

D.C. Circuit Strikes Down BART Provisions in Regional Haze Rule

In a decision that will have major impacts on EPA's regional haze program, the D.C. Circuit issued a decision vacating the provisions in EPA's 1999 regional haze rule addressing the requirement for certain sources to install the best available retrofit technology (BART). *American Corn Growers Ass'n v. EPA*, Nos. 99-1348 *et al.* (D.C. Cir., May 24, 2002). The D.C. Circuit concluded that EPA's use of a "group-BART" approach in the rule contravened the statute. However, the court rejected industry petitioners' arguments that EPA's establishment of a "natural visibility" goal and a "no degradation" requirement in the rule is unlawful. Because the court believed that, on remand, EPA likely will significantly alter key elements of the rule, it declined to address various challenges made by the Sierra Club to the rule.

Background

Section 169A of the Act provides that EPA is to promulgate regulations requiring States to revise their SIPs in order to make "reasonable progress" toward achieving the national visibility goal – the "prevention of any future, and the remedying of any existing, impairment in visibility in mandatory class I areas when impairment results from man-made air pollution." Moreover, section 169A provides special requirements for any major source placed into operation between 1962

and 1977 that emits pollutants that "may be reasonably anticipated to cause or contribute to any impairment of visibility" in a class I area. If the State determines that a source meets these statutory criteria, the source must install controls that constitute BART. Once a State determines that a source is subject to BART requirements, the State is to consider the following five factors to decide which controls constitute BART for the source in question: compliance costs; energy and non-air quality environmental impacts; the existing pollution control technology; remaining useful life; and the degree of visibility improvement which may reasonably be anticipated to result from the technology.

In the 1999 regional haze rule, EPA provided that States are to revise their SIPs to achieve a goal of attaining "natural visibility" in class I areas within 60 years. In implementing the statutory BART requirements, EPA emphasized a "group-BART" approach. EPA used the group-BART approach in two ways. First, the rule stated that, in determining whether there was a contribution to visibility impairment, the States must consider the collective contributions of all sources within a geographic area. Second, the rule provided that, although four of the five statutory factors were to be applied on a source-specific basis, the fifth factor – the degree of visibility improvement

that will result – was to be applied on a group basis.

Ruling on BART Provisions

Industry petitioners maintained that EPA’s group-BART approach conflicts with the statute and is arbitrary and capricious.^{1/} By a 2-1 vote, the three-judge panel ruled that the group-BART provisions “are contrary to the text, structure, and history” of the Act and “are inconsistent with the Act’s provisions giving states broad authority over BART determinations.” The court first examined EPA’s use of group-BART in directing the States how to determine what constitutes BART. The court concluded that EPA could not provide that the States apply four of the statutory factors on a source-specific basis but mandate that the remaining factor of “visibility improvement” be applied on a group basis. According to the court, the rule’s “splitting of the statutory factors is consistent with neither the text nor the structure of the statute. . . . To treat one of the five statutory factors in such a dramatically different fashion distorts the judgment Congress directed the states to make for each BART-eligible source.” The court pointed out that, under EPA’s approach, a State could never reasonably determine that particular controls are too costly for an individual source because the regulations compel the State to compare the costs of controls for that source with the collective benefits resulting from emissions reductions from an entire group of sources. As the court stated, “[u]nder EPA’s take on the statute, it is

1/ The Clean Air Implementation Project (CAIP) intervened in support of the industry petitioners and joined in the briefs filed by those parties. CAIP also intervened in opposition to the Sierra Club’s challenges to the rule.

therefore entirely possible that a source may be forced to spend millions of dollars for new technology that will have no appreciable effect on the haze in any Class I area.”

The D.C. Circuit also found that, aside from consideration of the statutory factors in determining what constitutes BART, the group-BART approach is inconsistent with the Act’s provisions giving States broad authority in determining which sources should be subject to BART. The court explained that, under the Act, it is the State – not EPA – which must determine whether a major source that otherwise satisfies the statutory criteria will cause or contribute to visibility impairment in class I areas and therefore is subject to BART requirements. The court concluded that, because of the group-BART approach, the rule “ties the states’ hands and forces them to require BART controls at sources without any empirical evidence of the particular source’s contribution to visibility impairment in a class I area.”

Ruling on Visibility Goal

The industry petitioners argued that EPA exceeded its statutory authority by adopting regulations that establish a return to “natural visibility” as the goal of the regional haze program and that conflict with the statutory PSD program. According to the industry petitioners, the rule’s natural visibility goal exceeds the Act’s national visibility goal of “prevention of any future, and remedying of any existing, impairment in visibility” They also maintained that, because the Act’s PSD provisions authorize the States to allow some air quality degradation in attainment areas, the rule’s natural visibility goal and its

requirement that there be no degradation of visibility conflict with the statutory PSD provisions.

The court rejected industry petitioners' arguments and ruled that EPA's implementation of the national visibility goal was entitled to deference. According to the court, "[a]gency regulations that aim to remedy any existing impairment of visibility and prevent any future impairment – as the statute commands – will of necessity aim to achieve a state of natural visibility."

The court likewise concluded that the regional haze rule did not conflict with the Act's PSD provisions. It stated that EPA had reasonably construed the PSD program and the regional haze program as "complementary regulatory regimes." In this regard, the court pointed out that "the natural visibility goal is not a mandate, it is a goal." From this, the court concluded that States already have flexibility in making reasonable progress toward this goal. In particular, the court stated that short-term emissions increases due to new sources subject to PSD were not inconsistent with the long-term goal of achieving natural visibility.

The Sierra Club's Issues

The Sierra Club argued that the regional haze rule did not go far enough to achieve visual improvement in several respects. In particular, the Sierra Club contended that the criteria for measuring or assuring "reasonable progress" were too lenient and that EPA had acted contrary to law in extending the statutory deadline for submission of state haze control plans. However, the court concluded that "our decision to invalidate the group-BART provisions renders

[the Sierra Club's] entire cluster of challenges unripe for disposition." The court indicated that the Sierra Club could raise its challenges again, if appropriate, once EPA completes the remand on the rule's BART provisions. "

EPA Issues Final Guidance on "Federally Permitted Releases"

On April 17, 2002, EPA published final guidance generally addressing the question of which air emissions qualify as "federally permitted releases" under section 101(10)(H) of CERCLA. 67 Fed. Reg. 18,899. Emissions that qualify as "federally permitted releases" are exempt from the hazardous substance reporting requirements under section 103 of CERCLA or section 304 of EPCRA. An earlier version of that guidance had been signed by EPA officials more than a year ago – on January 17, 2001 – but was subsequently withdrawn before publication by the incoming Bush Administration. Although the final guidance is identical to the January 2001 version in most respects, EPA made significant changes that should expand the scope of the exemption for releases of volatile organic compounds (VOCs) or particulate matter (PM).

The final guidance supersedes EPA's interim guidance on "federally permitted releases" involving air emissions, which was issued on December 21, 1999. 64 Fed. Reg. 71,613. EPA subsequently suspended the interim guidance in response to judicial challenges brought by several industry parties in the D.C. Circuit. *National Ass'n of Manufacturers v. EPA*, No. 00-1111 (D.C. Cir.). In connection with that litigation, the D.C. Circuit ordered EPA to take further action with regard to the interim guidance by January

26, 2001. EPA's signing of the revised guidance on January 17, 2001 was intended to respond to the court's directive. However, as part of its effort to review various actions taken in the last days of the Clinton Administration, the Bush Administration withdrew that version of the guidance before it was published in the *Federal Register*.

On April 23, 2002, EPA published a separate guidance that specifically addresses issues concerning whether "grandfathered" sources under the Clean Air Act come within the federally permitted release exemption. 67 Fed. Reg. 19,750. That separate guidance had also been withdrawn by the Bush Administration.

Final General Guidance

The principal points contained in EPA's final guidance on air emissions that qualify for the federally permitted release exemption are summarized below:

The final guidance, like the interim guidance, provides that a release must always be in conformance with the Act's requirements in order to qualify for the "federally permitted release" exemption. In other words, even though a release may be subject to permit terms or regulations under the Act, the release is not covered by the exemption if it violates those terms or regulations.

The final guidance clarifies and expands those instances where emissions of VOCs or PM could qualify for the federally permitted release exemption. Under the 1999 interim guidance, facilities were required to report on VOC or PM emissions that are

subject to permits or control regulations unless the permit terms or regulations specifically targeted the particular hazardous substance constituent in question. The final guidance provides instead that, where facilities are in compliance with permit limits or control regulations for VOCs or PM and "those limits or controls include conditions that, when viewed together, control the release of a constituent hazardous substance, such a release would likely qualify as a federally permitted release." The final guidance also states that "[w]hether the hazardous substance . . . is a criteria pollutant or a hazardous pollutant, the permit limit or control should have the specific effect of limiting or eliminating the releases of the designated hazardous substance . . . if releases of that hazardous substance . . . are to qualify for the federally permitted release exemption."^{2/}

The final guidance adds a section addressing emissions of nitrogen oxide (NO) and nitrogen dioxide (NO₂). Although NO_x emissions were not specifically addressed in the interim guidance, the final guidance

^{2/} The language in the final guidance addressing the scope of the "federally permitted release" exemption for VOCs or PM is also broader than the corresponding language in the January 2001 version of the guidance. The January 2001 version stated at several points that the limits or controls must "have been specifically designed" to limit or eliminate the releases in question. The final guidance uses the phrase "have the specific effect" in place of the phrase "have been specifically designed." Although no explanation for the language change was provided, it is clearly preferable to focus on the actual effect of the limits or controls rather than including a requirement related to the intent underlying the limits or controls. It is likely that in many situations a limit or control will have the effect of limiting or eliminating the releases even though the limit or control was not designed to do so.

exempts as federally permitted releases all NOx emissions that are expressly subject to permit limits for NOx. According to the final guidance, “NOx permit limits are sufficient to meet the CERCLA federally permitted release definition for releases of NO and NO₂.”

The final guidance provides that certain releases from minor sources subject to a federally enforceable limit may satisfy the definition of a “federally permitted release.” The final guidance provides that emissions from a minor source that are exempt from regulation because they are below a federally enforceable threshold would generally qualify as federally permitted releases. “Releases of hazardous substances . . . from the normal operations of such minor sources qualify for the CERCLA section 101(10)(H) federally permitted release definition when the emissions of specific hazardous substances . . . are subject to the threshold limit imposed by law or regulation.” For example, “area sources” under section 112 of the Clean Air Act – sources that have the potential to emit less than 25 tpy of a combination of hazardous air pollutants (HAPs) and less than 10 tpy of any one HAP – are not required to meet section 112 emissions standards applicable only to major sources. So long as such a source’s emissions remain below these thresholds, its releases of hazardous substances during normal operations are covered by the “federally permitted release” exemption.

The final guidance states that releases that are subject to waivers from the requirements of a new source performance standard (NSPS) under section 111 of the Clean Air Act are covered by the “federally permitted release” exemption. For example, if a source has been granted a waiver from an

NSPS to allow the use of an innovative technology, a release that would have been controlled by the NSPS without the waiver is covered by the exemption so long as the release is consistent with the terms of the waiver.

The final guidance, like the interim guidance, provides that releases occurring during an accident or other malfunction “in most circumstances” are not covered by the exemption because they are ordinarily unpredictable. According to the guidance, “[p]ermit limits and control regulations usually do not control or limit unanticipated releases such as accidents or malfunctions and for that reason they generally do not qualify for the . . . federally permitted release exemption.”

The final guidance provides that releases of hazardous substances that are in compliance with a facility’s startup and shutdown plan are generally considered as being exempted from the reporting requirements. However, if a release during startup or shutdown is not subject to regulation under the Clean Air Act and is not otherwise subject to emission limits or other controls during the startup or shutdown, such an uncontrolled release does not qualify for the exemption.

In light of the publication of the final guidance, it appears likely that the industry petitioners in the D.C. Circuit litigation challenging the 1999 interim guidance will move to dismiss their petitions for review.

Final Guidance on Grandfathered Sources

The separate final guidance on sources grandfathered under the Clean Air Act provides that “[g]enerally, releases from grandfathered sources do not meet the definition of federally permitted releases, because Congress exempted those sources, rather than imposing permits or control regulations on them.” However, the guidance states that, “[i]f there are federally enforceable permits or control regulations issued under the CAA provisions cited in CERCLA 101(10)(H) that apply to releases of hazardous substances from a grandfathered source, despite the grandfathered source exemption, those releases may qualify as federally permitted releases.” The language of the final guidance concerning grandfathered sources is essentially identical to the language in the version signed in January 2001 and subsequently withdrawn. ”

Administrator Denies Challenges to Modified Title V Permit Issued by New York

In a decision issued on April 8, 2002, the EPA Administrator denied petitions for objection to a Title V permit for a waste disposal/chemical processing facility in New York. *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, Petition No. II-2001-05. 67 Fed. Reg. 34,706 (May 15, 2002). The Administrator ruled, among other things, that the New York State Department of Environmental Conservation (NYSDEC) had properly addressed limits on the facility’s potential to emit (PTE) in the Title V permit and that environmental justice claims could not be considered in this proceeding.

The case arose from NYSDEC’s issuance of a permit in July 2000 under its

combined Title V/NSR permitting program to Pencor-Masada Oxynol (“Masada”) authorizing the construction of a new facility. Individual citizens and one corporation filed a total of 35 petitions requesting that the Administrator object to the issuance of the permit pursuant to section 505(b)(2) of the Act. The petitions raised numerous procedural and substantive claims.

In a decision issued on May 2, 2001, the Administrator upheld the challenged permit in most respects.^{3/} However, the Administrator granted the petitions with regard to two issues. She ruled that there had been inadequate public notice regarding the facility’s PTE limits and regarding recordkeeping requirements under the NSPS for steam generating units.

In October 2001, after receiving and considering additional public comments, NYSDEC issued a modified permit to Masada. Four new petitions were subsequently filed challenging the modified permit. The new petitions raised certain issues pertaining solely to the modified permit as well as other issues previously addressed in EPA’s May 2001 decision. In addition, one of the petitioners maintained that EPA had failed to comply with the executive order on environmental justice. We summarize the Administrator’s key rulings below.

PTE Limits

The Administrator rejected arguments that PTE limits to be used to avoid triggering major source requirements with regard to certain pollutants must be short-term physical

^{3/} That decision was discussed in the July 2001 *Washington Report* at WR-385.

or operational limits. The petitioners claimed that, in order to limit the facility's PTE, the permit must contain operational constraints such as limits on throughput, hours of operation, and amounts of materials or fuels as well as hourly rates. However, the Administrator stated that the Act does not specify how to calculate a source's PTE and that the regulations allow for a flexible, case-by-case approach. She specifically ruled that the methodology employed here – a 365-day “rolling cumulative total” emissions limit – is a “practically enforceable and effective means of limiting PTE in this case.”

Certain petitioners also argued that the annual limits for NO_x and SO₂ were too close to the major source thresholds for those pollutants and should be lowered to provide a greater margin of compliance, due to uncertainty in emissions estimates. The Administrator found that the estimates were sufficiently credible to serve as a reasonable basis for determining whether the PTE limits can be met by the source. She also found that a system of continuous emissions monitors (CEMs) required by the permit will provide reliable data to ensure that the emissions stay below the major source thresholds. The Administrator concluded that the source bears the risk if it has underestimated emissions and must constrain its operations to meet the rolling cumulative emissions total.

Role of Hourly Limits

Petitioners challenged the permit as inadequate because, although it contains hourly limits on NO_x and SO₂ emissions, compliance with the limits is determined on a 30-day rolling average. The Administrator agreed that the hourly limits are not directly tied to the 365-day rolling total emissions limit

but concluded that compliance with the 365-day rolling limit properly establishes that the source is a minor source. According to the Administrator, the hourly limits serve two important purposes: (1) they provide a maximum operating level, which is used to calculate a fallback PTE if CEM data availability falls below 75% and (2) they make a 97% control limit for SO₂ practically enforceable.

Consequences of Noncompliance

Certain petitioners contended that the permit should provide for severe consequences when exceedances occur. They argued that, if an exceedance occurs, the permittee should be required immediately to submit a major source permit application or to shut down until all requirements are met. However, the Administrator ruled that the permit need not be revised to contain such conditions. According to the Administrator, EPA and NYSDEC have sufficient authority to enforce the permit and must retain discretion to determine what remedy is appropriate in a given situation.

Environmental Justice Claims

One petitioner maintained that EPA had failed to evaluate the “environmental disparate impacts” on minority and low income communities under Executive Order 12898. That order, issued by President Clinton, directs federal agencies, among other things, to make environmental justice part of their mission by addressing disproportionately high and adverse human health or environmental effects in their programs. In determining whether the order applies to Masada's Title V permit, the Administrator contrasted Title V permits, which generally do not impose new substantive

control requirements, with PSD/NSR permits, which impose new requirements. Because the petitioners had not demonstrated that the permit fails to require compliance with any existing applicable requirements, the approved SIP, or any Title V requirements, the Administrator concluded that the petitions should be denied with regard to the environmental justice claims. However, the Administrator indicated that the petitioner could file a judicial complaint against NYSDEC alleging that the state agency, as a recipient of federal financial assistance, had violated Title VI of the Civil Rights Act as well as EPA's environmental justice regulations by discriminating on the basis of race, color, or national origin. "

Administrator Denies Petition for Objection to Alabama Title V Permit

The EPA Administrator has issued an order denying all the objections raised to a Title V permit issued to a chemical plant by the Alabama Department of Environmental Management (ADEM). *In the Matter of Kerr-McGee Chemicals, LLC's Mobile, Alabama Chemical Manufacturing Facility*, Pet. No. IV-2000-1 (Feb. 1, 2002). 67 Fed. Reg. 19,572 (April 22, 2002). Among other things, the Administrator rejected arguments that more stringent periodic monitoring should have been required for several emissions units and that a monitoring requirement for hydrogen chloride emissions should have been added to the permit.

The case arose in April 2000, when ADEM issued a Title V permit to Kerr-McGee for its facility in Mobile, Alabama. Mobile Bay Watch, Inc., subsequently filed a petition for

objection to the permit pursuant to section 505(b) of the Act. The petitioner raised numerous objections to the permit in its petition. Most of the challenges dealt with the adequacy of the monitoring requirements included in the permit.

Periodic Monitoring

With regard to the petitioner's claims that the periodic monitoring required for numerous emissions units was inadequate, EPA stated that it would take the same approach that it had taken in two previous decisions on petitions for objection to Title V permits: *In re PacifiCorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Pet. No. VIII-00-1 (Nov. 16, 2001); and *In re Fort James Camas Mill*, Pet. No. X-1999-1 (Dec. 22, 2000). Notwithstanding that the D.C. Circuit had ruled in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), that states are not authorized to undertake sufficiency reviews of the periodic monitoring contained in "applicable requirements," EPA concluded in those decisions that the general language in 40 C.F.R. § 70.6(c)(1) authorizes such sufficiency reviews.^{4/} Accordingly, EPA examined the periodic monitoring provisions in the permit for the emissions units in question to determine whether it was adequate.

In each instance raised by the petitioner, EPA concluded that the periodic monitoring was sufficient to assure compliance with the applicable requirement in question. With regard to certain emissions units, EPA found that periodic observations which verify the absence of visible emissions are sufficient

4/ See, e.g., the November 2000 *Washington Report* at WR-334.

because testing has shown a substantial difference between controlled emissions and allowable emissions, e.g., actual emissions for one unit are typically only seven percent of the allowable emissions. Given such differences, EPA believed that periodic visual observations were all that was required to assure compliance.

EPA specifically rejected the petitioner's claim that continuous monitoring for SO₂ must be required for certain emissions units. EPA stated that it "believes that this level of monitoring [i.e., continuous monitoring.] is not always necessary and that the need for monitoring must be considered in the context of the specific technical and regulatory issues presented by the source in question." For example, EPA stated that, because one unit burns natural gas only, its SO₂ emissions are "inherently extremely low," and continuous monitoring is not warranted.

Monitoring for Hydrogen Chloride Emissions

In a separate argument, the petitioner contended that, because the facility emits 74 tpy of hydrogen chloride, it is a major source of this pollutant under Title V, and the permit must include monitoring requirements for hydrogen chloride. However, EPA ruled that, since there is currently no applicable requirement that regulates hydrogen chloride at the facility, no monitoring can be required for that pollutant. The Agency explained the limited scope of Title V as follows:

The purpose of the title V permit program is not to evaluate the need for new emission standards or to create new substantive permit

requirements, but simply to incorporate all existing standards and requirements into a permit in a way that improves implementation of those standards. Title V does not require that permitting authorities conduct evaluations of the need for new emission standards nor does it independently authorize creation of new emission limits except in limited circumstances (e.g., establishment of limits on potential to emit in order to avoid major source status for a particular pollutant). While monitoring sufficient to assure compliance by providing reliable data from the relevant time period that are representative of the source's compliance with the permit is required (See 40 C.F.R. §§ 70.6(a)(3)(i)(B) and 70.6(c)(1)), title V does not require monitoring of emissions for which no applicable requirements exist.

In addition, EPA rejected various general contentions concerning the validity of the permit, e.g., the long period of time between the submission of the permit application and the issuance of the draft permit. It then dismissed the petition in its entirety. "