beyond-the-floor determinations. Because the mercury and total hydrocarbons standards were separately remanded to EPA because of the "no control" approach that it used, this part of the decision directly affected only the HAP metals standard.

Challenges to EPA's Technology-Based Approach

The Sierra Club also attacked EPA's overall technology-based approach in setting section 112(d) standards. It argued that section 112(d)(3) requires EPA to set new source floors at the lowest recorded emissions level for which it has data and to set existing source floors at the average of the lowest 12 percent of recorded emissions levels for which it has data. Also, the Sierra Club argued that the best performing 12 percent of plants might perform well because they use less-polluting fuels or purer raw materials, not because of the MACT floor technology they utilize. EPA countered by maintaining that it must ensure that standards are achievable under the most adverse circumstances which can reasonably be expected to occur and that evaluating how a given MACT technology performs is a permissible means of establishing actual performance of the top 12 percent of plants.

The D.C. Circuit ruled against the Sierra Club based primarily on its decision in *Sierra Club v. EPA*, 167 F.3d 658 (D.C. Cir. 1999), where it concluded that the statute authorized EPA to use data from other plants that use the same technology as the best 12 percent to estimate the performance

of the best 12 percent. As to the Sierra Club's specific argument that technology is only one factor affecting performance, the court ruled that it could not consider the argument because it was not raised in the Sierra Club's opening brief (it was raised for the first time at oral argument).

Claim that Monitoring Is Inadequate

The court rejected the Sierra Club's assertion that the monitoring required by the rule failed to provide a reasonable assurance of compliance with the emission standards. The Sierra Club contended in particular that the opacity monitoring required by the rule will not guarantee compliance with the PM standard. The court stated that the Sierra Club had not met its burden of showing that the required monitoring was inadequate and deferred to EPA's technical expertise in the area of monitoring.

Use of PM as a Surrogate for HAP Metals

As a threshold matter, the court ruled that the National Lime Association had standing to challenge the rule. The court relied primarily on the fact that some members of the Association operated cement kilns that would be subject to the rule.

The NLA argued that the use of PM as surrogate for HAP metals in this rule is both contrary to law and "arbitrary and capricious." The NLA maintained that EPA cannot lawfully use PM as a surrogate because PM is a criteria pollutant and section 112(b)(2) provides that no criteria pollutant can be added to the list of HAPs under section 112. The NLA additionally asserted that PM is an unreasonable surrogate for HAP metals because HAP metals make up only a small, variable portion of cement kiln PM emission, i.e., about 1/10 of 1 percent. Finally, the NLA argued that EPA failed to consider costs in concluding that HAP metals

should be regulated and should have established de minimis levels for HAP metals.

The court concluded that the prohibition in section 112(b)(2) does not apply in this case because the rule does not treat PM as a HAP in general. Instead, "it regulates only PM that is emitted from cement kilns." The court believed that it is significant that the presence or absence of PM emissions does not determine whether a cement plant is a "major source" of HAP emissions and PM is not broadly regulated under the rule. With regard to whether using PM as a surrogate in this instance is reasonable, the court relied on EPA's position that, although the proportion of HAP metals in PM is very small, cement kiln PM always contains HAP metals and a reduction of PM emissions will necessarily also reduce HAP metals emissions. The court concluded that, since HAP metals are always present in cement kiln PM emissions, EPA's "analysis is not unreasonable" and upheld the use of PM as a surrogate. In addition, the court stated that costs should be considered only in determining whether beyond-the-floor standards should be set and that EPA had acted reasonably in determining that de minimis exceptions from the MACT floor need not be established.

Test Method for HCl Emissions

Finally, the NLA challenged the requirement that, with regard to HCl emissions, major source determinations must be based solely on the so-called "FTIR" test method. It argued that the requirement is "arbitrary and capricious." However, the court ruled that the technical information relied upon by the NLA was submitted after the close of the comment period and need not have been considered by EPA. Accordingly, it denied the petition for review on this point as well.