

EPA Publishes Interim Final Rule and Proposed Rule Addressing Title V Periodic Monitoring Requirements

On September 17, 2002, EPA published an interim final rule and a proposed rule that would authorize EPA and State Title V permitting authorities to conduct “sufficiency reviews” of the already-established periodic monitoring contained in “applicable requirements.” 67 Fed. Reg. 58,529 (interim final rule) and 67 Fed. Reg. 58,561 (proposed rule). According to EPA, both the interim final rule and the proposed rule are intended to clarify that EPA’s existing Part 70 and 71 regulations authorize such sufficiency reviews in order to assure compliance with applicable requirements.

Industry representatives maintain that the purpose of the interim final rule and proposed rule is to significantly change the current Title V monitoring requirements and to overturn the D.C. Circuit’s decision in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). In that case, the court expressly ruled that EPA’s existing regulations did not authorize sufficiency reviews of the monitoring contained in applicable requirements. The court further vacated EPA’s periodic monitoring guidance as an unlawful attempt to amend agency regulations without complying with notice and comment requirements.

In subsequent decisions on petitions requesting that EPA object to certain Title V permits, the Agency has contended that the *Appalachian Power* decision does not foreclose sufficiency reviews because the court relied only on the language of 40 C.F.R. 70.6(a)(3), which specifically addresses periodic monitoring requirements, but did not consider the more general language of 40 C.F.R. 70.6(c)(1), which provides for monitoring “sufficient to assure compliance with the terms and conditions of the permit.” According to EPA, section 70.6(c)(1) applies when the applicable requirement in question contains some type of periodic monitoring and authorizes EPA and State permitting authorities to review that periodic monitoring to determine whether it is sufficient to assure compliance. EPA did not rely on section 70.6(c)(1) in its brief in *Appalachian Power* even though the issue before the court was whether the periodic monitoring guidance was consistent with EPA’s existing regulations.

An industry petitioner challenged EPA’s new interpretation of its permitting regulations in the D.C. Circuit. *Utility Air Regulatory Group (UARG) v. EPA*, No. 01-1204 (D.C. Cir.). (The Clean Air Implementation Project intervened in the litigation and filed briefs in support of UARG.) The industry parties maintained, among

other things, that EPA's new interpretation conflicts with the *Appalachian Power* decision and with the Agency's contemporaneous interpretation of its regulations as set forth in the preamble to the 1992 Part 70 regulations. One specific argument made by the industry parties is that the introductory language in section 70.6(c)(1) states that the provision must be read "consistent with" section 70.6(a)(3) and that EPA has historically interpreted section 70.6(a)(3) as providing that the periodic monitoring already contained in the relevant applicable requirement is deemed sufficient for Title V purposes.

Shortly before the D.C. Circuit held oral argument in the *UARG* case, EPA informed the court that the Administrator had signed the interim final rule and proposed rule addressing periodic monitoring requirements in Title V permits. The interim final rule contained two principal elements: (1) it stated that EPA interprets section 70.6(c)(1) as authorizing EPA and State permitting authorities to conduct sufficiency reviews of the periodic monitoring contained in applicable requirements; and (2) it suspended for 60 days the introductory phrase in section 70.6(c)(1) stating that the provision must be read "consistent with" section 70.6(a)(3). The interim final rule was published on September 17, 2002 without an opportunity for public comment and was made immediately effective.¹ It will automatically expire on November 17, 2002. The proposed rule, which was also published on September 17, is almost identical in content to the interim final rule. The public comment period on the proposed rule ended on October 17.

Industry comments on the proposed rule have focused on the following key points:

^{1/} Several industry parties, including UARG and the Clean Air Implementation Project, have challenged the interim final rule in the D.C. Circuit.

- C The proposed rule and the preamble interpretation do not reflect a "clarification" of the 1992 Part 70 regulations; instead, they directly conflict with the plain meaning of the regulations, EPA's contemporaneous interpretation of the regulations, and the *Appalachian Power* decision.
- C The proposed rule, if finalized, would constitute a standardless delegation of regulatory authority that conflicts with the statute.
- C EPA must adopt any additional or different periodic monitoring through rulemaking that does not alter the meaning of "compliance" as defined when the underlying emission control requirements were established and does not increase the stringency of the control requirements by redefining what constitutes compliance.
- C EPA should confirm its 1992 preamble interpretation that the Agency and State permitting authorities are not authorized to require additional or different monitoring where applicable requirements already provide for periodic monitoring unless EPA establishes such monitoring through rulemaking applying the relevant regulatory criteria.

EPA has made clear that it intends to take final action on the proposed rule prior to November 17 – the date on which the interim final rule expires. "

Federal Court Issues Key Rulings in Indiana NSR Enforcement Case

A federal district court in Indiana has issued four separate pre-trial rulings on important issues in EPA's enforcement action against a utility company for allegedly undertaking "major modifications" of a coal-fired power plant without obtaining PSD permits. *United States v. Southern Indiana Gas and Electric Co.*, No. IP 99-1692-C-M/F (S.D. Ind., July 19, July 29, and October 24, 2002). The enforcement action was brought as a part of EPA's November 1999 NSR enforcement initiative. The trial in this case is currently scheduled to begin in October 2003. In its pre-trial decisions, the court ruled as follows:

- C EPA did not violate the Congressional Review of Agency Rule Making Act (CRA) in that it did not establish a new agency rule or policy addressing the regulatory exclusion for "routine maintenance, repair, and replacement" without submitting a required report to Congress.
- C The fact that actual emissions did not increase after a particular modification does not, by itself, establish that the modification did not trigger PSD requirements. PSD applicability hinges on a prediction of emissions changes made before the proposed modification takes place.
- C The general statute of limitations in 28 U.S.C. 2462 prevents EPA from seeking civil penalties in connection with projects undertaken in 1991-1992.
- C EPA was not barred from maintaining that a modification triggered PSD requirements even though the State had expressly made a contrary determination.

We discuss each of these rulings in more detail below.

Compliance with the Congressional Review of Agency Rule Making Act

In a motion for summary judgment, the company argued that EPA had violated the CRA by establishing a new agency rule or policy without submitting a report to Congress on the rule or policy as required by that statute. In particular, the company maintained that EPA had changed its interpretation of the exclusion for "routine maintenance, repair, and repair" in such a way that the Agency created a new rule or policy. In support of its contentions, the company submitted four declarations from former high-ranking EPA and DOE officials.

In response, EPA argued that the court lacked jurisdiction to review its compliance with the CRA based on a provision in that statute stating that "no determination, finding, action, or omission under this chapter shall be subject to judicial review." The Agency further contended that it had not changed its interpretation of the "routine maintenance" exclusion and that, in any event, it had not promulgated any pertinent rule or policy triggering CRA requirements.

The district court rejected EPA's argument that it lacked jurisdiction over the company's CRA claim. The court concluded that that language of the provision restricting judicial review was ambiguous. According to the court, it was unclear whether the prohibition on judicial review applied to actions of both administrative agencies and Congress or only to actions of Congress. Because of this ambiguity, the court examined the statute's legislative history and concluded that Congress had intended that the judicial review prohibition would only bar review of actions taken by Congress itself.

With regard to the merits of the company's claim, the district court ruled that the company had failed to show that EPA had violated the CRA. The court stated that the

question before it was whether EPA had promulgated a new rule or policy addressing the “routine maintenance” exclusion after March 1996 – the effective date of the CRA – without following the CRA’s reporting requirements. The court then ruled that the declarations of former high-ranking officials were inadmissible as evidence to demonstrate EPA’s pre-1996 interpretation of the exclusion. According to the court, although the declarations addressed the background of the statutory and regulatory PSD/NSR provisions, they did not establish what the law was with regard to the PSD regulations and did not aid the court in determining EPA’s pre-1996 interpretation of the “routine maintenance” exclusion. The court opined that the question of how the PSD regulations worked was one of law, not fact, to be determined by the court.

The court further concluded that the Seventh Circuit in *Wisconsin Elec. Power Co. (WEPCO) v. Reilly*, 893 F.2d 901 (7th Cir. 1990), had upheld EPA’s four-part test for applying the “routine maintenance” exclusion – the same test that EPA purports to be using at the present time. It also rejected the company’s attempt to rely on EPA’s 2000 letter to the Detroit Edison Company to establish that EPA had changed its interpretation of the exclusion sometime after March 1996. The court believed that EPA applied the basic test upheld in the *WEPCO* case in the Detroit Edison letter and concluded that “the Detroit Edison letter does not represent the kind of departure from *WEPCO* and the language of the CAA that [the company] ascribes to it, and it does not constitute a new, post-1996 rule under the CRA.” As a result, the court denied the summary judgment on this question.

Although the court ruled that EPA’s use of the four-part test did not constitute the adoption of a new rule or policy, it did not address whether the projects at issue properly came within the “routine maintenance” exclusion.

This will be addressed at trial or possibly earlier in another summary judgment motion.

PSD Applicability Determination Prior to Construction of a Project

In its motion for partial summary judgment, the company contended that there was no evidence that, following the completion of certain projects, the projects caused any actual emissions increase. According to the company, this established that the company had not been required to obtain PSD permits.

In opposing the company's motion, EPA argued that the company was required to predict the amount of any emissions increase before commencing construction. EPA maintained that the company's "wait and see" approach conflicts with the statutory language and the purpose of the PSD program.

The court agreed with EPA's position and expressly adopted the relevant portion of the Environmental Appeals Board's decision in *In re: Tennessee Valley Authority* (EAB, September 15, 2000) addressing this issue. In that decision, the Board concluded that, because the PSD provisions of the Act create a pre-construction permitting program, PSD applicability determinations must always be made before commencement of construction. The Board stated that a facility must predict post-project emissions before commencing construction and that post-modification emissions data alone cannot establish that the modification did not trigger PSD requirements. Based on its adoption of the Board's decision, the court denied the company's motion for partial summary judgment on this point.

Applicability of General Statute of Limitations

The company also argued in its motion for partial summary judgment that the five-year general statute of limitations in 28 U.S.C. 2462

bars EPA's claims for civil penalties with regard to projects undertaken in 1991 and 1992. EPA argued in its opposition that the statute of limitations had not begun to run because the alleged failures to obtain PSD permits for those projects were "continuing violations."

In its decision, the court drew a sharp distinction between preconstruction permits and operating permits. The court concluded that the failure to obtain a preconstruction permit – in contrast to the failure to obtain an operating permit – is a discrete violation that occurs at the time of construction and therefore does not constitute a continuing violation. In this regard, the court stated that "[a] significant majority of district courts that have considered the issue have concluded that violations of PSD preconstruction permits do not constitute violations that continue past the completion of construction." The court noted that the statute of limitations, which expressly addresses civil penalties, would not bar EPA from seeking injunctive relief with regard to the 1991-1992 projects and had no impact on civil penalty or other claims involving projects undertaken in 1997.

Effect of State PSD Non-Applicability Determination

The company sought partial summary judgment regarding projects constructed in 1997 based on an express determination of the Indiana Department of Environmental Management (IDEM) that the projects were not subject to PSD requirements. In opposing the motion, EPA argued that IDEM's determination was incorrect and that the Agency was not bound by that determination.

The projects in question involved refurbishing a unit at a power plant by replacing steam tubes in a secondary superheater, replacing sections of a turbine with new blades of a more advanced design, and making other miscellaneous

repairs. In response to formal requests from the company, IDEM had issued a written determination that the activities in question constituted “routine maintenance, repair, and replacement” and therefore were not subject to PSD requirements.

In arguing that EPA cannot attack IDEM’s non-applicability determination, the company maintained: (1) that the Act makes such State determinations binding on EPA; (2) that IDEM is EPA’s agent for implementing the delegated PSD program and that EPA is bound because of the agency relationship; and (3) that EPA is equitably estopped from asserting a view that is inconsistent with IDEM’s determination.

The district court rejected the argument that the Act makes IDEM’s non-applicability determination binding on EPA. According to the district court here, “the plain language of [section 113 of the Act] indicates that in such a situation the Government is not precluded from acting. Indeed, that section’s broad language provides that the Administrator can bring an action whenever it finds that any person has violated ‘any requirement or prohibition’ of ‘an applicable implementation plan or permit.’ There is no language in the Act that precludes the Government from initiating an enforcement action if a source has already obtained a permit – or in this case, an applicability determination – from a state agency.” In doing so, it declined to follow two decisions (*United States v. AM General*, 34 F.3d 472 (7th Cir. 1994); and *United States v. Solar Turbines*, 732 F.Supp. 535 (M.D. Pa. 1989)), which both indicated that EPA could not bring an enforcement action against a source that had obtained an NSR/PSD permit from the state agency authorizing the project involved.

With regard to the argument that EPA was bound because IDEM was acting as its agent, the court ruled that EPA had not delegated all of its enforcement authority to IDEM. The court

concluded that the Act and the letters delegating EPA’s authority to administer and enforce the federal PSD program had expressly reserved EPA’s right to independently enforce the PSD provisions.

The court also summarily rejected the company’s argument that EPA was “equitably estopped” from bringing an enforcement action. It ruled that the company should have been aware that EPA had retained enforcement authority and that the company had not shown that EPA had engaged in any affirmative misconduct that would have caused the company to rely on the non-applicability determination to its detriment. Accordingly, the court denied the company’s motion for partial summary judgment insofar as it was based on IDEM’s non-applicability determination. ”

District Court Rules That Title V Parallel Permit Review Procedures Are Unlawful

A federal district court judge has addressed two significant issues related to Title V permit processing in deciding a case brought in the District of Columbia to compel EPA to respond to a petition to object to a permit issued by the Georgia Environmental Protection Division (EPD). *Sierra Club v. Whitman*, No. 01-01991 (D.D.C., January 30, 2002). First, the court ruled that EPA’s 45-day review period cannot run concurrently with the 30-day public comment period for Title V permits. (As discussed below, based on that ruling, EPA Region IV issued a letter on July 24, 2002 indicating that it would no longer conduct “parallel review” of Title V permits.) Second, the court concluded that the doctrine of “equitable tolling” can extend the period for submission of citizen petitions beyond

the 60 days provided for in the Clean Air Act and EPA and State regulations.

Parallel Review of Title V Permits

In deciding whether the public comment and EPA review periods can run concurrently, the court began with an analysis of the statutory framework. The court pointed out that the public must be provided an opportunity to comment for a period of 30 days on a “draft” permit. It then noted that EPA’s 45-day period for objecting to a permit begins after it receives a copy of a “proposed” permit. Even though Georgia has an approved Title V program, the court nowhere referenced the State’s regulatory provisions implementing the federal Title V program.

Relying on the distinction between a “draft” and “proposed” permit, the court concluded that the State did not have authority under the Act to submit a proposed permit before the close of the 30-day public comment period. It stated that “permitting EPA review prior to the close of the public comment period would undermine the ability of the public to participate in the permitting process and thereby frustrate the purposes of the Act.” It further stated that a “permit program would not be ‘adequate’ if it allowed the permitting authority to pass on and EPA to review a draft permit that had never been subjected to public scrutiny.” Based on this analysis, the court ruled that EPA’s receipt of the permit on which the public was provided an opportunity to comment was a “draft” permit, not a “proposed” permit. It further ruled that EPA’s 45-day review period did not commence until sometime after the close of the public comment period.

The court’s ruling only addresses the issuance of initial Title V permits. However, the ruling presumably would also apply to the

issuance of renewal permits. Because significant permit modifications are to be processed in the same manner as initial permits, there is reason to be concerned about whether processing of such modifications could be affected by this ruling.

In addition, the court did not address the situation where State Title V programs specifically provide for parallel processing. The provisions of such programs providing for parallel processing should continue to be the governing law until such programs are revised.

Region IV’s Letter on Parallel Permit Review

In its July 2002 letter to a local permitting official, Region IV takes the position that “parallel permit review” of Title V permits is no longer permissible.² Letter from Winston A. Smith, EPA Region IV, to Art Williams, Air Pollution Control District of Jefferson County (July 24, 2002). Citing the *Sierra Club v. Whitman* case, the Region IV letter indicates that EPA’s 45-day review period will not begin until EPA receives a “proposed” permit.

The issue of parallel Title V permit review has also recently been raised in litigation in the Fifth Circuit involving the validity of Texas’ Title V program. In defending its approval of Texas’ program, which authorizes parallel permit review, EPA’s counsel provided only lukewarm support for the validity of parallel permit review. EPA’s brief stated that “Title V and Part 70 do not expressly prohibit concurrent review of permits by the public and EPA” and that “Texas’ program, which gives Texas the discretion to seek

^{2/} The Region IV letter can be found in the Network’s website under Title V Operating Permits – Policy and Guidance Documents – Permit Application Requirements and Miscellaneous.

concurrent review, does not violate Title V.” EPA’s brief further indicated that the *Sierra Club v. Whitman* decision should not be followed. However, while maintaining that “EPA did not act arbitrarily in approving Texas’ concurrent review provision,” the brief stated that “EPA has encouraged States to adopt sequential review.”

EPA’s Title V staff in OAQPS have indicated that, notwithstanding the *Sierra Club v. Whitman* ruling, they continue to be supportive of parallel permit processing. They also believe that, other than Region IV, the regions are continuing to follow the same policies on processing as in the past.

Equitable Tolling of Objection Petitions

The issue given the most attention in the case was whether there can be “equitable tolling” of the period for citizens to file a petition requesting that EPA object to the issuance of a Title V permit. The court first reviewed case law relating to “equitable tolling” as a legal principle and concluded that such tolling is permissible. The court’s reasoning emphasized that Congress had used the word “may” in providing that citizens had a period of 60 days in which to file a petition and elsewhere had used the word “shall” in specifying required actions of the permitting authority and EPA. However, the court failed to recognize that “may” was used because objection petitions are not mandatory, but are optional and expected to be filed in limited circumstances. Thus, the court’s analysis on this issue appears to be unconvincing.

The specific facts that the court considered involved a situation where the Sierra Club had clearly been misinformed by the Georgia EPD regarding whether a permit would be repropose and thus would result in the Sierra Club having additional time to submit an objection petition. The court did not have to

reach the “tolling” issue but rather could have achieved the same practical outcome by concluding that the objection period would run from the date that the Georgia EPD had indicated that the permit would be repropose. Nonetheless, because the facts presented do not seem to provide a precedent for many other circumstances to justify “equitable tolling,” it will probably be rare that the period for citizens to file petitions would be extended. ”

Court of Appeals Upholds EPA Orders in PSD Permit Case

The U.S. Court of Appeals for the Ninth Circuit has issued a decision upholding three orders issued by EPA that effectively invalidated a PSD permit issued by the Alaska Department of Environmental Conservation (ADEC). *State of Alaska v. EPA*, No. 00-70166 (9th Cir., July 30, 2002). The permit had been issued to Teck Cominco Alaska, Inc., which operates a large zinc mine on the North Slope. In upholding EPA’s orders, the court concluded that EPA has broad authority to overrule a state’s determination regarding what constitutes BACT.

Background

The case involved a PSD permit issued by ADEC to the company so that it could increase the capacity of one of its six generators and construct a new generator to power additional mining equipment. In issuing the permit, ADEC determined that the use of Selective Catalytic Reduction (SCR) technology for the modified generator and the new generator would be economically infeasible and that BACT for the project should be based on the installation of low NOx burner technology on all of the company’s generators.

Upon reviewing the proposed permit, EPA maintained that BACT for the modified and new generators must be based on SCR and issued a “Finding of Noncompliance Order” directing ADEC to withhold issuance of the proposed permit because it allegedly would violate the Act and Alaska’s SIP. Despite the order, ADEC immediately issued the PSD permit as proposed. EPA subsequently issued two orders to the company to prevent it from beginning construction until EPA determined that the permit complied with the Act and the SIP.

Both ADEC and the company filed petitions for review with the Ninth Circuit challenging the three orders. In a March 2001 decision, *Alaska v. EPA*, 244 F.3d 748 (9th Cir. 2001), the court rejected EPA’s arguments that the orders were not judicially reviewable final orders.³ The court subsequently directed the parties to file supplemental briefs addressing EPA’s authority to issue the orders.

The Court’s Decision

After reviewing the language of the Act and its legislative history, the court concluded that “although the state has discretion to make BACT determinations as the permitting authority, the Act provides for EPA enforcement when the state issues a permit based on an improper determination” and “that EPA has the ultimate authority to decide whether the state has complied with the BACT requirements of the Act and the state SIP.” The court then rejected petitioners’ arguments (1) that EPA may not overrule a state’s BACT determination on projects where the state is to exercise discretion and (2) that EPA’s authority is limited to enforcing “objective requirements,” e.g., that the source obtain a permit, that the state permitting

^{3/} That decision was discussed in the May 2001 *Washington Report* at WR-369.

authority make a BACT determination, and that the state permitting authority consider the statutory factors in making the BACT determination. Instead, the court ruled that EPA had authority to decide whether ADEC had adequately justified each element of its BACT determination.

Finally, the court found that EPA’s decision that ADEC’s BACT determination was unsupported was itself not arbitrary and capricious and would be affirmed. The court explained that, in applying the “top-down BACT” approach, ADEC was obligated to determine that SCR constituted BACT unless it could show that SCR was economically infeasible. According to the court, the record failed to show that any of the circumstances in which a control option could be rejected based on cost considerations were present. Instead, ADEC had sought to justify its determination by relying upon the mine’s contribution to reducing unemployment rates in the area and the excessive costs of SCR technology in relation to the competitive status of the mine. The court concluded that ADEC’s justification was unacceptable under the top-down approach and that EPA had properly determined that it was arbitrary and capricious.

On October 25, ADEC filed a petition with the U.S. Supreme Court seeking review of the Ninth Circuit’s decision. "

Court of Appeals Upholds EPA’s Decision Not to Object to Title V Permit

The U.S. Court of Appeals for the Second Circuit has issued a decision affirming EPA’s determination not to object to a Title V permit for a combination waste processing/chemical processing facility. *LeFleur v. Whitman*, No. 01-4126 (2d Cir., July 31, 2002). The key issue was

whether the facility owner was required to obtain a PSD permit in connection with the construction of the new facility. The court of appeals held that EPA properly rejected the citizen petitioners' contentions that the portion of the facility engaged in chemical processing (ethanol production) triggered PSD requirements. The court's decision contains a lengthy discussion concerning the determination of a facility's "primary activity" for PSD purposes as well as EPA's "embedded facility" doctrine.

Background

The case involved an effort by the company to obtain a Title V operating permit in connection with the construction of an innovative waste processing/chemical processing facility in Middletown, New York. The facility is designed to process municipal solid waste from surrounding jurisdictions while also producing ethanol for commercial purposes. The New York State Department of Environmental Conservation (NYSDEC) issued a Title V permit to the company in July 2000.

Numerous petitioners filed a petition pursuant to section 505(b)(2) of the Act requesting that EPA object to NYSDEC's issuance of the permit. They maintained that the permit should have provided that the facility is subject to PSD requirements. The Administrator subsequently issued a decision denying that petition and upholding the Title V permit. *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxydol, LLC*, Petition No. II-2000-07 (May 2, 2001).⁴ In that decision, EPA ruled that the primary activity of the facility would

be waste processing rather than chemical processing. This was significant because, under the statute and regulations, a chemical process plant has a major source cutoff of 100 tpy while a waste disposal plant has a major source cutoff of 250 tpy. Because the facility's potential to emit would not exceed 250 tpy for any regulated pollutant, PSD requirements would not be triggered by the facility's primary activity. At the same time, EPA also concluded that the portion of the facility engaged in chemical processing might trigger PSD requirements because it would be considered an "embedded" chemical process plant under EPA's long-standing policy. However, EPA found that the emissions attributable to the embedded chemical process plant would be less than 100 tpy for SO₂ and all other regulated pollutants.

Certain petitioners (two citizens residing near the facility, trustees of a nearby shopping center, and their consultant) filed a petition for review in the Second Circuit challenging EPA's decision not to object to the permit. The petitioners made two principal arguments regarding why EPA's denial of the petition should be reversed. First, they contended that EPA had improperly weighed the evidence in determining that the "primary activity" of the facility would be waste processing rather than chemical processing. In particular, they maintained that EPA had erred in basing its determination on the projection that 70 percent of the facility's revenues would come from processing of municipal wastes. Second, the petitioners attacked EPA's conclusion that the potential to emit of the "embedded" chemical process plant at the facility would not exceed 100 tpy for SO₂ because EPA had determined that emissions from the gasifier should be allocated to the waste processing portion of the facility.

The Court's Decision

^{4/} That decision was discussed in the July 2001 *Washington Report* at WR-385.

The court of appeals first considered arguments of EPA and the company that the doctrine of collateral estoppel prevented the petitioners from relitigating the issues of whether chemical processing is the primary activity of the facility and whether the embedded chemical process plant would otherwise trigger PSD requirements. (Under the doctrine of collateral estoppel, a party cannot relitigate an issue that has previously been decided adversely to it in separate litigation involving the same parties or parties that are closely related.) The Second Circuit agreed that, because the petitioners had raised the same issues in a prior state court proceeding and the state court had ruled against them, the petitioners could not relitigate the issues in federal court. Accordingly, the court of appeals ruled that the petitioners' case could be dismissed on collateral estoppel grounds. However, the court went on to address the merits of the petitioners' claims.

With regard to the merits, the court upheld EPA's determination that the primary activity of the facility would be waste processing rather than chemical processing as well as EPA's conclusion that emissions from the gasifier should be allocated to the primary activity rather than to the embedded chemical process plant. The court ruled that EPA could permissibly base its "primary activity" determination on the projection that 70 percent of the facility's revenues would come from waste processing rather than ethanol production even though most of the processing steps would involve ethanol production. The court also ruled that EPA's determination that the embedded chemical process plant would emit less than 100 tpy of SO₂ was not arbitrary or capricious. The court found that, because the gasifier would be used to combust lignin – an intermediate waste product – EPA could reasonably allocate those emissions to

the waste processing operation despite the fact that the steam generated would be used in ethanol production. Based on these conclusions, the court denied the petition for review. "