

CLEAN AIR ACT

information network

Department of Justice Releases Report on EPA's NSR Enforcement Actions

On January 15, 2002, the Department of Justice (DOJ) released its report on the consistency of EPA's NSR enforcement actions with the Clean Air Act and its implementing regulations.^{1/} In May 2001, the National Energy Policy Development Group (NEPDG), chaired by Vice President Cheney, had directed the Department of Justice to "review existing enforcement actions regarding New Source Review to ensure that the enforcement actions are consistent with the Clean Air Act and its regulations." The report was prepared by DOJ's Office of Legal Policy.

Although DOJ's report concludes that EPA's NSR enforcement actions against electric utility companies are generally consistent with the Act and the NSR regulations, the report gives only a lukewarm endorsement of the legality of EPA's position. Moreover, as explained below, the scope of the issues considered by DOJ is narrow in several respects.

The DOJ report makes two principal findings. First, the report states that the existing NSR enforcement actions "do not constitute an impermissible reinterpretation of the Clean Air Act and its regulations such as to require notice and comment rulemaking." The report indicates that EPA has a "reasonable argument" that the

interpretation of the "routine maintenance, repair, and replacement" exclusion relied upon in the enforcement actions does not constitute an interpretation that "departs from a prior authoritative interpretation." In its analysis, DOJ emphasizes the point that rulemaking requirements are not triggered in such a situation unless there exists a prior "authoritative," "definitive," or "official" interpretation that conflicts with the current interpretation. In other words, the report's finding hinges upon DOJ's belief that EPA did not set forth an "authoritative" interpretation of the "routine maintenance" exclusion until recently and that "EPA's alleged past failure to bring enforcement actions may not be an 'authoritative' interpretation of the Clean Air Act and its implementing regulations."

The DOJ report inexplicably neglects to mention a key interpretation of the "routine maintenance" exclusion set forth in the 1992 preamble to the "WEPCO Rule." There the Agency stated that it "is today clarifying that the determination of whether the repair or replacement of a particular item of equipment is 'routine' under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources with the relevant industrial category." 57 Fed. Reg. 32,326. In other words, the preamble makes clear that the question of whether a repair or replacement is "routine" is to be based on what is "routine" for the "industrial category" involved. By contrast,

1/ The DOJ report can be found on the Network's website under New Source Review - Policy and Guidance Documents - Miscellaneous.

EPA's recent interpretation of the exclusion is instead based on the frequency of the repair or replacement for the particular piece of equipment in the plant involved. The DOJ report fails to explain why such an interpretation set forth in the preamble of a final rule does not constitute an "authoritative" agency interpretation of its regulations.

Second, DOJ concludes that EPA's interpretation that the "routine maintenance" exclusion does not extend to challenged projects undertaken by the electric utility defendants would be entitled to judicial deference. According to the report, the "plain language" of the regulations gives EPA the discretion to assert that the challenged projects "encompass[] more than" routine maintenance, repair, or replacement. In this part of its analysis, the report emphasizes that an agency is given great deference in interpreting its regulations -- more than if it were simply interpreting the statute in question.

In addition, the report states that DOJ will continue "to prosecute vigorously EPA's civil actions." The report indicates that "any decision to withdraw, terminate, or otherwise circumscribe" the enforcement action would rest within the discretion of DOJ's Environment and Natural Resources Division.

In assessing the conclusions drawn by DOJ's report, it is important to note that the scope of the report's analysis is limited in key respects. We summarize some of those limitations below:

- The report repeatedly makes clear that DOJ is not expressing any view on the policy decision to bring the NSR enforcement actions.

- The report focuses only on the enforcement actions brought against coal-fired electric utilities.
- The report focuses only on the validity of EPA's interpretation of the "routine maintenance, repair, and replacement" exclusion. In particular, it does not address the validity of EPA's recent regulatory interpretation that, in determining whether a significant net emissions increase has occurred, the "actual-to-potential" test must always be applied with regard to all existing units. The report does not explain why this key element of the NSR enforcement initiative was not discussed.
- The report does not address the important issue of "fair notice." Under this doctrine, an agency cannot enforce a regulation against a party unless the agency can establish that the party had fair notice of what the regulation requires. Given DOJ's discussion concerning the absence of any authoritative EPA interpretation of the "routine maintenance" exclusion for two decades and EPA's failure to bring enforcement actions during this period, there is a compelling argument that regulated parties did not have fair notice of EPA's current interpretation.

The NEPDG had also recommended that EPA, in consultation with the Department of Energy, should review the NSR regulations and their administrative interpretations and report to the President regarding "the impact of the regulations on investment in new utility and refinery generation capacity, energy efficiency, and environmental protection." It is expected that EPA's long-delayed report, along with the Agency's recommendations for NSR reform, will be issued in February or March. □

Appellate Court Rejects EPA's Jurisdictional Arguments in TVA Litigation; Will Decide Case on Its Merits

On January 8, 2002, the U.S. Court of Appeals for the Eleventh Circuit issued a decision holding that it has jurisdiction to consider the merits of challenges by the Tennessee Valley Authority (TVA) and other petitioners to EPA's actions in enforcing the Clean Air Act's PSD provisions against TVA. *Tennessee Valley Authority v. EPA*, No. 00-12310, 2002 U.S. App. LEXIS 249 (11th Cir. Jan. 8, 2002). The Eleventh Circuit's ruling means that it will address the validity of EPA's interpretation of the "routine maintenance, repair, and replacement" exclusion and other issues in the next phase of this litigation.

The consolidated cases involve the validity of an administrative compliance order (ACO) issued to TVA by EPA. In the ACO, EPA stated that numerous maintenance, repair, or replacement projects carried out by TVA at 14 of its facilities over two decades had triggered PSD requirements and that TVA had failed to obtain necessary permits. The ACO also directed TVA to undertake numerous remedial actions, including the installation of controls that allegedly should have been installed when the projects were undertaken. In response to TVA's contentions that the ACO was unlawful, EPA Administrator Browner directed EPA's Environmental Appeals Board (EAB) to review the validity of the ACO under procedures created specially for purposes of addressing the ACO. The EAB subsequently issued a decision upholding most aspects of the ACO.^{2/} In particular, it ruled that most of the projects listed in the ACO were not covered by

2/ The EAB's decision is discussed in the September 2000 *Washington Report* at WR-319.

the regulatory exclusion for "routine maintenance, repair, and replacement." TVA and certain private utility companies filed petitions for review in the Eleventh Circuit challenging the ACO, EPA's letter granting reconsideration of the ACO, and the EAB's decision.

In ruling that it has jurisdiction over the petitioners' challenges, the court rejected the following arguments raised by EPA: (1) that TVA lacks independent litigating authority to conduct this litigation; (2) that there is no justiciable case or controversy because both TVA and EPA are Executive Branch agencies whose leaders serve at the pleasure of the President; (3) that the EAB decision is not a reviewable final action; (4) that EPA's actions are not reviewable because TVA has not followed the procedures set forth in two Executive Orders dealing with inter-agency disputes; and (5) that the private utility company petitioners lack standing to challenge actions taken against TVA.

We summarize each of the court's principal rulings below:

TVA's Independent Litigating Authority

EPA contended that the court lacks jurisdiction to consider TVA's petitions for review because TVA lacks independent litigating authority to bring such suits over the objection of the Attorney General. However, the court concluded that, since TVA's creation in 1933, TVA has represented itself in litigation using its own attorneys. Relying upon three cases in which the courts had ruled that TVA had independent litigating authority, the Eleventh Circuit held that EPA's contentions had no merit in this case.

Justiciable Case or Controversy

EPA argued that no case or controversy exists because TVA and EPA are both Executive

Branch agencies whose leaders serve at the pleasure of the President. According to EPA, this means that the dispute regarding the validity of the ACO could not give rise to an Article III case or controversy. EPA further maintained that an Executive Branch agency can bring suit against another Executive Branch agency only under the following conditions: (1) the agency is an independent regulatory agency; (2) the real party in interest is a private party; or (3) a criminal investigation or prosecution is involved. The Eleventh Circuit concluded that the cases cited by EPA do not establish that these three situations are the only instances in which Executive Branch agencies can litigate against one another. The court determined that the proper test under governing case law is a two-pronged test: (1) whether the issue involved is "traditionally justiciable" and (2) whether true adversity exists between the agencies. The court then concluded that this case satisfies the two-pronged test.

Finality of the EAB Decision

In addressing EPA's arguments that the EAB decision was not a final agency action, the court applied the familiar two-part test for finality: (1) whether the action marks the "consummation" of the agency's decisionmaking process; and (2) whether the action determines the "rights or obligations" of parties. EPA asserted that the second element of the test was not satisfied because EPA cannot bring a *judicial* enforcement action against TVA. The court disagreed with EPA because it concluded that there can be concrete adversity between two Executive Branch agencies and that an agency's action can determine the rights or obligations of a party regardless of whether it can be enforced through a judicial enforcement action.

Effect of Executive Orders

EPA argued that the court lacks jurisdiction over the challenged actions because of

two Executive Orders which provide that certain disputes between Executive Branch agencies are to be resolved by referring the matters to the Attorney General or the Office of Management and Budget. The Eleventh Circuit concluded that the Executive Orders did not prevent it from hearing TVA's challenges and rejected EPA's related exhaustion, ripeness, and separation of powers arguments. The court ruled that, because there is no statutory requirement that TVA exhaust its administrative remedies, the Executive Orders do not prevent a court from exercising its jurisdiction. It also ruled that the legal and factual issues in the cases appeared to be ripe and that a court need not necessarily wait until the agencies have followed the dispute resolution procedures in the Executive Orders. Finally, the court determined that judicial review here did not present a constitutional separation of powers question because: (1) the President or the Attorney General could step in at any time and resolve the dispute; and (2) Congress has provided a statutory judicial review procedure in section 307(b)(1) of the Act that covers final actions such as this one.

Standing of Private Parties

EPA maintained that the private utility companies that filed separate petitions for review lack standing to pursue their claims. According to EPA, those claims are highly speculative and the interests involved do not fall within the "zone of interests" protected by the statute. The private petitioners alleged that, because their systems are integrated with those of TVA, the relief sought by EPA would require them to increase power production to compensate for the impacts on TVA's operations. The court agreed that those allegations were sufficient to establish injuries in fact and that those injuries would be fairly traceable to EPA's actions. In addition, the court concluded that the interests involved were included within the general interests protected by the Clean Air Act.

The Eleventh Circuit will schedule a second oral argument later this year to consider the merits of the petitioners' arguments that the EAB's decision should be overturned. □

Third Circuit Rules That Parties May Not Rely on Section 1983 to Enforce EPA's Environmental Justice Regulations

On December 17, the U.S. Court of Appeals for the Third Circuit issued a major decision concluding that plaintiffs may not sue to enforce EPA's environmental justice regulations by invoking 42 U.S.C. § 1983. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3rd Cir.). (Section 1983, which was enacted by Congress following the Civil War, authorizes citizens to bring suit against any person who deprives them of "any rights . . . secured by the Constitution and laws . . .") In so ruling, the court of appeals reversed a district court decision preliminarily enjoining operation of a new cement plant and remanding its state air construction permit to the state permitting agency. The Third Circuit's decision also answers a question left unresolved by the Supreme Court in its recent decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), i.e., whether parties may rely on Section 1983 to enforce "disparate impact" regulations promulgated by federal agencies under Section 602 of the 1964 Civil Rights Act.

The Third Circuit's decision is very significant because, if the ruling is not overturned and is uniformly followed, disparate impact regulations -- such as EPA's environmental justice regulations -- could only be enforced, if at all, by the federal agency responsible for implementing the regulations. The decision would foreclose citizen groups and individuals from bringing

various types of lawsuits to enforce such regulations.

This case arose when a citizen group and certain individuals in Camden, New Jersey, brought suit in federal district court against the New Jersey Department of Environmental Protection (NJDEP) to challenge that agency's issuance of a state air permit to a company for construction of a new cement plant. The plaintiffs contended, among other things, that the NJDEP had violated Title VI of the 1964 Civil Rights Act and EPA's environmental justice regulations implementing Title VI by failing to consider the adverse, disparate impact of its permitting decision on the nearby minority community. EPA's environmental justice regulations provide, in relevant part, that "[n]o person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin . . ." The regulations prohibit unintentional discrimination, i.e., discrimination resulting from the disparate impact of agency actions, as well as intentional discrimination.

In a decision issued on April 19, 2001, the district court ruled that the plaintiffs could bring an action under Section 602 of Title VI to enforce EPA's environmental justice regulations. The court also issued a preliminary injunction preventing the company from proceeding with construction of the plant and an order remanding the permit to the NJDEP.

Five days later, the Supreme Court issued its decision in *Sandoval* and held that such a private right of action under Section 602 did not exist. The majority opinion did not address the separate question of whether Section 1983, which was not relied on in that case, would provide an independent basis for enforcing disparate impact regulations. However, a statement in Justice

Stevens' dissenting opinion suggested that Section 1983 would provide an independent basis for private individuals to enforce disparate impact regulations.

One day after the Supreme Court issued its decision in *Sandoval*, the plaintiffs in the *South Camden* case moved to amend their complaint to allege an action under Section 1983. In his subsequent supplemental decision, the district court judge held that Section 1983 provides a cause of action for the plaintiffs' claims and that the preliminary injunction should remain in place. After concluding that EPA's environmental justice regulations create a "federal right" to be free of adverse, disparate impacts caused by recipients of federal funds, he ruled that plaintiffs could rely on Section 1983 to enforce that right. The court denied the company's motion to vacate the prior opinion and issued a new order that enjoined the company from operating its proposed plant and remanded the air permit to the NJDEP. Both the NJDEP and the intervenor cement company appealed the district court's decision to the Third Circuit.

In its decision, the Third Circuit ruled, by a 2 to 1 vote, that "an administrative regulation cannot create an interest enforceable under section 1983 unless that interest already is implicit in the statute authorizing the regulation, and that inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a [section] 1983 action under the EPA's disparate impact regulations." In so ruling, the court of appeals relied heavily on the reasoning in the Supreme Court's *Sandoval* decision, where the majority ruled that Section 602 did not provide a basis for enforcing disparate impact regulations promulgated under that provision. The Third Circuit further concluded that the Supreme Court has never

found that a valid federal regulation^{3/} can by itself create a right enforceable under Section 1983. The Third Circuit additionally concluded that the district court had erred in reaching a contrary conclusion. In the case primarily relied upon by the district court, the Supreme Court had found that the enforceable right in question had been conferred by the statute, not by the regulation that further defined the right. The court of appeals also distinguished a number of other decisions relied upon by the district court.

On January 15, the Third Circuit denied the citizen group's request for review of the decision before all the judges on the court. Given the importance of the appellate decision, it is likely that the citizen group will seek Supreme Court review. □

EPA Issues Guidance to Harmonize Deadlines under NOx SIP Call and Section 126 Rule

In a recent guidance memorandum, EPA has announced its intention to extend the compliance deadline for the Section 126 Rule from May 1, 2003 to May 31, 2004. Memorandum from John S. Seitz, OAQPS, to Regional Air Directors (Jan. 16, 2002).^{4/} As a result of this extension, the compliance deadline under the Section 126 Rule for both electrical generating units (EGUs) and non-electrical generating units (non-EGUs), i.e., industrial boilers, would match the compliance deadline for

3/ Although the court assumed for purposes of this case that EPA's environmental justice regulations are valid, the majority decision suggested that they might be vulnerable to a judicial challenge.

4/ The guidance memorandum can be found on the Network website under Nonattainment Requirements – Ozone Nonattainment.

the NO_x SIP call.^{5/} EPA indicates in the memorandum that further rulemaking will be required in order to make the extension legally effective.

The guidance explains that the extension is necessary in order to reconcile the compliance deadlines in the NO_x SIP call and the Section 126 Rule. In connection with the judicial challenges to the NO_x SIP call, the D.C. Circuit extended the NO_x SIP call deadline from May 1, 2003 to May 31, 2004 to reflect the fact that court had stayed the effectiveness of the rule for 13 months pending the outcome of that litigation. In May 2001, the D.C. Circuit issued a decision that, among other things, remanded to EPA the growth factors applicable to EGUs in the related Section 126 Rule. In August 2001, the D.C. Circuit suspended the compliance deadline for EGUs under the Section 126 Rule pending EPA's completion of the remand of the growth factors.

EPA states that, although the Agency intends to respond to the growth factors remand "as soon as possible" and contemplates taking action in March 2002, the remand and the suspension of the Section 126 rule compliance deadline have affected the ability of sources to meet the original May 1, 2003 deadline. Accordingly, EPA will take action to change the May 1, 2003 deadline to May 31, 2004 "to align" that date with the current compliance deadline for the NO_x SIP call. EPA explains that the Section 126 Rule was intended to be a "backstop" for the NO_x SIP call and therefore should have the same compliance date in order to ensure there is a "better coordinated and simpler program."

5/ The NO_x SIP call rule establishes NO_x emissions budgets for 22 States while the Section 126 Rule imposes specific emissions reductions requirements on listed major sources within 12 of the 22 States covered within the NO_x SIP call.

The memorandum further explains that EPA will also extend the Section 126 Rule deadline for non-EGUs even though they are not subject to the growth factors remand. According to EPA, because non-EGUs are a small portion of the sources regulated by the Section 126 Rule, it makes no sense to require them to comply earlier than EGUs. In particular, if non-EGUs are subject to an earlier compliance deadline, they would be unable to engage in emissions trading with EGUs until a year later.

The guidance states that the EPA Regional Air Directors are to advise the States of EPA's current plans to extend the Section 126 Rule compliance deadline. □

District Court Addresses Key Issues in Clean Air Act Citizen Suit Involving Reactivation of Refinery

In two separate decisions, a federal district court judge has ruled on a number of issues concerning the ability of a group to bring a citizen suit challenging the reactivation of a refinery as well as issues regarding the extent to which the reactivation is subject to NSR requirements. *Communities for a Better Environment v. Cenco Refining Co.*, 180 F.Supp.2d 1062, 179 F.Supp.2d 1128 (C.D. Cal., June 22, 2001 and September 26, 2001). Among other things, the court ruled that the citizen group was entitled to bring the citizen suit and granted a preliminary injunction requiring the refinery owner to comply with NSR requirements. However, the court denied the group's motions for summary judgment and a permanent injunction because it concluded that there are triable issues of fact concerning the applicability of NSR.

Background

The case involves the reactivation of a petroleum refinery in Los Angeles County. In June 1995, the previous owner of the refinery, Powerine, informed the South Coast Air Quality Management District (SCAQMD) that it would be shutting down the refinery within a month. Refining operations were suspended in July 1995. However, in December 1995, Powerine informed state agencies that it might resume operation of the refinery at some point in the future. In July 1998, Powerine applied to SCAQMD to reactivate its expired permits for the facility. In August 1998, Cenco purchased the refinery from Powerine. SCAQMD subsequently reactivated Powerine's expired operating permit and made Cenco the holder of the permit.

Cenco also filed 47 applications for "permits to construct" with SCAQMD regarding various pieces of equipment that it planned to construct or alter as part of a new "Refinery Project." In determining whether NSR applied to these changes, SCAQMD found that NSR requirements would apply only if a modification would increase emissions. In determining whether there was an emissions increase for a unit, SCAQMD used a baseline that reflected emissions before the suspension of operations in 1995. In May 2000, U.S. EPA issued a notice of violation (NOV) to Cenco in which it alleged that BACT must be installed on each piece of equipment at the refinery that emits any regulated pollutant regardless of whether the emissions reflect an increase over any 1995 baseline.

CBE brought a citizen suit under section 304 of the Clean Air Act against Cenco, SCAQMD, and the City of Santa Fe Springs in August 2000. In its complaint, CBE alleged numerous violations of federal and state law. Its primary contentions were that the reactivation of the shutdown refinery triggered major NSR requirements, that the reactivation should be

treated as the construction of a new major source, and therefore that BACT should be installed on every unit emitting regulated pollutants.

Citizen Suit Rulings

In its initial opinion, the court addressed the issues raised in the defendants' motions to dismiss the citizen suit. Each ruling is summarized below.

Standing – The defendants maintained that CBE had failed to demonstrate that its members had suffered an "injury-in-fact" sufficient to establish standing to bring suit in that refinery operations had not yet resumed. However, the court concluded that the CBE's allegations that preliminary activities at the refinery had resulted in odors and smoke were sufficient to withstand a motion to dismiss. The court noted that certain CBE members live and work in the vicinity of the refinery and that their declarations allege concrete and actual injuries.

Subject matter jurisdiction – The defendants argued that a Clean Air Act citizen suit must involve allegations that an "emission standard or limitation" has been violated and that none of CBE's allegations involve a specific claim that a *numerical* standard or limitation has been violated. The court rejected the defendants' arguments for two reasons. First, the court disagreed with the contention that only numerical standards or limitations may be enforced through a citizen suit. Based on relevant case law, the court determined that allegations that objective requirements set forth in SIP provisions had been violated were sufficient. Second, the court concluded that because "emission standard or limitation" is defined in section 304(f) of the Act as including "any other standard, limitation, or schedule . . . under any applicable [SIP]," it should be read broadly to encompass non-numerical standards or limitations.

Exhaustion of state administrative remedies – The defendants contended that CBE had failed to exhaust its administrative remedies because it had not sought administrative review of certain permitting decisions under state law. However, the court concluded that because the administrative review procedures had not been incorporated into the SIP, it would not require that they be pursued. It concluded that providing notice 60 days before filing suit as required by section 304 satisfied any general requirement to exhaust administrative remedies.

Abstention – The defendants additionally argued that the district court should abstain from deciding this case until the D.C. Circuit has rendered a decision in a case brought against EPA by Cenco. In that case, Cenco has challenged the validity of EPA's "reactivation policy," which CBE relied on in arguing that the facility should be subject to NSR. Under EPA's "reactivation policy," if the owner of a facility indicates an intention to shut down the facility permanently, a subsequent reopening of the facility will ordinarily be treated as the construction of a new source and will trigger major NSR if major source threshold levels are met. The district court ruled that it would not abstain because (1) the citizen suit was filed first and (2) the reactivation policy is not the sole basis for CBE's NSR claims.

NSR Rulings

In its second decision, the court concluded that CBE is entitled to a preliminary injunction requiring Cenco to comply with NSR requirements before reopening the refinery. At the same time, it denied CBE's motions for a permanent injunction and for summary judgment because it found that triable issues of fact remained.

Permit was not voided by change in ownership – CBE contended that, under a particular SIP provision, the refinery's existing operating permit should

have been voided by the change in ownership from Powerine to Cenco. According to CBE, this meant that Cenco had to obtain a new operating permit and NSR should apply to the facility as a whole. However, the court read the relevant SIP provision as not voiding a permit because of a mere change in ownership. Instead, the court agreed with defendants' interpretation of the provision, i.e., a permit cannot be transferred to a new entity without first applying to the SCAQMD but the permit does not become void if procedures are not followed.

Expiration of permit did not trigger NSR – CBE additionally maintained that the alterations of equipment undertaken increased emissions because the relevant baselines for NSR purposes should be zero. According to CBE, this is because the operating permit had expired in 1998 and operations had been suspended for five years by the owners. But the court concluded that the expiration of a permit due to non-payment of fees did not by itself subject a source to NSR. It also concluded that under the SIP provision in question, the issue was whether the changes had increased the source's PTE. Although CBE argued that the relevant baseline was zero for the equipment in question because operations had been suspended, the court concluded that, although actual emissions were zero, the units' PTE had not changed during this period.

CBE made strong showing that permanent shutdown subjects entire facility to NSR – CBE separately maintained that because Powerine indicated an intent to permanently shut down the refinery, the refinery was shutdown for five years, and the refinery will utilize different equipment upon reactivation, the reactivated refinery must be regarded as a "new source" for NSR purposes. CBE based its position on the relevant SIP provision as well as EPA's "reactivation policy." Although the court did not issue a definitive ruling on CBE's contentions, it found that CBE had made a "strong showing" that it would

CLEAN AIR ACT

information network

prevail on its contentions – a showing that was sufficient to warrant the granting of preliminary injunction. In particular, the court found that CBE had made a strong showing that EPA's reactivation policy is a reasonable interpretation of EPA's regulations that does not conflict with any aspect of the NSR program. The court further found that CBE is likely to succeed in establishing as a factual matter that the refinery was permanently shut down – at least for some period of time.

In addition to finding that CBE had demonstrated a likelihood of success on the merits, the court also found that the other requisites for a preliminary injunction had been satisfied – CBE members might suffer irreparable harm, the balances of harms here favored CBE, and the public interest favored the granting of preliminary relief. Accordingly, the court granted a preliminary injunction and will hold a trial to resolve the merits of CBE's claims. □