

Supreme Court Hears Arguments on Validity of EPA's Revised Ozone and PM Standards

On November 7, the U.S. Supreme Court heard arguments from attorneys representing industry, EPA, and the states in two closely related cases concerning the validity of EPA's 1997 regulations revising the National Ambient Air Quality Standards (NAAQSs) for ozone and particulate matter (PM). *Browner v. American Trucking Ass'ns*, S.Ct. No. 99-1257; *American Trucking Ass'ns v. Browner*, S.Ct. No. 99-1426.

The Supreme Court had granted EPA's petition seeking review of the D.C. Circuit's decision overturning the revised standards (No. 99-1257). EPA challenged the court of appeals' ruling that the standards were unlawful because EPA's interpretation of the Act violated the constitutional "nondelegation doctrine," i.e., the doctrine that Congress may not delegate its legislative powers to an agency. The court had concluded that EPA had not identified "intelligible principles" to govern its standard-setting and was therefore improperly exercising Congress' powers. EPA also challenged that part of the D.C. Circuit's decision in which it ruled that Subpart 2 of Part D of the Act, which was added by the 1990 amendments, limited EPA's ability to promulgate and implement a revised ozone standard. In addition, the Supreme Court granted the cross-petition of industry parties to review the decision because the court had ruled that EPA may not consider costs in determining at what level to set the standard (No. 99-1426).

In general, the oral arguments before the Supreme Court focused more on whether EPA was required to consider costs in setting NAAQSs rather than on whether EPA's approach violated the nondelegation doctrine. Some of the Justices seemed skeptical of the basis for the D.C. Circuit's

ruling on the nondelegation doctrine and appeared to believe that EPA's action in setting the revised standards should have instead been reviewed under the traditional "arbitrary and capricious" test. Certain Justices also seemed skeptical of industry's position that consideration of "public health" in determining the appropriate standards necessarily entailed consideration of costs. In addition, some of the Justices seemed to be interested in the argument of the State respondents that Subpart 2 foreclosed EPA from revising the existing ozone standard.

Opening Argument by EPA in First Case

Seth Waxman, the Solicitor General, argued on behalf of EPA in both cases. His approach was to maintain that EPA's choice in arriving at the numeric level for a NAAQS was guided by general principles and procedures set forth in the statute and that case law did not require that the statute or EPA itself specify determinate criteria. In explaining how EPA sets NAAQSs, he referred to the statutorily-required criteria documents prepared by the Agency and review by the independent Clean Air Scientific Advisory Committee (CASAC), which provides recommendations to the Agency. He further explained that, in determining whether a standard should be revised, EPA determines whether there are "medically significant health effects" on the population caused by the pollutant.

Waxman stated that the Act requires that EPA establish NAAQSs that are "requisite to protect the public health" "allowing for an adequate margin of safety." In response to a question from Justice O'Connor as to what "requisite" means, he

answered that it means “sufficient, but not more than required.” In response to a question concerning whether EPA considers costs in arriving at the standard, Waxman said that setting and implementing a NAAQS is a two-step process. First, EPA determines what is requisite by examining the health effects of the pollutant without considering costs. Second, each state is to consider costs and other factors in determining how the standard will be implemented through its SIP and applied to individual sources. According to Waxman, the real question in this case is whether EPA had been “arbitrary and capricious” in setting the standards, not whether there was a lack of “intelligible principles” to guide the Agency.

Responsive Argument by Industry in First Case

Edward Warren represented the industry petitioners in both cases. Justice Souter asked him why the case should be decided based on the nondelegation doctrine, rather than on the “arbitrary and capricious” test. Warren responded by stating that it is first necessary to identify intelligible principles before there is a basis for undertaking judicial review and applying the “arbitrary and capricious” test. According to Warren, the statute does set forth an intelligible principle to be applied, and that intelligible principle is derived from the statutory directive to protect “public health.” He argued that the term “public health” must be interpreted to involve an evaluation of costs as well as the consideration of other “countervailing factors.” He maintained that the problems in the case are caused by the D.C. Circuit’s 1980 decision in *Lead Industries*, in which the court held that costs could not be considered by EPA in setting NAAQSs.

Justice Souter pressed Warren to explain how consideration of costs could be derived from the term “public health,” and Justices Scalia and Breyer questioned whether simply adding other factors would somehow make the standard-setting process more determinate. Justice Scalia asked whether, although the term “requisite to protect the public health” is too vague under industry’s theory,

“it would be all right if it said, are requisite to protect the public health provided that it doesn’t cost too much.”

Responsive Argument of the States in First Case

Judith French of the State of Ohio represented the States as respondents in the first case. She focused solely on the issue of whether Subpart 2 of Part D, which sets forth a complex scheme containing classifications, requirements, and deadlines for ozone nonattainment areas, forecloses EPA from revising the existing ozone standard. She contended that Congress, by enacting Subpart 2 in the 1990 amendments, had eliminated EPA’s ability to revise the ozone standard in effect in 1990 and that Congress would need to amend the statute before EPA could issue a revised ozone standard.

The questioning was generally light on this issue, and Justice Scalia’s questioning was helpful to French. One of the Justices asked whether the position that Subpart 2 foreclosed further revisions of the ozone standard conflicted with the statutory provision directing EPA to review each NAAQS every five years and revise it if appropriate. She answered that the specific language of Subpart 2 for ozone essentially trumped the more general language in the periodic review provision. In response to a question concerning whether a state is “home free” after it attains the ozone standard in effect in 1990, French replied in the affirmative and indicated that all a state would need to do is to ensure that it will maintain the standard.

Rebuttal Argument of EPA in First Case

Seth Waxman argued that the issue concerning the impact of Subpart 2 had not properly been before the D.C. Circuit and should not be considered by the Supreme Court. He contended that the D.C. Circuit had based its ruling on language in the preamble to the final rule and that there was no final agency action to review.

Opening Argument of Industry in Second Case

Edward Warren indicated that he would be focussing on the proper interpretation of the term “public health.” In response to a question from Chief Justice Rehnquist regarding whether the Administrator was entitled to deference in interpreting the term, Warren maintained that the Administrator could not lawfully interpret the term to exclude consideration of countervailing factors. He explained that these countervailing factors would be both health factors and economic factors.

Warren also contended that the term “public health” should be given its implicit, pre-1970 meaning in the Act, i.e., cost/benefit considerations should be included. However, Justice Breyer pressed Warren to explain how a “cost/benefit analysis” could be “imported” into the term “public health.” Justice Ginsburg stated that “[i]t just seems to me that you are adding something that will create another morass, many more things that can be attacked than under the *Lead Industries* regime.” Warren responded by arguing that there would not have to be a formal cost/benefit analysis and that industry was simply saying that the Administrator cannot “take countervailing factors off the table.” In response to a question regarding precisely what “public health” means in this context, he answered that “[p]ublic health contemplates a consideration of competing factors, including costs, in seeking to reduce population sickness and increase longevity.”

Chief Justice Rehnquist asked why there is a problem, since *Lead Industries* has been followed for 20 years and everyone has been able to live with that regime. Warren indicated that the problem is that we are now in the “last mile” of pollution control. He explained that, with regard at least to ozone and PM, EPA has already extensively regulated those pollutants but is now seeking to control “the last one percent.” At that point, cost considerations become even more important than before.

Responsive Argument of EPA in Second Case

Seth Waxman first reiterated that the plain meaning of the statute was that costs could only be considered during the implementation phase. In response to a question, he stated that EPA would consider countervailing health factors, e.g., whether ground level ozone may actually diminish the probability that persons will contract skin cancer. He acknowledged that the Agency was now acquiescing in the decision of the D.C. Circuit on this specific point. He further stated that EPA will consider any countervailing health or economic factors so long as they are caused by the presence of a pollutant in the air.

Waxman attacked industry’s position that costs must be considered at the standard-setting stage by referring to the Supreme Court’s *Union Electric* decision, which he maintained held that EPA need not consider economic feasibility in setting standards unless Congress has expressly provided for such consideration. He also quoted from the Court’s “Benzene” decision, where it stated that “when Congress has intended that an agency engage in cost/benefit analysis, it has clearly indicated such intent on the face of the statute.”

Justice O’Connor pressed Waxman as to why the Agency would not in some situation say that the level of a pollutant should be reduced to zero because that would be most beneficial for protecting public health. He answered that the Agency would never get to zero because there would be no need to do so in order to end treatable diseases or treatable effects.

Summary

Although predicting the outcome of a Supreme Court case is inherently risky, it appears that the Court might remand the cases to the D.C. Circuit and direct it to review both the ozone and PM standards in accordance with the “arbitrary and capricious” test. However, if the Supreme Court rules that Subpart 2 prevents EPA from revising the ozone standard, that ruling would cause the ozone

standard to be vacated as being unauthorized under the Act. '

EPA Issues Decision on Part 70 Monitoring That Conflicts with Appalachian Power Decision

On November 16, 2000, the EPA Administrator signed a decision that 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. (We address the second issue below in a separate article in this bimonthly report.) The 25-page decision responded to a petition filed by a citizen group pursuant to section 505(b)(2) of the Act requesting that EPA object to two Part 70 permits. *In the Matter of: PacifiCorp's Jim Bridger and Naughton Utility Steam Generating Plants*, Petition No. VIII-00-1. In that decision, the Administrator granted the petition with regard to the monitoring issues.

As explained below, EPA's decision is of great interest because the Agency asserts that it 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. Notably, in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), the court expressly held that EPA lacked such authority.

EPA's decision on the petition for objections arose from PacifiCorp's efforts to obtain Part 70 permits for two of its electric power plants. During the public comment process on the proposed permits, the Wyoming Outdoor Council (WOC) contended that the proposed permits unlawfully failed to require that continuous opacity monitoring systems (COMS) be used on the units as required by the Title IV acid rain program and Part 70. After considering all the public comments, the Wyoming Department of Environmental Quality (WDEQ) issued the permits to PacifiCorp in April 1998. EPA reviewed the permits and did not

object to them within the 45-day period provided in section 505(b)(1).

WOC's Petition for Objections

Pursuant to section 505(b)(2), the WOC subsequently petitioned EPA to exercise its authority to object to the permits. The WOC argued in its petition that monitoring compliance with the opacity limit in the Wyoming SIP must be conducted using a COMS, not through quarterly Method 9 readings as provided in the contested permit terms. It contended that the monitoring provisions in the two permits were deficient in two respects. First, the WOC alleged that use of a 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.

EPA's Decision on Monitoring

In its decision, EPA agreed with the WOC that each of the facilities should have been required to use a COMS. First, 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. EPA indicated that the company could submit a new petition to it requesting that alternative monitoring methods be approved and that it would take expeditious action. (The company had previously submitted such a petition, but EPA had failed to take action on it.)

Second, 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 provision in Part 70.

Under the Title V program, periodic monitoring is provided for in 40 C.F.R. § 70.6(a)(3)(i). 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) addresses situations where an applicable requirement does not provide for periodic monitoring or testing: “Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring . . . , [each permit shall contain] periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit” Thus, the regulations provide that, solely as a gap-filling measure where the applicable requirement does not address periodic monitoring or testing, the permitting agency (or EPA itself) is to prescribe periodic monitoring requirements.

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. In particular, they argued that, although the promulgated regulatory language states that a permitting agency is to prescribe periodic monitoring requirements only where the applicable requirement does not, EPA’s guidance states that a permitting agency can do so whenever it believes that more stringent periodic monitoring requirements is advisable.

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:

Nothing on the face of the regulation or in EPA’s commentary at the time said anything about giving State authorities a roving commission to pore over existing State and federal standards, to decide which are deficient, and to use the permit system to amend, supplement, alter or expand the extent and frequency of testing already provided.

208 F.3d at 1026.

Notwithstanding the D.C. Circuit’s ruling in *Appalachian Power*, EPA stated 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. In this particular case, EPA determined that the periodic monitoring provided in the challenged permit terms was not sufficient to assure compliance with the opacity limit in the SIP. It therefore concluded that the periodic monitoring provisions in the permits were invalid.

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.

The Agency has informally indicated that it might issue guidance addressing its interpretation of section 70.6(c)(1) – guidance which would state that the provision grants permitting agencies and EPA authority to require more stringent periodic monitoring even where the applicable requirement specifies periodic monitoring requirements. The *PacifiCorp* decision appears to be an initial effort to set forth that interpretation. '

EPA Upholds Inclusion of Malfunction Provision That Exempts Excess Emissions in Part 70 Permits

As indicated in the previous article, EPA recently issued an important decision in response to a petition requesting that it object to certain Part 70 permits. *In the Matter of: PacifiCorp's Jim Bridger and Naughton Utility Steam Generating Plants*, Petition No. VIII-00-1 (Nov. 16, 2000). In addition to monitoring issues, that decision also 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.

During the public comment process on the proposed permits, the Wyoming Outdoor Council (WOC) contended that the proposed permits impermissibly exempted excess emissions from SIP emission limitations during equipment malfunctions and other conditions. The challenged excess emissions provisions in the two permits read as

follows: "Emissions in excess of established regulation limits as a direct result of malfunction or abnormal conditions or breakdown of a process, control or related operating equipment beyond the control of the [operator] shall not be deemed to be in violation of such regulations," if the event is reported within 24 hours and corrective action is taken. EPA reviewed the permits but did not object to them within the 45-day period provided in section 505(b)(1). Pursuant to section 505(b)(2), the WOC subsequently petitioned EPA to exercise its authority to object to the permits.

The WOC attacked the 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 indicated that it largely agreed with the WOC's description of its excess emissions policy but that it could not grant any relief with regard to this part of the petition. 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. (EPA also indicated that WDEQ's actual enforcement of the excess emissions provision may make the challenged language consistent with EPA's policy in any event.) 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. ‘

Court of Appeals Overturns EPA Determination That Petroleum Refinery NSPS Applies to Power Plant Combustion Turbines Adjacent to a Refinery

The U.S. Court of Appeals for the Third Circuit recently 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. *Star Enterprise and Texaco Inc. v. EPA*, No. 98-6321 (3rd Cir., Dec. 7, 2000). The court concluded that EPA had impermissibly attempted to expand the scope of the NSPS’s applicability beyond what was originally intended. The decision may increase the potential for other refineries to challenge Subpart J applicability determinations where gas streams result from processes other than petroleum refining processes or contain constituents different from the typical refinery fuel gases historically regulated 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.

After Motiva made extensive submissions and had lengthy discussions with EPA, the Agency 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 SO₂. 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 court also indicated that the very different chemical composition of synthesis gas compared to the typical refinery fuel gases regulated under Subpart J further suggests that EPA’s interpretation is inconsistent with the regulation.

Morgan Lewis lawyers represented the companies throughout this litigation. ‘

District Court Rules That Statute of Limitations Blocks Recovery of Penalties for Failure to Obtain Preconstruction Permit

In a Clean Air Act enforcement action brought by EPA, a federal district court has 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. *United States v. Brotech Corp.*, No. Civ. A. 00-2428, 2000 WL 1368023 (E.D. Pa. Sept. 19, 2000). The court's decision is significant in that it provides additional support for the important proposition that EPA's claims that a company has failed to obtain a PSD or other type of construction permit will be barred unless EPA brings an action within five years after the alleged violation initially occurred.

Statute of Limitations Issue

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 City of Philadelphia intervened as a plaintiff in support of EPA.

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. According to the company, the claims accrued, if at all, when those six pieces of equipment were installed, which was more than five years before EPA filed its complaint. 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-95-1854DFL, 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.

Notice Issue

The court also addressed an unrelated issue concerning the notice requirement in section 113(a)(1) of the Act. Under that provision, if EPA finds that a person has violated a SIP or permit, EPA must notify the person and the state in question of the finding at least 30 days before filing a civil action or taking administrative action. In this case, EPA issued a Notice of Violation (NOV) to the company several months before filing its complaint but did not include a particular allegation that the company had violated a New Source Performance Standard (NSPS) at its facility. The company moved to dismiss the NSPS claim because it was not set forth in the NOV. However, the court noted that, when EPA issued the NOV, it simultaneously sent a letter to the company in which it mentioned the alleged violation of the NSPS. The court concluded that the letter provided sufficient notice to the company and that it was not necessary that the notice be in the form of a formal NOV. '