

## D.C. Circuit Upholds EPA's NOx SIP Call

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.<sup>1/</sup> *Michigan v. EPA*, Nos. 98-1497, *et al.*, 2000 WL 1806450 (D.C. Cir. March 3, 2000). 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 court's March 3 decision and the parties' subsequent response to it have created a great amount of uncertainty and have presented additional issues for the court to resolve. Industry, state, and labor petitioners have filed two separate petitions for rehearing with the court requesting that the panel's decision be reconsidered by all the judges on the D.C. Circuit. EPA has filed a motion with the court to lift the stay of the rule that had been granted by the court in May 1999. (The March 3 decision did not address the stay.) EPA's motion also requests that the states covered by the SIP call be required to submit their SIP revisions under the rule by September 1, 2000. (The original deadline for the submissions was September 1, 1999.) EPA additionally maintains that the original May 1, 2003 deadline for compliance with the NOx

budgets should remain in place. The petitions for rehearing and EPA's motion are all currently pending before the court.

We review the court's principal rulings in the March 3 decision below:

### **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.

### **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.

### **EPA's Current Approach Does Not Impermissibly Conflict with Past Approach**

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1/ The NOx SIP Call Rule is discussed in the September 1998 *Washington Report* at WR-206.

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.

### **"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. In the rule, 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.

Judge Sentelle dissented on this issue and would have overturned the entire rule because of EPA's cost-effectiveness approach. He stated that Congress had decreed that the sole criterion for determining whether a contribution was significant was the amount of pollution being contributed but that EPA was instead using the cost of alleviating the pollution. He maintained that the majority had not shown that there is a reasonable interpretation of the statute that relates a "significant contribution" to cost-effectiveness. Because he would have invalidated the rule on this basis, he did not address

any of the other issues decided by the remaining two judges.

### **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.

### **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'n's* 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, unlike the situation with the revised ozone and particulate matter standards in *American Trucking Ass'n's*, 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.

### **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. According to the court, the budgets simply provide the states a projection of what reductions will be necessary so that interstate pollutant transport will be sufficiently reduced.

### **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. '

## Court of Appeals Limits Review of Environmental Justice Executive Order

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

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. The order states that "to the greatest extent practicable and permitted by law, . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." 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 particular, the court ruled that EPA was not required to conduct a full impact analysis of SO<sub>2</sub> emissions because the plant proposed to use a novel combination of control devices and that EPA had not improperly relied on outdated data. '

## District Court Concludes That Citizen Suit May Proceed Despite Defendant's Prior Settlement with State Agency

**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. *Citizens Legal Environmental Action Network v. Premium Standard Farms*, Civ. No. 97-6073, 2000 WL 220464 (W.D. Mo. Feb. 23, 2000). This decision illustrates the fact that a company entering into a broadly worded consent decree with a state agency may not be protected from a related citizen suit.

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 certain of

the company's confined animal feeding operations (CAFOs) should have applied for Title V permits. A few months after the citizen suit was filed, the State of Missouri 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 cases that have already been decided. The company maintained that the doctrine applied because the citizens were suing to vindicate the interests of the State and therefore they were "in privity" with the State. According to the company, the citizens should be bound by the terms of the consent decree, which broadly apply to all claims "arising from facts known to the state at the time of the settlement." In addition, the company contended that, in any event, *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. In this case, the court concluded that the state had diligently prosecuted all the claims specifically mentioned in its complaint. However, the court further concluded that the broad release of all claims "arising from facts known to the state at the time of the settlement" did not constitute diligent prosecution of claims not specifically referenced in the state's complaint and therefore that *res judicata* would not bar CLEAN from proceeding with the remainder of its citizen suit claims. '

## EPA Denies Petition to Object to Title V Permit

The Administrator of EPA denied a petition requesting that EPA object to the issuance of a Title V permit for a wallboard manufacturing facility in Nevada. *In the Matter of Pacific Coast Building Products, Inc.*, Permit No. A00011 (January 10, 2000). 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 should be revisited and found to be deficient.

The Administrator ruled that, although the permit focused 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.<sup>2/</sup> 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 relevant preconstruction permit. The decision states as follows:

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. Consequently, preconstruction permits issued by CCHD must conform to the applicable requirements of the Clean Air Act and the SIP, and failure to do so may result in corrective action by EPA.

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2/ An Issue Analysis (July 1996) discussing White Paper No. 2 is set forth at OP-61 in Volume 2 of the Network notebooks.

Thus, the decision makes clear that EPA’s authority to overrule state BACT determinations is significantly limited. This statement conflicts with certain EPA decisions in the past where the Agency essentially substituted its judgment as to what constitutes BACT for that of the state or local permitting agency. ‘

## EPA and DOJ Issue Proposal to Regulate Public Access to Off-Site Consequence Analysis Information in Risk Management Plans

Pursuant to the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act (“the Chemical Safety Information Act”),<sup>3/</sup> EPA and the Department of Justice (“DOJ”) issued a proposed rule to address the public’s access to information regarding the potential off-site consequences of accidental releases of hazardous and toxic chemicals regulated under section 112(r) of the Clean Air Act. 65 Fed. Reg. 24,834 (April 27, 2000). The proposed rule would provide that less-sensitive off-site consequence analysis (“OCA”) information (“data elements”) in industrial facilities’ Risk Management Plans (“RMPs”) would be made available on the Internet. More-sensitive information would be available only at public reading rooms, where an individual would have “read-only” access to information concerning no more than 10 facilities per month. The proposed rule attempts to balance the interests of public access with the risks posed by providing information that could be used for criminal or terrorist activities.

Section 112(r) of the Act requires that certain facilities develop and implement an RMP and submit a summary of it to EPA by June 21, 1999. The RMP must contain the results of an OCA for hypothetical accidental worst-case release

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3/ That legislation is discussed in the September 1999 *Washington Report* at WR-268.

scenarios and/or alternative release scenarios for each covered process at a facility.

Because section 112(r) requires that RMPs be made available to the public, EPA had contemplated posting them on the Internet for easy access. However, before EPA undertook any Internet posting, the FBI and other law enforcement and intelligence communities, as well as industry, raised concerns that releasing OCA information could allow terrorists or criminals to anonymously obtain information that they could then use in planned industrial chemical releases. These concerns resulted in passage of the Chemical Safety Information Act, which exempted OCA information from the Freedom of Information Act ("FOIA") and limited public access to that information for at least one year while the government performed risk and benefit assessments. The Chemical Safety Information Act required assessment of "the increased risk of terrorist and other criminal activity associated with the posting of [OCA] information on the Internet," and "the incentives created by public disclosure of the [OCA] information for reduction in the risk of accidental releases." The Attorney General was assigned to conduct the risk assessment, while EPA was assigned to conduct the benefit assessment.

### **Risk Assessment and Benefit Assessment**

DOJ's Risk Assessment concluded that posting certain portions of OCA information on the Internet would increase the risk that terrorists and criminals could carry out a planned industrial chemical release. The Risk Assessment set forth three categories of OCA information that might aid a terrorist or criminal, ranked from greatest value to least in relation to initiating an industrial release: (1) that which provides general information about the consequences of a chemical release, including the distance to the endpoint, the public receptors, the environmental receptors, and the map or graphic of the worst-case or alternative release scenario; (2) that which provides a "rough sketch" of what would be involved in triggering a release, including the name of the chemical involved, the projected quantity of

the chemical released, the release rate, the duration of the release, and the scenario involved in the release; and (3) that which describes passive or active mitigation measures.

EPA's Benefit Assessment concluded that public disclosure of OCA information would be "likely to lead to a significant reduction in the number and severity of accidental chemical releases," based on the theory that access to RMP information ensures that facilities will take steps to reduce accidents. Additionally, such disclosure fulfills the requirement of the CAA that RMP information be made available to the public.

### **Paper Copy and Internet Access to OCA Information**

The proposed rule contemplates controlled dissemination of OCA information that the Risk Assessment concludes would pose the greatest risk of being used for terrorist or criminal purposes, and provide access over the Internet to those portions of OCAs that pose less risk of being used for such purposes or that are already widely available. It would ensure that all OCA information is available to the public in some form, and some information would be available in several forms.

The public would be provided access to paper copies of OCA information for a limited number of facilities located anywhere in the United States. The information would be accessible at no fewer than 50 "reading rooms" geographically distributed across the country, such as at EPA regions or other federal facilities. Members of the public would be able to read and take notes from OCA information about any facility, but would not be permitted to reproduce or remove OCA portions of RMPs from the reading room. The reading rooms would be authorized to provide access to OCA information for up to 10 stationary sources per month.

### **Risk Indicator**

The proposed rule would establish a “risk indicator” system to provide the public with the means to understand some aspects of the risk expressed by OCA information without providing the actual information. The system would consist of query and response software. For example, individuals could enter a specific address to learn if they are located within the “vulnerable zone” (the worst-case or alternative release scenario’s distance to endpoint) of at least one facility, but the indicator would not provide the identity or location of any facility.

### **Access to Local OCA Information**

The proposed rule also provides for enhanced access to local OCA information, and encourages Local Emergency Planning Committees (“LEPCs”) and fire departments to set up reading rooms or other sites where the public could read, but not remove or copy, paper copies of OCA information about all sources in the jurisdiction, or about sources whose vulnerable zone extends into that jurisdiction. There would be no limit on the number of facilities for which information could be reviewed, nor would LEPCs or fire departments have to require identification to gain access to the information. ‘