

# Clean Air Act Litigation Developments

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# Clean Air Act Litigation Developments 2000

## Citizen Suits

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### ***Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 120 S.Ct. 693 (2000)**

On January 12, 2000, the Supreme Court issued a decision addressing the requirements for citizen suit standing in environmental cases and the criteria for determining whether a citizen suit has become moot. By a 7 to 2 vote, the Supreme Court reversed a decision of the Fourth Circuit holding that citizen suit plaintiffs' claims for civil penalties had become moot because the defendant had come into compliance and the plaintiffs had not been granted injunctive relief. The Supreme Court's opinion distinguished the situation before it from that in *Steel Co. v. Citizens for A Better Environment*, 523 U.S. 83 (1998), and also limited the potential scope of that decision. In *Steel Co.*, the Supreme Court had ruled that a citizen suit plaintiff lacked Article III standing to bring suit to impose civil penalties against a defendant where the plaintiff was not entitled to injunctive relief to prevent future harm.

The *Laidlaw* case involved a Clean Water Act citizen suit in which plaintiffs alleged that the company had violated its NPDES permit on numerous occasions. Plaintiffs sought injunctive and declaratory relief, an award of civil penalties, and attorneys' fees. The federal district court imposed civil penalties of more than \$400,000 but denied the plaintiffs any injunctive relief based on its conclusion that the company had ultimately come into substantial compliance with its permit.

On appeal, the Fourth Circuit vacated the district court's decision and ruled that the case had become moot. The court of appeals concluded that, because the company had come into compliance with its permit terms and plaintiffs had failed to appeal the denial of injunctive relief, there was no longer a live "case or controversy" under Article III. Relying on the *Steel Co.* decision, the court of appeals reasoned that the only remedy currently available to the plaintiffs – civil penalties payable to the Treasury – would not redress any injury that plaintiffs had suffered.

The majority of the Supreme Court Justices ruled that, as a threshold matter, the court of appeals should have determined whether plaintiffs had Article III standing to bring the action before addressing the issue of mootness. The majority determined that plaintiffs had established the requisite injury in fact based on affidavits of individual members stating that unlawful discharges had adversely affected their use and enjoyment of the river in question. The majority further concluded that the defendant's payment of civil penalties to the Treasury could provide sufficient redress to the plaintiffs to satisfy Article III standing requirements. In this regard, the majority distinguished the holding in *Steel Co.* and stated that the *Steel Co.* holding applies only to situations involving wholly past violations at the time the complaint was filed – not violations that were still occurring when the complaint was filed.

The majority also held that the plaintiffs' civil penalty claims did not necessarily become moot once the company came into substantial compliance with its permit. It noted that voluntary cessation of an activity does not ordinarily deprive a federal court of jurisdiction. According to the majority, there are

circumstances in which the prospect that a plaintiff will engage in harmful conduct may be too speculative to support standing, but not too speculative to overcome a claim of mootness. Thus, the majority limited the *Steel Co.* holding that citizen suit plaintiffs cannot seek civil penalties for wholly past violations to situations where standing, rather than mootness, is at issue.

Justice Scalia, in an opinion joined by Justice Thomas, strongly disagreed with the majority's ruling on both the standing and mootness questions. He contended, among other things, that the affidavits relied upon by the plaintiffs were far too vague and unsubstantiated to establish that any of the individuals had been injured in fact.

***Citizens Legal Environmental Action Network v. Premium Standard Farms***, No. 97-6073-CV-SJ-6, 2000 WL 220464 (W. D. Mo. Feb. 23, 2000)

A federal district court judge in Missouri ruled that an environmental group may continue to prosecute its citizen suit against a hog farm operator even though the operator had previously entered into a comprehensive settlement with the State of Missouri. The environmental group, CLEAN, brought a citizen suit against the company under both the Clean Air Act and the Clean Water Act. CLEAN alleged, among other things, that the company should have applied for Title V permits for certain of its confined animal feeding operations (CAFOs).

The State of Missouri subsequently brought an enforcement action against the company, alleging numerous violations of the Clean Air Act and the Clean Water Act. The enforcement action resulted in a state court consent decree resolving the claims set forth in the State's complaint as well as all claims "arising from facts known to the state at the time of the settlement."

The company filed a motion for summary judgment, arguing that CLEAN's action was barred by the doctrine of *res judicata*, which precludes the litigation of claims that have already been decided. The company contended that *res judicata* applies to all claims that were raised or could have been raised in the state court proceeding.

The district judge granted the company's summary judgment motion only with regard to those specific incidents that were alleged in both the State's complaint and CLEAN's complaint. He ruled that the company had the burden of establishing the defense of *res judicata* and that the company had not met its burden of demonstrating that the State had knowledge of the facts that formed the basis for other claims set forth in CLEAN's complaint. In addition, the court concluded that CLEAN and the State were not "in privity" with regard to the claims that were covered by the broad release in the consent decree. The court relied on the language in the citizen suit provisions of both statutes stating that a citizen suit is precluded where the state in question is "diligently prosecuting" its own enforcement action. According to the court, this language means that citizen suit plaintiffs and the state in question can be in privity for *res judicata* purposes only where the state is "diligently prosecuting" an enforcement action.

***Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp.***, 207 F.3d 789 (5th Cir. 2000)

Reversing a federal district court's decision, the U.S. Court of Appeals for the Fifth Circuit ruled that the prosecution of a state administrative proceeding against a source that is alleged to have violated

the Clean Air Act cannot preclude a citizen suit involving the same violations. The court of appeals also rejected the company's arguments that the citizen suit plaintiffs lacked standing to bring the action.

The case involved allegations that numerous violations of the new source performance standards for refineries had occurred at the company's refinery in Pasadena, Texas. In 1995, the company and the Texas Natural Resources Conservation Commission (TNRCC) entered into an administrative consent order that required the company to pay civil penalties and implement measures to prevent future violations. In July 1997, the plaintiffs filed a citizen suit under the Clean Air Act, alleging that the company was continuing to violate the standards and the terms of the consent order. In November 1997, the TNRCC commenced an administrative enforcement action against the company and alleged that the consent order had been violated. The company and the TNRCC negotiated a new consent order, under which the company will pay more than \$1 million in civil penalties and hire experts to recommend further measures to be taken.

The federal district court ruled that the plaintiffs could not prosecute the citizen suit because it was precluded under section 304(b)(1)(B) of the Act, which provides that a citizen suit cannot be brought where EPA or the state is "diligently prosecuting a civil action in a court" addressing the same violations. The plaintiffs appealed the district court's decision.

Although the district court had not addressed the issue of Article III standing, the court of appeals concluded that it was necessary to do so before deciding the preclusion issue. The Fifth Circuit addressed the three prongs of the test that must be satisfied to establish standing: (1) an injury in fact; (2) traceability; and (3) redressability. It concluded that, regardless of whether additional injunctive relief would be necessary, the plaintiffs had standing to seek civil penalties for ongoing violations or for those violations that could continue into the future.

The Fifth Circuit disagreed with the district court that the TNRCC's administrative enforcement actions precluded the citizen suit pursuant to section 304(b)(1)(B) of the Act. The court ruled that the plain meaning of the provision was that, in order to preclude a citizen suit, a state enforcement action must occur in a federal or state *judicial* proceeding. As a result, the court of appeals reversed the district court and remanded the case to it for further proceedings.

## **"Continuing Violation"**

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***United States v. Brotech Corp.***, No. Civ.A. 00-2428, 2000 WL 1368023 (E.D. Pa. Sept. 19, 2000)

In a Clean Air Act enforcement action brought by EPA, a federal district court ruled that a company's failure to obtain a construction permit was not a "continuing violation" and therefore that the applicable statute of limitations began to run from the time that the violation initially occurred. As a result, the court concluded that certain EPA claims for civil penalties were barred by the five-year statute of limitations set forth in 28 U.S.C. § 2462.

The case arose when EPA brought an enforcement action under section 113 of the Act against the company and alleged, among other things, that the company had installed and operated nine specific pieces of equipment at its facility without obtaining construction permits as required by the Pennsylvania SIP. EPA sought civil penalties and injunctive relief with regard to each alleged event.

The company argued that EPA's civil penalty claims involving six of the nine pieces of equipment were barred by the five-year statute of limitations contained in 28 U.S.C. § 2462. The company did not contend that the statute of limitations barred EPA's request for injunctive relief.

In opposing the company's motion to dismiss the civil penalty claims, EPA and the City of Philadelphia contended that the failure to obtain necessary construction permits constituted a "continuing violation." Under their theory, the statute of limitations had never begun to run on those violations.

In its decision, the district court ruled that "[v]iolations of the various requirements to obtain construction permits or plan approvals occur at the time of the construction, modification, or installation of the equipment or facility." It therefore rejected EPA's "continuing violation" argument and granted the company's motion to dismiss EPA's civil penalty claims dealing with the failure to obtain construction permits for the six pieces of equipment. In rejecting EPA's arguments, the court distinguished the cases relied upon by EPA. It concluded that they dealt with the failure to obtain operating permits, which, the court pointed out, was not at issue here. Instead, the court relied on the decisions in *United States v. Campbell Soup Co.*, No. CIV-S-95-1854, 1997 WL 258894 (E.D. Cal. March 11, 1997), and *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F.Supp. 863 (E.D. Pa. 1996), for the proposition that the failure to obtain a construction permit does not constitute a continuing violation.

## **Disapproval of SIP Provisions**

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### ***Michigan Manufacturers Ass'n v. Browner*, 230 F.3d 181 (6th Cir. 2000)**

The U.S. Court of Appeals for the Sixth Circuit issued a decision upholding EPA's disapproval of proposed revisions to the Michigan state implementation plan (SIP) that addressed startup, shutdown, and malfunction (SSM) conditions. EPA had disapproved the revisions primarily because it contended that they improperly provided an "automatic exemption" for sources during SSM conditions.

The decision is the first court of appeals decision to address directly EPA's "excess emissions" policy for approval of SIP provisions. Under this policy, EPA maintains that any exceedance of an emissions limit in a SIP provision constitutes a violation, even if the exceedance occurs during SSM conditions. According to EPA, the policy is based on its interpretation of section 110 of the Act as requiring that sources comply with SIP provisions at all times in order to ensure that national ambient air quality standards (NAAQSs) will be met and maintained. The policy was initially set forth in two memoranda issued by the Assistant Administrator for Air in 1982 and 1983 ("the Bennett memoranda").

This case involved proposed SIP revisions which provided that exceedances would be allowable during SSM conditions for certain sources under specified circumstances. In particular, if a source was operated in a manner consistent with good air pollution control practices for minimizing emissions during SSM conditions and met certain notice, reporting, and associated requirements, an exceedance during SSM conditions would not constitute a violation of the relevant standard. After EPA disapproved Michigan DEQ's proposed SIP revisions in 1998, review of the disapproval was sought in the Sixth Circuit.

In its decision, the Sixth Circuit upheld EPA's interpretation of section 110 and rejected the petitioners' contentions that EPA had intruded on the state's responsibility to formulate SIP provisions to carry out its intentions. The court concluded that it must defer to EPA's interpretation of section 110 under the principles set forth by the Supreme Court in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

Because the court concluded that it could not say that the interpretation of section 110 set forth in the Bennett memoranda is “unreasonable” under the *Chevron* test, it ruled that EPA could apply its “excess emissions” policy in disapproving the proposed SIP revisions. The court also stated that the petitioners had failed to offer evidence that Michigan’s proposed rules would not interfere with attainment and maintenance of the NAAQS.

## **Environmental Justice**

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### ***Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000)**

In a case involving a citizen group’s challenge to a PSD permit, the U.S. Court of Appeals for the First Circuit rejected a claim that EPA had violated the President’s Executive Order on Environmental Justice. Executive Order No. 12,898, 59 Fed. Reg. 7629 (1994). The case involved EPA Region II’s issuance of a PSD permit for a new coal-fired power plant in Puerto Rico. The citizen group challenged the permit on multiple grounds, including the claim that Region II had not adequately considered the impact of the new plant on minority and low-income populations and therefore had violated Executive Order 12,898. After EPA’s Environmental Appeals Board upheld the permit, the citizen group sought review of that decision in the court of appeals.

The First Circuit ruled that it could not review the permit for compliance with the executive order because, by its terms, the executive order “shall not be construed to create any right to judicial review” and is intended simply as an executive branch management tool. The court also cited judicial precedents holding that such executive orders cannot give rise to judicially reviewable claims. In addition to the environmental justice claim, the court of appeals also rejected other arguments by the citizen group that EPA had acted arbitrarily in issuing the permit.

### ***In re: Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 through 99-72 (EAB, March 14, 2000)**

In a 1998 PSD permit challenge, the EAB concluded that states that are delegated authority to administer the federal PSD program have a duty to undertake an environmental justice analysis pursuant to Executive Order 12,890 as if they were federal agencies. *In re: Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20 (EAB, Feb. 4, 1999). Because the record did not demonstrate that the local permitting agency had undertaken an environmental justice analysis, the EAB directed the agency to obtain documentation of any such analysis undertaken by EPA Region IX, to include it in the record, and to make it available for public comment.

On remand, the local agency obtained two memoranda from Region IX and made them available for public comment. Those documents, as well as the Region’s response to comments document, concluded that the proposed facility would not have disproportionately high and adverse human health or environmental effects on a minority or low-income population. Among other things, the Region stated that the area was an attainment area for PM and concluded that the proposed facility would not cause the PM increment to be exceeded or cause any other adverse impacts on sensitive subpopulations.

The EAB ruled that petitioners had failed to show that the Region’s conclusion regarding the lack of adverse impacts was “clearly erroneous.” It also ruled that all procedural requirements had been met by the local agency. Accordingly, the EAB denied the petitions with regard to all environmental justice claims.

***See In the Matter of Polypropylene Unit, Baton Rouge Polyolefins Plant, Exxon Chemical Americas***, Petition No. 6-00-1, 65 Fed. Reg. 26,380 (May 9, 2000) (Title V Permit Program).

## **Fair Notice**

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***See In re: Tennessee Valley Authority***, CAA Docket No. 00-6 (EAB, Sept. 15, 2000) (PSD Requirements).

## **Justiciability**

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***Public Service Company of Colorado v. EPA***, 225 F.3d 1144 (10th Cir. 2000)

The U.S. Court of Appeals for the Tenth Circuit ruled that letters written by EPA Region VIII stating that a proposed power plant project would trigger PSD requirements are not judicially reviewable under the Clean Air Act. The court concluded that the EPA letters did not constitute reviewable “final actions” under section 307(b) of the Act.

The case involved a proposal by a joint venture to build a new power plant near an existing plant owned by Public Service of Colorado (PSCo). PSCo contracted with the owners of the proposed plant to purchase the plant’s entire electrical output for use to satisfy peak load demands. Although PSCo would play no role in building or operating the new plant, one of the companies in the joint venture seeking to build the new facility is a subsidiary of the same parent company that owns PSCo.

Because the emissions of the new facility would not exceed PSD “major source” threshold levels, the joint venture submitted a minor NSR permit application to CDPHE. However, CDPHE indicated that it might consider the two facilities to be a “single source” for permitting purposes. As a result, the proposed project would trigger PSD requirements as a “major modification” of an existing facility. CDPHE, which has an approved PSD program and is therefore responsible for making PSD applicability determinations, wrote to EPA Region VIII requesting advice on whether the two plants were under “common control” and therefore would constitute a “single source.”

In two separate letters – one to the CDPHE and one to a company official – EPA stated that, based on its interpretation of the PSD regulations, the proposed and existing facilities would constitute a “single source.” EPA’s belief that there was common control was based on PSCo’s contract to purchase the entire output of the new facility and the relationship between PSCo and one of the members of the joint venture. EPA further stated that it believed construction of the new facility would be a major modification of a major source and would require a PSD permit. After reviewing the EPA letter, the CDPHE took no further action on the minor NSR permit application submitted by the joint venture.

The court of appeals concluded that the letters did not satisfy its test for determining whether an agency action is final. In particular, the court stated that EPA’s letters had no direct and immediate impact on PSCo because PSCo is not the permit applicant. It further concluded that the decisionmaking process had not been consummated because CDPHE had not taken any action on the minor source permit

application and, if it denied the application and insisted that the project was subject to PSD, the permit applicants could pursue their appeal rights in state court. Finally, the court ruled that the letters had not determined any rights or obligations because CDPHE, not EPA, will make the initial decision regarding whether PSD requirements will be triggered. Since the court concluded that no final agency action had occurred, it dismissed PSCo's petition for lack of jurisdiction.

***See Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.***, 120 S.Ct. 693 (2000) (Citizen Suits).

***See Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp.***, 207 F.3d 789 (5th Cir. 2000) (Citizen Suits).

***See National Lime Association v. EPA***, 233 F.3d 625 (D.C. Cir. 2000) (MACT Standards/Section 112).

***See Appalachian Power Co. v. EPA***, 208 F.3d 1015 (D.C. Cir. 2000) (Title V Permit Program).

## **MACT Standards/Section 112**

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***National Lime Association v. EPA***, 233 F.3d 625 (D.C. Cir. 2000)

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." 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. We summarize the rulings below.

### **C** *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. 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 accepted the Sierra Club's argument 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. The effect of this ruling is to invalidate EPA's long-standing 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.

C *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.

C *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. 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.

C *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.

C *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 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.” 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. 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.

## **Monitoring**

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***See Appalachian Power Co. v. EPA***, 208 F.3d 1015 (D.C. Cir. 2000) (Title V Permit Program).

***See National Lime Association v. EPA***, 233 F.3d 625 (D.C. Cir. 2000) (MACT Standards/Section 112).

***See In the Matter of: PacifiCorp’s Jim Bridger and Naughton Utility Steam Generating Plants***, Petition No. VIII-00-1 (Nov. 16, 2000) (Title V Permit Program).

## **New Source Performance Standards**

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***Star Enterprise and Texaco Inc. v. EPA***, 235 F.3d 139 (3rd Cir. 2000)

The U.S. Court of Appeals for the Third Circuit ruled that the Petroleum Refinery New Source Performance Standard (NSPS), found at 40 C.F.R. Part 60, Subpart J, does not apply to two combustion turbines that are part of a power plant located adjacent to a petroleum refinery owned by Motiva Enterprises. The court concluded that EPA had impermissibly attempted to expand the scope of the NSPS’s applicability beyond what was originally intended.

EPA issued a decision concluding that the combustion turbines would be subject to Subpart J, which applies to certain types of equipment located at petroleum refineries, including fuel gas combustion devices. EPA reasoned that, because the Repowering Project was located adjacent to the refinery and will help to meet the refinery’s energy needs, and because the refinery and Repowering Project are under common control, the Project’s combustion turbines were in a “petroleum refinery” and therefore subject to Subpart J’s standards for SO<sub>2</sub>. Motiva and Texaco (whose process was to be used) filed a petition for review of EPA’s applicability determination.

The court of appeals rejected EPA’s reasoning, making clear that Subpart J cannot apply to facilities merely adjacent to, but not physically located in, a petroleum refinery. The court characterized EPA’s position as “untenable.” It pointed out that EPA’s theory would be sufficient to establish that a restaurant, owned by the refinery and built on adjacent ground for the convenience of refinery workers, is part of the refinery itself, thereby subjecting combustion devices inside the restaurant to Subpart J standards. Importantly, the court noted that the activities conducted at the Repowering Project, which include petroleum coke gasification and energy production, are not among the kinds of processes found in petroleum refineries as defined under the rule.

The two combustion turbines are part of Motiva's Repowering Project – a project to renovate an existing power plant adjacent to the refinery. The combustion turbines, which will burn synthesis gas derived from petroleum coke, will generate electricity for use by the adjacent refinery and the commercial power grid. After EPA questioned whether Subpart J would be applicable to the project, Motiva (formerly Star Enterprise) sought an NSPS non-applicability determination from the Agency.

Morgan, Lewis & Bockius LLP, counsel for the Clean Air Act Information Network, represented Motiva and Texaco in this litigation.

## **NOx SIP Call**

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### ***Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000)**

On March 3, 2000, a three-judge panel of the D.C. Circuit issued a decision that upheld the NOx SIP Call Rule promulgated by EPA in October 1998. By a 2 to 1 vote, the judges affirmed the rule with certain exceptions. The majority opinion rejected the main arguments made by the industry, state, and labor petitioners. However, the majority ruled that the record did not support including the States of Wisconsin, Missouri, and Georgia in the SIP call. Judge Sentelle wrote a dissenting opinion stating that he would have overturned the rule based on EPA's unlawful interpretation and implementation of the key requirement that emissions from an upwind state "contribute significantly" to nonattainment in a downwind state. The principal rulings are summarized below.

- C *New Ozone Transport Commission Not Required* – The court ruled that EPA was not required to convene an ozone transport commission under the Act prior to issuing the SIP call. The court held that EPA is required to convene a new commission only if it has created a new ozone transport region and that there is no statutory language mandating the creation of transport regions.
  
- C *EPA's Approach Is Sufficiently State-Specific* – The court rejected the argument that EPA did not sufficiently analyze the emissions in each state in determining which states "contribute significantly" to ozone nonattainment. The petitioners had argued that, under section 110(a)(2)(D) of the Act, EPA must focus on "emissions activity within the state" and cannot merely rely on regional and multi-state analyses of NOx emissions. However, the court stated that EPA had undertaken state-specific modeling after the publication of the proposed rule and that this modeling was generally sufficient to support the Agency's determination as to which states should be included in the SIP call.
  
- C *EPA's Current Approach Does Not Impermissibly Conflict with Past Approach* – The court disagreed with petitioners' contentions that EPA's current interpretation of the key phrase "contribute significantly" conflicts with its prior approach to implementing the interstate pollution requirements in section 110 and 126 of the Act. The court concluded that, although EPA has used a more demanding approach in the past, it had never bound itself to any particular approach. It also noted that the key phrase "contribute significantly" was not added to the statute until 1990 and therefore that EPA's pre-1990 approach cannot be regarded as specifically interpreting that statutory phrase.

- C      *“Significant Contribution” Determination Can Be Based on Cost-Effectiveness* – The panel majority rejected petitioners’ arguments that EPA could not base its “significant contribution” determinations on the cost-effectiveness of emissions controls. EPA determined that states “contribute significantly” to nonattainment based in part on whether the state contributes 2 ppb to exceedances in downwind states. EPA then determined that such a contribution would no longer be significant if sources applied “highly cost-effective controls” (less than \$2000/ton). The majority concluded that the word “significant” was ambiguous and that nothing barred EPA from using this approach. It also pointed out that, under D.C. Circuit case law, EPA can consider costs in promulgating regulations unless it is expressly prohibited from doing so.
- C      *Permissible to Rely on Uniform Controls* – The petitioners argued that the imposition of the same cost-effective controls in every state is irrational because the amount of emissions and the effects of the emissions will vary significantly depending on distances and other factors. However, the court deferred to EPA’s modeling results, which purportedly show that there would be no significant differences between the uniform controls relied upon by EPA and regional-based controls.
- C      *No Violation of the Nondelegation Doctrine* – Petitioners argued that EPA’s interpretation of the statute with regard to determining what constitutes a “significant contribution” violates the “nondelegation” doctrine – the doctrine relied upon by the court in deciding the *American Trucking Ass’ns* case. In other words, petitioners contended that there are no “intelligible principles” governing the determination of whether a state is “contributing significantly” to ozone nonattainment. The court held that the nondelegation doctrine was not violated in this case because EPA’s discretion is limited here. The court stated that EPA must make a number of threshold determinations before finding that a state should be subject to a SIP call for contributing to nonattainment problems.
- C      *Approach Does Not Intrude on State Authority* – Petitioners maintained that EPA’s imposition of a NOx budget for each state covered by the SIP call exceeded EPA’s authority under the Act in that EPA cannot dictate to the states how they are to meet the statutory requirement to develop and implement an adequate SIP. However, the court ruled that the SIP call does not impose specific measures or emissions limitations on the states but instead gives the states substantial leeway in how they will satisfy the budget figures.
- C      *No Violation of SBREFA* – The court rejected petitioners’ arguments that EPA had violated the Small Business Regulatory Enforcement Fairness Act (SBREFA) by not adequately analyzing the impacts of the rule on “small entities.” The court held that the rule is not subject to the requirements of SBREFA because it does not directly regulate individual emissions sources but instead allows the states to decide which sources to regulate.

On June 22, the D.C. Circuit denied petitions for rehearing filed by state and industry petitioners challenging the NOx SIP Call rule. On August 30, 2000, the D.C. Circuit issued an order in the case giving sources that must install controls because of EPA’s NOx SIP call an additional 13 months in which to comply with the rule’s emission reduction requirements. As a result of the court’s order, the deadline for reducing NOx emissions pursuant to the SIP call has been extended from May 1, 2003 to May 31, 2004.

# Overfiling

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## ***United States v. LTV Steel Co.***, 118 F. Supp. 2d 827 (N.D. Ohio 2000)

A federal district court issued a decision holding that EPA may pursue Clean Air Act enforcement actions against a company even though the company entered into settlements with local agencies that allegedly resolved the same violations. In ruling against the company, the district court rejected arguments that EPA may not engage in the practice of “overfiling” – filing a federal enforcement action addressing certain alleged violations after a state or local agency has taken enforcement action regarding the same alleged violations.

EPA brought an enforcement action under section 113 of the Act against LTV, alleging that several violations of SIP requirements had occurred at the company’s facility in Cleveland, Ohio. LTV argued that the court should dismiss one of EPA’s claims involving alleged opacity violations because the company had previously entered into a settlement with the City of Cleveland regarding that claim. Relying on the Eighth Circuit’s decision in *United States v. Harmon Industries, Inc.*, 191 F.3d 894 (8th Cir. 1999), LTV maintained that EPA was foreclosed from overfiling under the Clean Air Act. LTV additionally maintained that EPA’s claim was barred by the doctrine of *res judicata*, i.e., the principle that a final judgment on the merits of a claim precludes further claims by those parties (or parties acting “in privity” with them) based on the same cause of action.

The court ruled that this was not a true overfiling situation because EPA was not seeking to enforce the same requirements as the City. According to the court, EPA had alleged that provisions of the Ohio SIP had been violated while the City had been enforcing its municipal ordinances, which are not a part of the SIP, and had no authority to enforce the Ohio SIP provisions. Moreover, the court pointed out that the settlement agreement expressly stated that it did not bind the Ohio EPA and did not excuse any violations of federal law.

The court further ruled that, even if EPA and the City had sought to enforce the same SIP provisions, the rationale of the *Harmon* case would not apply. The court concluded that the language in RCRA relied upon by the Eighth Circuit in *Harmon* was not present in the Clean Air Act and that section 113 of the Clean Air Act apparently anticipated that overfiling could occur. Finally, the court rejected LTV’s *res judicata* argument because it concluded that the claim asserted by EPA was a wholly different claim from the one settled by the City and that EPA had played no role in that settlement agreement.

## ***United States v. LTV Steel Co.***, 116 F. Supp. 2d 624 (W.D. Pa. 2000)

In this enforcement action, EPA alleged that LTV’s coke production plant in Pittsburgh had violated certain regulations of the Allegheny County Health Department (ACHD). The regulations in question are part of the Pennsylvania SIP. LTV moved to dismiss the case because it contended that it had previously entered into a settlement with the ACHD that had resolved the claims. The company maintained that EPA’s enforcement action was barred by the doctrine of *res judicata*.

The district court ruled that the doctrine of *res judicata* did not apply because the settlement did not constitute a final judgment on the merits, i.e., the parties had entered into the settlement prior to any judicial

or administrative proceeding, and EPA had played no role in that settlement. The court also rejected LTV's argument that the language of the Clean Air Act foreclosed EPA from engaging in overfiling.

The district court additionally ruled against LTV on three unrelated points. First, it disagreed with the company's argument that the Paperwork Reduction Act had been violated because the SIP provisions in question had not been assigned a control number by the Office of Management and Budget. Second, it ruled that the notices of violation (NOVs) issued in this case gave LTV sufficient notice of the alleged violations even though certain pre-1996 violations were not specifically identified. Third, it rejected LTV's claim that EPA could not seek penalties based on continuous emissions monitoring (CEM) data because the data were not an approved method of determining compliance for the SIP provisions in question.

## PSD Requirements

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***In re: Tennessee Valley Authority***, CAA Docket No. 00-6 (EAB, Sept. 15, 2000)

On September 15, 2000, EPA's Environmental Appeals Board (EAB or the Board) issued a 164-page opinion addressing the validity of the compliance order issued to the Tennessee Valley Authority (TVA) by EPA as part of its NSR enforcement initiative. The EAB affirmed most of the legal positions relied upon by EPA in issuing the order. The EAB's decision, which constitutes the definitive position of EPA on the legal and factual issues involved, addresses, among other things, the interpretation of key PSD/NSR provisions such as the exclusion for "routine maintenance, repair, and replacement" activities and the definition of a "significant net emissions increase."

In December 1999, TVA sought reconsideration of the compliance order by EPA. In May 2000, the Administrator issued a memorandum creating special procedures for review of the order and delegating to the EAB the authority to conduct the review proceeding. The special procedures involved a greatly expedited briefing schedule, limited opportunities for discovery by the parties, and the opportunity to present oral testimony before an EPA administrative law judge.

### C *The "Routine Maintenance, Repair, and Replacement" Exclusion*

The EAB upheld EPA Enforcement's interpretation of the "routine maintenance, repair, and replacement" (RMRR) exclusion and its position that none of TVA's projects were covered by the exclusion. The EAB concluded that the four-factor test advanced by EPA Enforcement for determining whether a project falls within the RMRR exclusion is consistent with the Act, the regulations, and case law. Under the four-factor test, EPA maintains that it will consider the nature and extent, purpose, frequency, and cost of a project in determining whether the project was routine.

The EAB ruled that TVA's interpretation of the exclusion, which focuses on whether a particular maintenance, repair, or replacement activity is commonplace within the relevant industrial category as set forth by EPA in the 1992 WEPCO rule, had no merit. According to the Board, TVA's interpretation would "swallow" the general rule that sources making changes that increase emissions are to meet PSD requirements. The Board then ruled that TVA had not met its burden of showing that the projects in question are "routine" under EPA Enforcement's interpretation. In applying the four-factor test, the EAB summarized the findings that it believed were most relevant in determining whether the RMRR exclusion applied.

With regard to the “nature and extent” of the projects, the Board characterized each of the 14 projects in question as being “massive” and involving the repair or replacement of a significant amount of boiler components. According to the Board, each project took many years to plan and required lengthy plant shutdowns (from 2 to 13 months) that substantially exceeded the time typically associated with forced outages (up to 5 days) or scheduled maintenance outages (up to 4 weeks).

According to the Board, the “purpose” of each project “generally was to significantly extend the life of the unit in question by as much as twenty years.” The Board also believed it was significant that all the projects were classified by TVA as being “capital” projects rather than “maintenance” projects.

With regard to “frequency,” the Board found that the replacements had generally not been performed before on the units. It also found that the evidence did not show that these replacements were common “in the lifetime of a unit.”

The Board believed that it was significant that the cost of each project exceeded \$2.5 million and that the cost would have consumed most or all of each plant’s operation and maintenance budget. The cost of the 14 projects ranged from \$2.6 million to \$57.1 million.

In concluding that none of the projects in question qualified as “routine,” the Board considered the evidence as a whole and did not indicate how the main factors or its findings relative to each factor should be weighed. According to the Board, “[t]he mere fact that a number of different facilities within an industry may have undertaken these projects strikes us as much less instructive with respect to whether a project under review should be considered ‘routine’ than the observation that this kind of replacement is, for an individual unit, an unusual or once or twice-in-a-lifetime occurrence.”

C *Fair Notice of EPA’s Interpretation of the RMRR Exclusion*

The Board also rejected TVA’s argument that it had not received “fair notice” of EPA’s restrictive interpretation of the RMRR exclusion. According to the EAB, EPA Enforcement’s four-factor test was “reasonably ascertainable” from the regulatory text even though it had not been mentioned by EPA Enforcement until decades after the exclusion was promulgated.

In this regard, the EAB seemed to confuse the question of whether EPA’s interpretation may have been one permissible reading of the regulations with the separate question of whether a source reading the regulations in the 1980s would have been aware of EPA’s supposedly narrow reading of the provision. The EAB also suggests that a source is required to seek an applicability determination from EPA whenever it is possible to read a regulation narrowly – a proposition that could flood EPA and state agencies with applicability determination requests.

C *Determining Whether There Is A “Significant Net Emissions Increase”*

The EAB rejected TVA’s argument that a unit’s maximum hourly emissions rate must increase before there can be a “significant net emissions increase” under the PSD/NSR program. According to the EAB, TVA’s interpretation is not supported by the PSD/NSR regulatory language and likewise is not mandated by the Act.

With regard to determining a unit’s pre-change actual emissions baseline, the EAB ruled against EPA Enforcement. According to EPA Enforcement, there is a strong presumption that the average annual

emissions level for *the two-year period immediately preceding the change* is representative of normal operations and thus will be used to establish the pre-change baseline. However, the EAB concluded that TVA's evidence regarding what constituted normal operations was sufficient to overcome any such presumption. The Board cited testimony that the two-year period with the highest emissions within the preceding five years would be most representative of normal operations because TVA always sought to operate its generator at full capacity, if possible.

The EAB also ruled that EPA Enforcement could not use the "actual-to-potential" test in this case to determine whether TVA's projects had caused a "significant net emissions increase." EAB did not rule on the general validity of the actual-to-potential test but instead based its ruling on the language of the compliance order. In that order, EPA Enforcement had stated that the appropriate test was to compare pre-change actual emissions to post-change "projected actual emissions." Because EPA Enforcement had not based its compliance order on the actual-to-potential test, the EAB declined to let it use that more stringent test in the review proceeding.

At the same time, the EAB rejected TVA's argument that post-change emissions in this case should be based on post-change historical operating data. The EAB stated that, because the Act and regulations contemplate that a source must predict future events to determine whether a PSD/NSR permit will be required by a project, a finding of a violation should be based upon what the source could reasonably have predicted before beginning construction of the project.

After the EAB applied an actual-to-projected future actual test to the projects involved in this case, it concluded that EPA Enforcement had failed to show that many of the projects resulted in a "significant net emissions increase." EPA Enforcement also abandoned some of its claims with regard to particular pollutants. As a result, the EAB concluded that EPA Enforcement had sustained its burden of establishing violations alleged in the compliance order in 21 instances. The EAB found that approximately the same number of allegations had not been adequately supported by EPA Enforcement and therefore vacated those allegations.

***In re: Steel Dynamics, Inc.***, PSD Appeal Nos. 99-4 and 99-5 (EAB, June 22, 2000)

EPA's Environmental Appeals Board (EAB) remanded a PSD permit authorizing the construction of a new steel mill to the Indiana Department of Environmental Management (IDEM). The EAB ruled that the permit was deficient in three respects:

- C the choice of BACT with regard to NO<sub>x</sub> emissions from the reheat furnace
- C the form of BACT limits for NO<sub>x</sub> and CO emissions from the electric arc furnace (EAF)
- C the determination of whether lead emissions exceeded the PSD applicability threshold level

The case involved challenges by a labor union and a citizens group to IDEM's issuance of the permit for the construction of the new steel mill in Whitley County, Indiana. EPA's Office of Air and Radiation and EPA Region V jointly participated in the case as an *amicus curiae*, supporting the petitioners on certain issues.

The petitioners, supported by EPA, challenged IDEM's choice of combustion controls as constituting BACT and its technical and economic analysis of the options available. They specifically

contended that selective catalytic reduction (SCR) should constitute BACT for NOx emissions from the reheat furnace. The EAB agreed that IDEM's cost-effectiveness analysis of SCR technology was inadequate. As a result, the EAB remanded the issue to IDEM so that it could conduct a new cost-effectiveness analysis and consider and respond to public comments on its determination.

Petitioners and EPA maintained that both hourly limits and production limits are necessary to ensure that NOx and CO emissions from EAFs are adequately controlled regardless of the production rate or operational conditions at the facility. IDEM had imposed only hourly emission limits in terms of "lb/hr" for the pollutants, rather than either (1) production limits (in "lb/ton" or "lb/MMBtu") or (2) production rates alone. The EAB concluded that the EAF limits should be remanded to IDEM so that it can explain why the form of the limits it chose should be completely different from the limits of other steel mills.

Although IDEM determined that the facility need not install BACT to control lead emissions because the projected lead levels were below the significance level for the PSD program (0.6 ton/yr), the EAB concluded that the determination was based on data not contained in the record. Moreover, the EAB concluded that IDEM had failed to consider the union's detailed alternative calculation of the facility's potential to emit lead. IDEM's determination was remanded so that it could provide a clear rationale for its determination in the record and specifically consider the union's alternative calculation.

***See Sur Contra La Contaminacion v. EPA***, 202 F.3d 443 (1st Cir. 2000) (Environmental Justice).  
***See Public Service Company of Colorado v. EPA***, 225 F.3d 1144 (10th Cir. 2000) (Justiciability).

***See In the Matter of Pacific Coast Building Products, Inc.***, Permit No. A00011 (January 10, 2000) (Title V Permit Program).

***See In re: Knauf Fiber Glass, GmbH***, PSD Appeal Nos. 99-8 through 99-72 (EAB, March 14, 2000) (Environmental Justice).

## **SIP Provision Enforcement**

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***See United States v. LTV Steel Co.***, 118 F. Supp. 2d 827 (N.D. Ohio 2000) (Overfiling).

***See United States v. LTV Steel Co.***, 116 F. Supp. 2d 624 (W.D. Pa. 2000) (Overfiling).

## **Statute of Limitations**

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***See United States v. Brotech Corp.***, No. Civ.A. 00-2428, 2000 WL 1368023 (E.D. Pa. Sept. 19, 2000) ("Continuing Violation").

# Title V Permit Program

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## *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000)

On April 14, 2000, a three-judge panel of the D.C. Circuit issued a decision holding that EPA's September 1998 "Periodic Monitoring Guidance for Title V Operating Permits" must be set aside in its entirety. The court's opinion contains a number of important rulings, three of which are highlighted below.

First, the court ruled that, contrary to EPA's contentions, guidance documents that are treated by an agency as binding may constitute judicially reviewable "final agency actions." Second, the opinion makes clear that EPA's practice of issuing guidance documents or other interpretations without following notice and comment procedures is unlawful where the effect of the guidance document or interpretation is to amend duly promulgated regulations and/or other prior regulatory interpretations. Third, the opinion expressly holds that the Periodic Monitoring Guidance is invalid because it significantly broadens EPA's Part 70 regulations by compelling state permitting authorities to impose more stringent periodic monitoring requirements in Title V permits than originally provided for in those regulations.

The industry petitioners argued, *inter alia*, that the guidance document was an unlawful attempt by EPA to revise its Part 70 regulations with regard to the monitoring requirements states are to include in Part 70 permits. The petitioners maintained that, under the Part 70 regulations as promulgated in 1992, the states are to play a limited, gap-filling role with regard to periodic monitoring. In particular, the states are to prescribe additional monitoring in connection with a particular federal or state standard only where the standard did not contain any monitoring requirement or it is necessary to prescribe a frequency for the monitoring contained in the standard. The petitioners further argued that EPA's guidance document – in conflict with the Part 70 rule and EPA's previous interpretation – directed the States to exercise wide-ranging authority to examine monitoring requirements in the applicable standard and prescribe additional monitoring.

As an initial matter, the court rejected EPA's position that a guidance document cannot be a final agency action for judicial review purposes because it necessarily is not binding on regulated parties. The court explained that, even though a guidance or other interpretive document may expressly state that it is not "binding," the practical effect of the document may be to bind states or regulated entities. The court further explained that, in order to be a final agency action, an action must mark the consummation of the agency's decisionmaking process and determine rights or obligations or one from which legal consequences flow. The court then ruled that the Guidance was, in fact, a "final agency action" for judicial review purposes.

In addition, the court rejected EPA's argument that the Guidance was not ripe for review because a court's review would be more focussed in a challenge to a particular permit. The court concluded that whether the Guidance properly instructed state agencies regarding how to conduct sufficiency reviews of proposed monitoring will not depend on the specific facts involving any one permit.

The court disapprovingly described EPA's practice of issuing regulatory interpretations that alter or expand requirements without providing an opportunity for notice and comment. The court stated that the practice may allow the agency to "think" that it is "immunizing its lawmaking from judicial review." The court emphasized that EPA may not use a guidance document to amend a duly promulgated

regulation. The court then analyzed the language of the Part 70 regulations and the Guidance to determine whether the Guidance simply spells out “dut[ies] fairly encompassed within” the regulations or whether it instead purports to “carry the force and effect of law.”

After examining the language of the Part 70 regulations addressing periodic monitoring requirements, the court agreed with petitioners that states are to play a gap-filling role in prescribing periodic monitoring. The court concluded that, by contrast, the Guidance directs the states to undertake wide-ranging sufficiency reviews and to upgrade existing monitoring requirements pursuant to vague criteria contained in the Guidance – even where the relevant standard already provides for periodic monitoring. As a result, the court concluded that the effect of the Guidance was to amend the Part 70 regulations in violation of notice and comment procedures.

Although the petitioners had sought to overturn only certain portions of the Guidance, the court independently concluded that the Guidance “should be set aside in its entirety.” The court also stated that state permitting authorities may not rely on the Guidance or the Part 70 regulatory language to “require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless the standard requires no periodic testing, specifies no frequency, or requires only a one-time test.”

***In the Matter of Pacific Coast Building Products, Inc.***, Permit No. A00011 (January 10, 2000)

The EPA Administrator denied a petition requesting that EPA object to the issuance of a Title V permit for a wallboard manufacturing facility in Nevada. The Administrator’s decision addressed streamlining issues under EPA’s White Paper No. 2 and the standard to be applied in reviewing state or local BACT determinations for inclusion in Title V permits.

The petition was filed pursuant to section 505(b)(2) of the Act by an individual citizen seeking to have EPA object to the facility’s Title V permit. The permit was issued by the local permitting agency – the Clark County Health Department (“CCHD”). The petition alleged, among other things, that the permit was unlawful for the following reasons: (1) it was not based on approved and applicable SIP provisions; and (2) the CCHD’s BACT determination for a preconstruction permit was deficient.

The Administrator ruled that, although the permit focussed on the CCHD’s non-SIP approved provisions rather than approved SIP requirements, this approach is entirely permissible under EPA’s White Paper No. 2. The decision noted that White Paper No. 2 specifically allows the use of a non-SIP approved requirement as a streamlined requirement that would subsume federally enforceable requirements when the non-approved or “state only” requirement is at least as stringent as any applicable federal requirement that it would subsume. In this case, EPA determined that the CCHD requirements represent an appropriate streamlining of the SIP provisions.

In addition, the Administrator declined to second-guess the CCHD with regard to the BACT determination contained in the facility’s preconstruction permit. The decision makes clear that EPA’s authority to overrule state BACT determinations is significantly limited:

In determining BACT under a preconstruction review program as in implementing other aspects of SIP preconstruction review programs, a permitting authority exercises considerable discretion. Thus, EPA lacks authority to take corrective action merely

because the Agency disagrees with a permitting authority's lawful exercise of discretion in making BACT-related determinations. The permitting authority's discretion is bounded, however, by the fundamental requirements of administrative law that agency decisions not be arbitrary or capricious, be beyond statutory authority, or fail to comply with applicable procedures.

***In the Matter of Polypropylene Unit, Baton Rouge Polyolefins Plant, Exxon Chemical Americas***, Petition No. 6-00-1, 65 Fed. Reg. 26,380 (May 9, 2000)

The EPA Administrator denied a petition filed by environmental groups under section 505(b)(2) of the Act requesting that EPA object to a Title V permit issued by the Louisiana Department of Environmental Quality (LDEQ). The petitioners contended (1) that the permit violated Title VI of the Civil Rights Act and EPA's environmental justice regulations and (2) that the permit violated the SIP requirement that "reasonable further progress" toward attaining the ozone NAAQS be made.

The environmental groups argued, among other things, that the granting of the permit would have a disparate impact on minority populations within the vicinity of the facility. In response, the Administrator stated that, in order to justify EPA's objection to the permit, the petitioners must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of the Louisiana SIP. The Administrator concluded that "[w]hile there may be authority under the Clean Air Act to consider civil rights issues in some circumstances to justify objection to a Title V permit, Petitioners have not shown that their particular civil rights concerns are grounds under the Clean Air Act for objection to the Exxon Permit." Accordingly, the Administrator denied this portion of the petition. The Administrator further noted that the environmental justice claims raised in a separate complaint filed with EPA's Office of Civil Rights are still pending before that office.

The petitioners also maintained that the permit violated the "reasonable further progress" requirement in the Louisiana SIP in that the facility is located in a severe nonattainment area and issuance of the permit allegedly would "hinder" efforts to attain the ozone NAAQS. In response, the Administrator stated that the "reasonable further progress" provision is a planning requirement for states containing nonattainment areas and that it is not an "applicable requirement" for particular sources "within the meaning and purview of the Title V operating permit program."

***In the Matter of: PacifiCorp's Jim Bridger and Naughton Utility Steam Generating Plants***, Petition No. VIII-00-1 (Nov. 16, 2000)

The EPA Administrator issued a decision in response to a petition requesting that it object to certain Part 70 permits pursuant to section 505(b)(2) of the Act. The decision discussed two key sets of issues within the Title V permitting program: (1) what monitoring can be required by EPA to satisfy Part 70 requirements; and (2) how may compliance during malfunction conditions be addressed in Part 70 permits. The Administrator granted the petition with regard to the monitoring issues, but denied it with regard to the malfunction compliance issues.

- *EPA Ruled That the Permit's Monitoring Provisions Were Insufficient to Assure Compliance*

As explained below, EPA's decision is of great interest because it asserts that the Agency has the authority to require more stringent periodic monitoring in a Part 70 permit even where the relevant applicable requirement specifies what periodic monitoring should be conducted. However, in *Appalachian*

*Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), the D.C. Circuit expressly held that EPA lacked such authority.

Pursuant to section 505(b)(2), the Wyoming Outdoor Council (WOC) petitioned EPA to exercise its authority to object to two Part 70 permits sought by PacifiCorp for two of its electric power plants. The WOC argued that the monitoring provisions in the two permits were deficient in two respects. First, the WOC alleged that use of continuous opacity monitoring systems (COMS) is required by Title IV acid rain provisions and that the WDEQ had improperly exempted the two facilities in question from the applicable opacity monitoring requirements. Second, the WOC argued that the monitoring provisions in the permits otherwise failed to assure compliance with the SIP opacity limit as required by Part 70.

In its decision, EPA agreed with the WOC that each of the facilities should have been required to use a COMS. EPA ruled that, because it had never delegated its authority to approve alternative monitoring methods to WDEQ, the exemptions granted by the WDEQ were unlawful. Furthermore, the Agency ruled that it had the authority to require more stringent periodic monitoring requirements than set forth in the permits even though the permits contained the periodic monitoring requirements explicitly included in the relevant applicable requirement. In doing so, it relied not on the periodic monitoring provision in Part 70, but on more general language in another Part 70 provision – 40 C.F.R. § 70.6(c)(1).

Under the Title V program, periodic monitoring is provided for in 40 C.F.R. § 70.6(a)(3). Subparagraph (A) of that section states that a Part 70 permit is to contain the monitoring or testing provisions required by the relevant applicable requirements. Subparagraph (B) provides that, where the applicable requirement does not address periodic monitoring or testing, the permitting agency (or EPA itself) is to prescribe periodic monitoring requirements solely as a gap-filling measure.

The *Appalachian Power* case involved challenges by industry parties to EPA's 1998 Periodic Monitoring Guidance. In that guidance, the Agency stated that, even where the relevant applicable requirement provides for periodic monitoring or testing, the permitting agency is to require more stringent periodic monitoring or testing if it believes that such requirements are necessary to ensure that the monitoring or testing will be sufficient to assure compliance. The industry petitioners maintained that the guidance was unlawful because it purported to amend the language of the Part 70 regulations without meeting notice-and-comment rulemaking requirements. The court in *Appalachian Power* rejected EPA's position that the guidance was consistent with the regulatory language and ruled that the guidance was unlawful because it violated notice- and-comment rulemaking requirements. In doing so, the court expressly rejected EPA's "sufficiency" argument, i.e., that the Part 70 regulations authorized state permitting agencies to require more stringent periodic monitoring or testing to assure that monitoring or testing would be sufficient to assure compliance:

Notwithstanding the *Appalachian Power* decision, EPA maintained in the *PacifiCorp* decision that it has the power to require more stringent periodic monitoring or testing even where the applicable requirement sets forth the periodic monitoring or testing that is required. To support its position, EPA sought to rely on section 70.6(c)(1), which provides that all Part 70 permits shall contain, "[c]onsistent with paragraph (a)(3) of this section, compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." According to EPA, where the applicable requirement already requires periodic testing or monitoring, "the separate regulatory standard at section 70.6(c)(1) applies instead" of section 70.6(a)(3) and authorizes EPA or permitting agencies to require more stringent periodic monitoring.

EPA's legal position in this decision directly conflicts with the D.C. Circuit's holding in *Appalachian Power*. There the court expressly ruled that EPA lacks the very power that it asserts in this decision it possesses. Notably, in the *Appalachian Power* case, EPA did not even attempt to rely on the language in section 70.6(c)(1), despite the fact that its Part 70 "sufficiency" theory was directly before the court and the court's ruling would be dispositive of the issue in the future.

- *EPA Ruled That It Could Not Overturn "Excess Emissions" Provisions In The Permit That Are Consistent With Approved SIP Provisions*

In addition to monitoring issues, the *PacifiCorp* decision addressed the validity of permit provisions dealing with excess emissions during malfunction conditions. The Administrator denied the petition with regard to the excess emissions/malfunction issues and made clear that the scope of prior "excess emissions" policy documents is limited.

Pursuant to section 505(b)(2), the Wyoming Outdoor Council (WOC) petitioned EPA to exercise its authority to object to two of PacifiCorp's permits. The WOC attacked certain permit provisions as constituting "automatic" exemptions from SIP emission limitations in violation of EPA's "excess emissions" policy as set forth in policy documents issued in 1982 and 1983 (the "Bennett memoranda"). According to the WOC, the permit provisions impermissibly fail to require that the source show that the event is truly "unavoidable" as opposed to being beyond its control. Further, the WOC argued that the provision impermissibly fails to provide that, if the source met its burden, the event would merely become eligible for an agency's exercise of enforcement discretion, rather than being deemed not to be a violation.

In its decision, EPA explained that the language in the challenged permit provision had been taken directly from the EPA-approved Wyoming SIP provision. EPA stated that, regardless of whether the permit provision met the criteria set forth in the Bennett memoranda, "EPA could not properly object to a permit term that is derived from a provision of the federally approved SIP" because that provision is inherently a part of the "applicable requirement" that is being reflected in the Part 70 permit. In other words, EPA acknowledged that, although it may apply its excess emissions policy in determining whether to approve SIP provisions, that policy cannot be used to alter already approved SIP provisions (without additional notice and comment rulemaking) and cannot overrule permit provisions that are consistent with existing SIP language.

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