

EPA Issues Final General Provisions/ Section 112(j) Rule

On May 30, 2003, EPA issued a final rule amending the Part 63 General Provisions and the regulations implementing section 112(j) of the Act.^{1/} 68 Fed. Reg. 32,586. The final rule revises various aspects of the General Provisions dealing with startup, shutdown, and malfunction (SSM) plans, compliance issues, and reporting requirements. With regard to section 112(j), the final rule, among other things, establishes new deadlines by which sources must submit Part 2 permit applications if EPA fails to promulgate a relevant MACT standard in a timely fashion.

For the most part, EPA's action finalizes the measures set forth in its December 9, 2002 proposed rule. 67 Fed. Reg. 72,875. That proposed rule was intended to implement a settlement agreement between EPA and the Sierra Club. As discussed below, one important provision of the final rule involves public access to SSM plans. Although the proposed rule would have required that facilities routinely submit their SSM plans and revisions to the regulatory authority so that citizens could review them, the final rule deletes the routine submission requirement and provides that a citizen may obtain a copy of a facility's SSM plan if the citizen submits a "specific and reasonable" request to review the SSM plan to the permitting authority. Counsel for the Sierra Club has indicated that the Sierra Club may judicially challenge this provision or even challenge the final rule as a whole, including the section 112(j) provisions, because of the changed language.

Background

In 1994, EPA promulgated two separate rules setting forth the Part 63 General Provisions and regulations to implement the case-by-case MACT

provisions of section 112(j). Numerous industry petitioners challenged the two rules in the D.C. Circuit. After years of settlement negotiations, industry petitioners and EPA entered into settlement agreements under which EPA agreed to make numerous revisions to the two rules. On April 5, 2002, EPA published a final rule amending the General Provisions and section 112(j) regulations in accordance with the settlement agreement and in other additional respects. 67 Fed. Reg. 16,582.

The Sierra Club, which had not participated in the rulemaking proceedings, challenged the April 2002 final rule in the D.C. Circuit. Among other things, it maintained that EPA's action in extending the deadline for filing complete section 112(j) permit applications for two years from May 15, 2002 to May 15, 2004 was unlawful. EPA and the Sierra Club engaged in settlement negotiations from which the industry petitioners were excluded. EPA and the Sierra Club subsequently entered into an initial proposed settlement agreement, which provided, among other things, that the deadline for filing Part 2 permit applications would be May 15, 2003 rather than May 15, 2004. Industry commenters on the proposed settlement maintained that the new deadline would require tens of thousands of sources to file Part 2 applications and unnecessarily impose tremendous costs on sources and permitting authorities for no environmental benefits. In light of these comments and the concerns of state and local permitting authorities, EPA decided to discuss a different approach to implementing section 112(j) with the Sierra Club. As a result, EPA and the Sierra Club entered into a revised settlement agreement on November 26, 2002, under which EPA would propose a new set of deadlines for the submission of Part 2 applications. Pursuant to the settlement agreement, EPA would also revise certain aspects of the General Provisions dealing with SSM plans, compliance issues, and reporting requirements. A proposed rule was published on December 9, 2002,

^{1/} The final rule is available on the Network's website under "Recent Updates" and "MACT Standards/Section 112."

and the Administrator signed the final rule amendments on May 8.

Key elements of the final rule are summarized below.

SSM Plans and the General Duty to Minimize Emissions

The 1994 rule created a general duty for a source to minimize its emissions that are covered by MACT standards, including during SSM conditions. According to EPA, it modified the language of the 1994 rule in the 2002 rule to make clear that a source was not required to reduce emissions further when the source is already in full compliance with the relevant MACT standard. However, the Sierra Club argued that the revised language in the 2002 rule could be construed as indicating that a facility that complies with its SSM plan – regardless of whether the plan is adequate or properly developed – automatically satisfies its general duty to minimize emissions. Accordingly, under the settlement agreement, EPA agreed to delete language contained in the 2002 rule which describes compliance with the general duty as “meet[ing] the emission standard or comply[ing] with the startup, shutdown, and malfunction plan.” In their comments on the proposed rule, numerous industry parties objected to the deletion because it could cause the regulations to be read as providing that a source’s compliance with a properly drafted SSM plan does not necessarily constitute compliance with the general duty to minimize emissions.

In the May 30 final rule, EPA deleted the language above as it had proposed to do, despite industry comments that the language should be retained. However, it clarified in the preamble that “compliance with a properly drafted SSM plan during a period of startup, shutdown, or malfunction will necessarily also constitute compliance with the duty to minimize emissions, even though compliance with the MACT standard itself during a period of SSM may not be practicable.” EPA also inserted additional regulatory language providing that, during SSM conditions, the general duty “does not require the owner or operator to achieve emissions levels that would be required by the applicable standard at other times if this is not consistent with safety and good air pollution control practices, nor does it require the owner or operator to make any further efforts to reduce emissions if levels required by the applicable standard have been achieved.” In addition, the final

rule preamble expressly rejects the Sierra Club’s position that compliance with a MACT standard during SSM conditions should be required unless it can be demonstrated that a violation was “unavoidable.”

Public Access to SSM Plans

The May 30 final rule amendments significantly changed the procedures governing public access to SSM plans. Under the 1994 rule, SSM plans were to be made available to the permitting authority upon request for “inspection and copying.” The preamble to the 1994 rule stated that the Administrator or the permitting authority was authorized to require a facility to submit its SSM plan.

The Sierra Club maintained that the language of the 2002 rule improperly failed to require that a facility submit its SSM plan to the permitting authority and that the permitting authority might decline to give an SSM plan to a citizen that had requested it. The settlement agreement entered into by EPA and the Sierra Club provided that EPA would propose regulatory language requiring that facilities routinely submit their SSM plans and revisions thereto to the permitting authority. It also provided that the permitting authority was required to provide any SSM plan to a citizen if a request were made. The December 2002 proposed rule contained the language in the settlement agreement.

During the comment period, industry parties opposed the proposed approach for a number of reasons. They argued, among other things, that EPA lacked the authority to require public access to all SSM plans, that the requirement that all SSM plans and revisions be routinely submitted was unduly burdensome, that the routine submission requirement ignored the fact that SSM plans should be fully integrated into the process and operating procedures at the facility, and that the routine submission approach was not likely to adequately protect confidential business information (CBI) contained in the SSM plans.

In the May 30 final rule preamble, EPA expressly acknowledges that the routine submission approach would be unnecessarily burdensome. For example, the Agency states that “we think that requiring routine submission of every SSM plan, without regard for whether any member of the public will ultimately seek access to it, involves a resource burden which is disproportionate to the time which

may be saved when a specific plan is actually requested by a member of the public.” The Agency agrees with industry’s position that routine submission of plans would interfere with the need to have them fully integrated with the facility’s process and operating procedures and that protecting CBI claims will likely be very resource intensive.

In the May 30 final rule, EPA used a new approach in addressing the public access issue. The approach does not include the routine submission requirement contained in the proposal, but it does impose requirements that were not contained in the 2002 rule. Under the new approach, if the permitting authority requests submission of a facility’s SSM plan, the facility must “promptly” provide it.^{2/} If a citizen wants to review a facility’s SSM plan, it must request the plan from the permitting authority. If the permitting authority determines that the request is “specific and reasonable,” it is to request that the facility submit the SSM plan to it and then provide the relevant parts of the plan to the citizen. The final rule preamble also states that, if the source and the citizen requestor mutually agree that it would be preferable to examine the SSM plan at the facility, this approach can be used rather than submitting the plan to the permitting authority.

Counsel for the Sierra Club has indicated that the Sierra Club believes that the new approach is unlawful and that it may challenge these public access provisions in the D.C. Circuit. In addition, counsel has apparently raised the possibility of challenging the entire final rule because it believes that the public access provisions are substantially changed from the provisions contained in the settlement agreement.

Reporting Requirements

In the rulemaking proceeding leading to the April 2002 final rule, representatives of state and local permitting authorities submitted comments indicating that the regulations should require that the number and description of malfunctions that have occurred during the reporting period be included in the

^{2/} The regulations do not explicitly state what “promptly” means in this context. However, because EPA acknowledges the importance of having the SSM plan fully integrated with process and operating procedures, what constitutes a “prompt” submission should take account of the time needed to separate the plan from other facility procedures and to protect CBI.

required semiannual report. In response to that comment, EPA inserted regulatory language requiring that a facility report “the number, duration, and a brief description of each startup, shutdown, and malfunction,” i.e., startups and shutdowns were included in addition to malfunctions. Industry representatives subsequently maintained that this requirement was unduly burdensome and that in many industries startups and shutdowns are numerous and routine in nature. As a result, EPA’s December 2002 proposal would have excluded startups and shutdowns from the reporting requirement.

In the May 30 final rule, EPA finalized its proposal to delete the regulatory language providing that startups and shutdowns must be included in periodic reports. The Agency also narrowed the scope of the requirement that malfunctions be reported by providing that a source is only required to report those malfunctions that caused or may have caused an emission limitation in the relevant MACT standard to be exceeded. Finally, the Agency also revised the definition of “malfunction” for purposes of section 112 so that it includes only an event that “causes, or has the potential to cause, the emissions limitations in an applicable standard to be exceeded.”

Correction of SSM Plan Deficiencies

The April 2002 rule provided that the permitting authority “may” require that an SSM plan be revised if certain specified deficiencies are found. The December 2002 proposed rule would have changed the regulations so that, if the permitting authority finds a deficiency, the revisions are mandatory rather than discretionary. In the final rule, EPA stated that it was not persuaded by comments arguing that changes to this provision were unnecessary. Accordingly, EPA finalized the proposed change making revisions mandatory.

Definition of “Monitoring”

In the April 2002 final rule, EPA modified the definition of “monitoring” in Part 63 to include the phrase “or to verify a work practice standard.” Industry representatives subsequently pointed out that EPA had not included this language in the proposed rule and maintained that the revision could cause unanticipated regulatory problems. In response, EPA sought comment on this revision in the December 2002 proposal. Commenters argued that

the revised definition could make changes in work practice verification a significant permit modification or might require verification of work practice beyond the procedures specified in a particular MACT standard. In the final rule, the Agency explained that it did not intend such consequences and retained the revised definition without change.

Combined Compliance Reports

The April 2002 final rule added language to the provisions governing the filing of compliance reports that was intended to allow sources to include more than one compliance demonstration activity in a single compliance report (rather than filing multiple reports) so long as the activities had the same compliance date. Industry representatives objected because EPA had not proposed this language change and the final rule language in question was ambiguous. EPA requested comments on the revised language in the December 2002 proposed rule. In the final rule, EPA redrafted the language to more clearly express its intent.

New Schedule for Part 2 Permit Applications

EPA provided in the April 2002 final rule that the deadline for filing Part 2 permit applications for those source categories where EPA has not promulgated a MACT standard was May 15, 2004. In connection with its challenge to that rule, the Sierra Club maintained that the statute gave the Agency no authority to establish such a deadline and that sources in those categories should be required to file section 112(j) permit applications without further delay. However, the revised settlement agreement entered into between EPA and the Sierra Club contained a new approach for the filing of Part 2 applications. This new approach was suggested by state and local permitting authority representatives and reflected additional suggestions made by industry representatives. Under the new approach, the Part 2 application for a particular source category would be due 60 days after a newly established promulgation deadline for the MACT standard covering that category. The deadlines for particular “bins” of source categories would be set forth in a consent decree entered into between EPA and the Sierra in a separate district court citizen suit brought by the Sierra Club. The December 2002 proposed rule set forth this new approach.

In the May 30 final rule, EPA finalized the new deadline scheme contained in the proposed rule with no significant changes. It stated that concerns about the promulgation deadlines for particular source categories should be addressed in the separate district court litigation involving the consent decree between it and the Sierra Club.

The Agency also indicated in the preamble that it will attempt to provide “prompt notice” to affected sources and permitting authorities if it “[has] reason to believe that an impending promulgation deadline for a particular MACT standard will not be met.” Despite industry comments requesting regulatory language addressing this advance notice issue, the Agency declined to provide any regulatory language and also declined to set forth any deadline by which it would attempt to provide notice, e.g., 60 days before the scheduled promulgation date. In addition, EPA declined to provide regulatory language stating that the corresponding Part 2 application deadline will automatically be extended if the promulgation date for a MACT standard in the consent decree is extended. The Agency stated that it would consider any such situation at the time it arose and determine if an extension of the Part 2 deadline is warranted.

Requests for Applicability Determinations

In the April 2002 rule, EPA established a process by which sources could request that the permitting authority determine whether or not their facilities belonged to a category that was subject to section 112(j) requirements, i.e., one of the categories where EPA missed the statutory promulgation deadline. All such applicability determination requests were due on May 15, 2002 – also the deadline for submission of Part 1 applications. If the permitting authority determined that the facility or some part of it belonged to one of the categories, the source was required to submit its Part 2 permit application within 24 months.

Because EPA subsequently proposed to use the new Part 2 application deadline approach instead of requiring that all Part 2 applications be submitted by May 15, 2004, it decided that it was also necessary to change the applicability determination approach. In the December 2002 proposed rule, EPA proposed that any source that still wanted to pursue a previously filed request for an applicability determination must resubmit and supplement its request within 60 days after EPA publishes the final

rule amending the section 112(j) regulations or within 60 days after EPA publishes a proposed rule for the MACT standard in question, whichever is later. According to EPA, the publication of the proposed MACT standard should give the source an opportunity to decide whether the issue of applicability is still uncertain and, if so, to explain why. The Agency also proposed to require that the permitting authority act upon any supplemented request within 60 days after is resubmitted.

In the May 30 final rule, the Agency essentially finalized the applicability determination approach that it had proposed. Some commenters had urged EPA to provide that the permitting authority's failure to act within 60 days after the applicability determination request is resubmitted establishes a presumption that the standard will not apply. However, EPA declined to provide for either a positive or negative presumption if the permitting authority fails to act in a timely manner. According to EPA, this will provide a strong incentive for the source and permitting authority to work together to resolve any remaining applicability issues.

Content of Part 2 Applications

In the December 2002 proposed rule, EPA provided preamble guidance regarding the information which should be contained in Part 2 applications. The preamble generally sought to limit the kinds of information that must be submitted in the Part 2 application. In the May 30 final rule, EPA decided to include additional regulatory language regarding the content of Part 2 applications rather than just providing guidance. The final rule language states that sources may cross-reference specific information in any prior submission to the permitting authority. It also provides that sources can cross-reference any part of a proposed MACT standard that is applicable. The preamble expressly states that a source can cross-reference a proposed MACT standard without necessarily supporting the proposal itself and is free to argue later that a different approach should be taken in making a case-by-case MACT determination. In addition, EPA deleted a regulatory provision requiring estimates of total uncontrolled and controlled HAP emission rates in Part 2 applications and added a provision requiring the source to submit additional emissions data or other information specifically requested by the permitting authority. Finally, EPA deleted a

provision requiring sources to submit "information relevant to establishing the MACT floor" but made clear that a source is still free to submit such information."

EPA Issues Proposed Rule for Implementation of 8-Hour Ozone Standard

On June 2, 2003, EPA published a proposed rule that would establish a scheme for implementation of the 8-hour ozone standard promulgated in 1997. 68 Fed. Reg. 32,801. The proposed rule is intended, among other things, to respond to the U.S. Supreme Court's decision in *Whitman v. American Trucking Assn's*, 531 U.S. 457 (2001) ("ATA"), where the Court ruled that the Agency's interpretation of the statutory provisions addressing implementation of a revised ozone standard was invalid. The proposal does not include proposed regulatory language but instead contains an extensive discussion of the measures that the Agency is considering to implement the 8-hour standard.

In the proposal, EPA sets forth two principal, alternative frameworks for implementing the 8-hour standard. Under the first option, areas that are not in attainment with the 8-hour standard would be classified as marginal, moderate, etc., based primarily on the classification scheme set forth in Part D, Subpart 2, of the Act. These nonattainment areas would then be subject to the specific requirements in Subpart 2 for the classification in question.

Under the second option - the option "preferred" by EPA - areas that are not in attainment with the 8-hour standard would be governed either by the general requirements for nonattainment areas in Subpart 1 or the specific requirements for ozone nonattainment areas in Subpart 2, depending on the extent to which the area is not in attainment. This second option would provide greater flexibility for the States in implementing the revised standard and greater flexibility for sources in meeting their obligations. The proposed rule also addresses procedures for the transition from the 1-hour ozone standard to the 8-hour ozone standard as well as numerous other issues involving implementation of the standard.

Background

In 1997, EPA promulgated its revised ozone standard, which provides for a limit of .08 ppm averaged over an 8-hour period. The 8-hour standard was subsequently challenged in the D.C. Circuit by various industry parties and environmental groups. In its decision, the D.C. Circuit ruled, among other things, that the standard was unlawful because it violated the “non-delegation” doctrine. Upon subsequent review of that decision, the Supreme Court reversed the D.C. Circuit’s “non-delegation” doctrine ruling in the *ATA* decision.

The Supreme Court additionally held that EPA’s interpretation of the statute with regard to implementation of the revised standard – as set forth in the preamble to the final rule – was unlawful. *ATA*, 531 U.S. at 477-486. EPA had stated in the preamble that it intended to implement the 8-hour standard by relying on the provisions of Subpart 1 of Part D, rather than Subpart 2. Subpart 1 sets forth general requirements governing nonattainment areas and does not contain specific classifications, deadlines, or other requirements for ozone nonattainment areas. On the other hand, Subpart 2, which was added by the 1990 amendments, sets forth five different classifications for ozone nonattainment areas depending on their design values and prescribes detailed requirements to be met by areas based on their classifications. In the preamble, EPA explained that it believed reliance on Subpart 1 was appropriate because the provisions of Subpart 2 are specifically based on the 1-hour ozone standard in effect in 1990. The Supreme Court ruled that the preamble discussion constituted a reviewable final action and that EPA’s interpretation conflicted with the statute. According to the Court, EPA may not construe the statute in a way that completely nullifies the detailed provisions of Subpart 2, which were intended to limit the Agency’s discretion. As a result, the Court remanded the implementation issue to EPA for further consideration.

In March 2002, the D.C. Circuit addressed the issues remanded to it by the Supreme Court as well as all other remaining issues. *American Trucking Assn’s v. EPA*, 283 F.3d 355 (D.C. Cir. 2002). In its decision, the D.C. Circuit rejected all remaining challenges to the 8-hour standard. As a

result, the Agency concluded that there are no further impediments to implementation of the 8-hour standard. The June 2 proposal is intended to set forth the principles to be used by the States in implementing the 8-hour standard.

The proposal, which consists of 70 pages in the *Federal Register*, discusses a wide range of issues concerning implementation of the 8-hour standard and the options that EPA is considering in developing a final rule. Below we focus on two key elements of the proposal: (1) the basic implementation framework and classification scheme; and (2) measures for the transition from the 1-hour standard to the 8-hour standard.

General Framework and Classification Scheme

EPA proposes two alternative frameworks for implementation of the 8-hour standard: “Option 1,” which it believes is a relatively simple option to communicate and carry out; and “Option 2,” which is EPA’s preferred option and is intended to provide greater flexibility for States and sources.

Under Option 1, the Agency would classify 8-hour ozone nonattainment areas according to the severity of their ozone pollution based on 8-hour ozone levels or design values. Under this approach, all 8-hour nonattainment areas would be classified under Subpart 2 as either marginal, moderate, serious, severe-15, severe-17, or extreme. In order to carry out this approach, EPA would create by rulemaking a set of 8-hour design values based on Table 1 in section 181 of the Act, which contains 1-hour design values and the corresponding classification for each design value. The Agency would create a new table for 8-hour design values by using the percentage differences between the classifications in the statutory table and deriving new design values for the 8-hour standard.^{3/} Once an 8-hour nonattainment area is classified under this approach, it must meet a new deadline that corresponds to the deadline provided in Subpart 2 and comply with the substantive requirements applicable to that classification. EPA

^{3/} For example, the threshold separating marginal and moderate areas in Table 1 of the statute is 15 percent above the 1-hour standard, so EPA would set the 8-hour moderate area lower threshold at 15 percent above the 8-hour standard.

proposes to use the time periods provided in Subpart 2 in establishing deadlines but to tie them to an area's designation as an 8-hour nonattainment area rather than to passage of the 1990 amendments. For example, marginal areas for the 8-hour standard would have three years from designation and classification in which to meet the 8-hour standard.

Under Option 2 – EPA's preferred option – some areas would implement the 8-hour standard under Subpart 1 and other areas would implement that standard under Subpart 2. This option is based on the Supreme Court's recognition that the Act contains a "gap" with regard to revised ozone standards like the 8-hour standard. In other words, there will be some areas that are in attainment for the 1-hour standard but not for the 8-hour standard. Because the design values of these "gap" areas do not exceed the .120 ppm limit in Table 1 of the Act, the classifications and other requirements in Subpart 2 would not apply directly to them. Under Option 2, areas that are nonattainment for both the 1-hour standard and the 8-hour standard would be classified under Subpart 2 in the same way as proposed under Option 1, i.e., using a converted table that reflects 8-hour design values. However, for "gap" areas subject to Subpart 1, EPA would have discretion regarding whether to classify nonattainment areas and, if so, what classifications to use. (Unlike Subpart 2, Subpart 1 does not mandate that classifications be used for nonattainment areas.)

One alternative proposed by EPA would be not to classify such "gap" areas but to instead rely on the general five-year deadline after designation for attaining a standard set forth in section 172 of the Act. A second alternative would be to classify certain qualified "gap" areas as "transport areas," i.e., areas where nonattainment is due to "overwhelming transport" of pollutants from other areas. Pursuant to this alternative, such "transport areas" would be treated similarly to "marginal" areas under Subpart 2, would be subject to less restrictive NSR requirements, and would receive an attainment date that reflects the contribution of upwind areas and the implementation schedule for those areas. In explaining why it believes that "transport areas" should be subject to such flexible requirements, the Agency states that regional modeling has shown that most "gap" areas will attain the 8-hour standard by 2007 based on reductions from the NO_x SIP call, the Federal Motor Vehicle Emissions Control

Program, and other existing control measures, without further local controls.

Transition Issues

The proposed rule discusses various issues involving the transition from the 1-hour standard to the 8-hour standard in those areas that are already nonattainment areas for the 1-hour standard. The Agency indicates that, in developing a transition scheme, it is being guided by the Act's "anti-backsliding" provisions and by the ruling in *ATA* that it cannot ignore the provisions of Subpart 2 in implementing the new 8-hour standard. EPA proposes to revoke the 1-hour standard for an area either in whole or in part one year following the area's designation under the 8-hour standard. Under either approach, EPA would promulgate regulations specifying which control measures, NSR requirements, and planning requirements remain in effect. In addition, EPA proposes to consider on a case-by-case basis whether a particular requirement should apply to a specific area if there is a showing that application of that requirement would cause "absurd results."

The proposed rule states that with regard to control measures required for a 1-hour nonattainment area pursuant to Subpart 2 (e.g., RACT, vehicle inspection/ maintenance), EPA would require that all such measures remain in place if the area is also a nonattainment area for the 8-hour standard. With regard to nonattainment NSR requirements in place at the time a 1-hour nonattainment area is designated nonattainment for the 8-hour standard, the Agency is proposing that the Subpart 2 major source applicability cut-offs and offset ratios continue to apply to the extent the area has a *higher* classification for the 1-hour standard than for the 8-hour standard. With regard to planning requirements, EPA is seeking comment on the question of whether States without fully approved 1-hour attainment demonstrations should be required to proceed to obtain approval or instead should devote all their resources to preparing attainment demonstrations for the 8-hour standard.

The comment period on the proposed rule expires on August 1. Agency officials have indicated that they intend to issue a final rule by the end of 2003. "

D.C. Circuit Rules That EPA Did Not Adequately Consider Cost-Effectiveness in Promulgating MACT Standard

The U.S. Court of Appeals for the District of Columbia Circuit has remanded a MACT standard to EPA because the Agency failed to justify the approach it took in considering the cost-effectiveness of the standard. *Arteva Specialties v. EPA*, Nos. 96-1422 *et al.* (D.C. Cir., April 8, 2003). The Group IV Polymers and Resins MACT standard applies to plants that manufacture polymers and resins, including polyethylene terephthalate resin (PET). The court ruled that EPA had not adequately explained why it aggregated the costs and effectiveness of equipment leak detection and repair (LDAR) requirements on a facility-wide basis rather than considering the costs and effectiveness of each individual control technology that had been proposed.

The decision is significant in that it marks the first time that a court has discussed the cost-effectiveness requirement in section 112(d)(2) of the Act in any detail. Section 112(d)(2) provides that EPA is to “tak[e] into consideration the cost of achieving [the] emission reduction” as well as “non-air quality health and environmental impacts and energy requirements” in setting a MACT standard. The court’s decision makes clear that the cost-effectiveness requirement is an important requirement and that EPA must fully justify the approach it takes in assessing the cost-effectiveness of a proposed standard.

Background

In setting the MACT floor for PET manufacturing plants, EPA selected sensory LDAR, i.e., reliance on human senses to detect leaks. However, for certain types of equipment, EPA prescribed the use of one or both of the following “beyond-the-floor” technologies: (1) “one-time” equipment modifications or (2) “Method 21” LDAR, which uses portable organic vapor analyzers to monitor emissions. In conducting cost-effectiveness analyses, EPA aggregated the costs of the proposed controls on a facility-wide basis for each plant and divided them by the aggregated

emission reductions for each plant to obtain a dollar per ton figure for each type of PET manufacturer.

Two companies who owned PET manufacturing plants filed petitions for review of the final MACT standard promulgated in 1996. In addition, they jointly submitted to EPA an administrative petition for reconsideration of the final rule. In response to new data submitted by the two companies, EPA adjusted the costs upward but proposed to deny the petition for reconsideration. The two companies submitted comments in which they maintained, among other things, that EPA should not have aggregated the costs and effectiveness of the LDAR requirements on a facility-wide basis. EPA issued a final denial of the petition for reconsideration, and the companies challenged the denial in the D.C. Circuit.

The petitioners argued before the D.C. Circuit that aggregating the costs and effectiveness on a facility-wide basis misrepresents the cost-effectiveness of LDAR provisions with regard to certain types of equipment. In particular, they maintained that EPA’s approach misrepresented the cost-effectiveness of Method 21 because it averages the cost-effectiveness of Method 21 with the cost-effectiveness of the other two controls – one-time modifications and sensory LDAR. According to the petitioners, because the costs of Method 21 are so high, only a separate analysis of the method for certain types of equipment will accurately reflect the cost-effectiveness of the LDAR provisions.

The Court’s Decision

The court concluded that, although aggregating cost-effectiveness may be a permissible approach, the record in the case did not demonstrate that EPA’s use of aggregation was reasonable. Although the court made clear that the Act does not prohibit aggregating cost-effectiveness, it could not discern from the record that the petitioners’ objections to EPA’s approach in this rulemaking had been adequately answered. In defending its approach, EPA additionally argued that because most of the LDAR provisions allow the use of alternative methods, aggregation did not distort the results. However, the court noted that no alternative method exists for certain types of equipment and that, in any event, EPA “did not take into account these particular alternatives in

conducting its cost effectiveness analysis.” The court remanded the case to EPA “to clarify the PET equipment leak standard after reconsidering its cost effectiveness in accord with this opinion.” ”

Federal District Court Grants Motion to Dismiss Portions of Citizen Suit Alleging PSD Violations

In a citizen suit brought by the State of New York alleging numerous PSD violations, a federal district court judge has granted motions to dismiss filed by two groups of defendants. *State of New York v. Niagara Mohawk Power Corp.*, No. 02-CV-245 (W.D.N.Y., March 27, 2003). The court concluded, among other things, that the federal statute of limitations applies to the State’s claims for civil penalties based on its allegations that PSD permits should have been obtained. In reaching this conclusion, the court ruled that the failure to obtain a pre-construction permit does not constitute a “continuing violation.” In addition, the court ruled that certain defendants had not violated PSD permitting requirements because they were not “owners” or “operators” of the facilities involved at the time the PSD violations allegedly occurred.

Background

The State of New York filed a Clean Air Act citizen suit against Niagara Mohawk and nine other companies (the nine companies are referred to as the “NRG Defendants) alleging that the defendants had undertaken a total of 55 projects at two power plants between 1982 and 1999 without obtaining necessary pre-construction permits. The State alleged that the defendants had violated federal PSD permitting requirements as well as related state law provisions.

Niagara Mohawk and the NRG Defendants filed separate motions to dismiss the State’s claims. Niagara Mohawk owned and operated the two facilities during the time period that the State alleged the projects in question were undertaken. In June 1999, Niagara Mohawk sold the two facilities to the NRG Defendants.

In its motion, Niagara Mohawk argued that the complaint should be dismissed because the Clean Air Act citizen suit provisions do not authorize suits for “wholly past violations” of pre-construction permitting requirements. It also argued that all the alleged violations occurring more than five years before the State filed its complaint, i.e., all alleged violations occurring before November 28, 1996, are barred by the federal statute of limitations in 28 U.S.C. § 2462. Niagara Mohawk further contended that the State’s separate allegations that it failed to install BACT cannot be the subject of a citizen suit. Niagara Mohawk also maintained that the State’s additional claims based on SIP provisions or general state law principles cannot be brought under the federal citizen suit provisions.

In their motion, the NRG Defendants moved to dismiss both the federal and state claims in the State’s complaint as applied to them because they did not own or operate the two facilities during the time period in which the projects were undertaken.

Wholly Past Violations

The court disagreed with Niagara Mohawk’s argument that the State’s claims must be dismissed because the Clean Air Act citizen suit provisions did not authorize suits for “wholly past violations.” The court ruled that section 304(a)(3) of the Act, which authorizes citizen suits against any person who constructs a new or modified major emitting facility without a permit, plainly authorizes the type of action brought by the State. It also rejected Niagara Mohawk’s reliance on the decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), where the Supreme Court had ruled that the Clean Water Act’s citizen suit provision did not provide federal jurisdiction for citizen suits involving “wholly past violations.” According to the district court, the language of section 304(a)(3) can be distinguished from the language of the Clean Water Act citizen suit provision, which contains the language “alleged to be in violation” – language which does not appear in section 304(a)(3).

Statute of Limitations

With regard to the statute of limitations issue, the district court rejected the State’s position that the statute of limitations had not run because

the failure to obtain a PSD permit is a “continuing violation.” The court stated that the distinction between pre-construction permits and operating permits is “important” and that “violations of the preconstruction permitting requirements occur at the time of construction, not on a continuing basis.” The court noted that the majority of judicial decisions have held that the failure to obtain a pre-construction permit is not a continuing violation. Accordingly, the court concluded that the statute of limitations began to run at the time of construction for each project and therefore that the State’s claims for civil penalties for projects undertaken prior to November 28, 1996 are barred by 28 U.S.C. § 2462.

BACT Requirements

The court disagreed with Niagara Mohawk’s contentions that the State could not bring a citizen suit based on allegations that Niagara Mohawk had failed to install BACT in connection with the projects (independent of the alleged failure to obtain PSD permits). Niagara Mohawk contended that BACT requirements are not “in effect” and therefore do not satisfy the definition of “emission standard or limitation” in section 304(f), which contains the phrase “in effect.” According to Niagara Mohawk, BACT requirements are not “in effect” because the permitting authority will not have determined what constitutes BACT for the units in question. However, the court ruled that a source proposing to undertake a project is obligated to obtain a BACT determination and cannot benefit from having failed to satisfy pre-construction requirements. Accordingly, the court ruled that a claim that a source failed to install BACT is independent from permitting claims. However, the court ruled that the State’s BACT claims in this case are subject to the five-year statute of limitations in the same way that permitting claims are.

State Law Claims

The State’s complaint also generally alleged that the defendants had violated certain SIP provisions that apparently mirror the federal PSD provisions. In response to Niagara Mohawk’s motion to dismiss, the court ruled that these related state law claims were subject to a three-year statute

of limitations under New York law and that the state statute of limitations applied both to claims for civil penalties and for injunctive relief.

Claims Against the NRG Defendants

The State claimed that the NRG Defendants had violated PSD requirements even though it was undisputed that they neither owned or operated the facilities at the time the projects allegedly occurred. According to EPA, the NRG Defendants had violated the Act by operating the facilities in violation of the Act’s pre-construction requirements. In addressing these claims, the court ruled that “preconstruction obligations are imposed only upon the person who actually seeks to construct or modify a facility within the meaning of the Act.” In this regard, the court explained that the distinctions between the Act’s pre-construction permitting program and operating permit program are “critical.” Because the failure to obtain a pre-construction permit is not a “continuing violation,” the court ruled that the NRG Defendants could not be liable for simply operating facilities that allegedly should have obtained PSD permits in the past. ”