

CLEAN AIR ACT

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EAB Upholds TVA Compliance Order in Most Respects

On September 15, 2000, EPA's Environmental Appeals Board (EAB or the Board) issued a 164-page opinion addressing the validity of the compliance order issued to the Tennessee Valley Authority (TVA) by EPA as part of its NSR enforcement initiative. The EAB affirmed most of the legal positions relied upon by EPA in issuing the order. The EAB's decision, which constitutes the definitive position of EPA on the legal and factual issues involved,^{1/} addresses, among other things, the interpretation of key PSD/NSR provisions such as the exclusion for "routine maintenance, repair, and replacement" activities and the definition of a "significant net emissions increase."

As explained below, TVA will presumably seek judicial review of the EAB's decision before the U.S. Court of Appeals for the Eleventh Circuit. That court is currently considering on a parallel track direct challenges to the same compliance order filed by TVA and other parties.

Background

EPA issued the initial compliance order to TVA on November 3, 1999. EPA simultaneously issued several notices of violation (NOVs) to certain electric utility companies alleging PSD/NSR violations and filed district court enforcement actions

against other electric utility companies.^{2/} The compliance order issued to TVA was substantially amended by EPA in April 2000. The amended compliance order contained allegations of violations involving 14 projects at 9 different TVA facilities. The order alleged that violations of PSD requirements, NSPS requirements, and minor NSR permit terms had occurred numerous times over more than a decade.

In December 1999, TVA sought reconsideration of the compliance order by EPA. In May 2000, the Administrator issued a memorandum creating special procedures for review of the order and delegating to the EAB the authority to conduct the review proceeding. (EPA's regulations do not address EAB review of administrative orders issued to federal agencies.) Under the special procedures, EPA enforcement personnel were responsible for defending the compliance order, and the EAB would review the legal and factual bases for the order. The special procedures involved a greatly expedited briefing schedule, limited opportunities for discovery by the parties, and the opportunity to present oral testimony before an EPA administrative law judge. The Administrator's memorandum directed the EAB to close the record by August 1 and issue its final decision by September 15.

TVA objected to the special procedures because it believed that the procedures would not provide it a full and fair opportunity to present its

1/ The EAB consists of four EPA officials who are to decide, on an impartial basis, specified types of administrative appeals. By regulation, the Administrator has delegated his or her authority to decide such appeals to the EAB.

2/ TVA received an administrative compliance order rather than an NOV because of its status as a federal agency. The Department of Justice and EPA maintain that EPA cannot bring judicial enforcement actions against a sister federal agency.

case and refute the allegations in the compliance order. However, the Board rejected TVA's objections.

The EAB's Decision

The key rulings in the EAB's September 15 decision are summarized below:

The "Routine Maintenance, Repair, and Replacement" Exclusion

The EAB upheld EPA Enforcement's interpretation of the "routine maintenance, repair, and replacement" (RMRR) exclusion and its position that none of TVA's projects were covered by the exclusion. The EAB concluded that the four-factor test advanced by EPA Enforcement for determining whether a project falls within the RMRR exclusion is consistent with the Act, the regulations, and case law. Under the four-factor test, EPA maintains that it will consider the nature and extent, purpose, frequency, and cost of a project in determining whether the project was routine. However, EPA's interpretation provides no indication of what weight will be given to particular factors or how EPA's discretion to find that a project is non-routine is limited in any meaningful way.

The EAB ruled that TVA's interpretation of the exclusion, which focuses on whether a particular maintenance, repair, or replacement activity is commonplace within the relevant industrial category as set forth by EPA in the 1992 WEPCO rule, had no merit. According to the Board, TVA's interpretation would "swallow" the general rule that sources making changes that increase emissions are to meet PSD requirements.

The Board then ruled that TVA had not met its burden of showing that the projects in question are "routine" under EPA Enforcement's interpretation. In applying the four-factor test, the EAB summarized the findings that it believed were most relevant in determining whether the RMRR exclusion applied.

With regard to the "nature and extent" of the projects, the Board characterized each of the 14 projects in question as being "massive" and involving the repair or replacement of a significant amount of boiler components. (Many of the projects involved the replacement of superheaters, reheaters, and/or

substantial portions of waterwalls.) According to the Board, each project took many years to plan and required lengthy plant shutdowns (from 2 to 13 months) that substantially exceeded the time typically associated with forced outages (up to 5 days) or scheduled maintenance outages (up to 4 weeks). The Board also noted that the projects had been carried out by TVA's central office rather than by the maintenance department at each plant and that the projects had required approval by TVA's board of directors.

According to the Board, the "purpose" of each project "generally was to significantly extend the life of the unit in question by as much as twenty years." The Board also believed it was significant that all the projects were classified by TVA as being "capital" projects rather than "maintenance" projects.

With regard to "frequency," the Board found that the replacements had generally not been performed before on the units. It also found that the evidence did not show that these replacements were common "in the lifetime of a unit."

The Board believed that it was significant that the cost of each project exceeded \$2.5 million and that the cost would have consumed most or all of each plant's operation and maintenance budget. The cost of the 14 projects ranged from \$2.6 million to \$57.1 million.

In concluding that none of the projects in question qualified as "routine," the Board considered the evidence as a whole and did not indicate how the main factors or its findings relative to each factor should be weighed. It stated that "TVA's principal defense – that it had become common practice at TVA and generally within the industry and thus 'routine' in this industry, to make such once or twice-in-a-lifetime replacements – is alone not enough to carry TVA's burden to establish that these projects fit within the narrow regulatory exception for routine maintenance, repair, and replacement." According to the Board, "[t]he mere fact that a number of different facilities within an industry may have undertaken these projects strikes us as much less instructive with respect to whether a project under review should be considered 'routine' than the observation that this kind of replacement is, for an individual unit, an unusual or once or twice-in-a-lifetime occurrence." The Board further explained

that “we do not believe that Congress in the statute or EPA in its underlying regulations excluded such carefully planned, massive rebuilding efforts from the requirements to obtain a permit and put on appropriate pollution controls. Although numerous activities fall within the exception for routine maintenance, repair, and replacement, to conclude that these activities are within its scope would stretch the exception beyond reason.”

Fair Notice of EPA’s Interpretation of the RMRR Exclusion

The Board also rejected TVA’s argument that it had not received “fair notice” of EPA’s restrictive interpretation of the RMRR exclusion. According to the EAB, EPA Enforcement’s four-factor test was “reasonably ascertainable” from the regulatory text even though it had not been mentioned by EPA Enforcement until decades after the exclusion was promulgated.

In this regard, the EAB seemed to confuse the question of whether EPA’s interpretation may have been one permissible reading of the regulations with the separate question of whether a source reading the regulations in the 1980s would have been aware of EPA’s supposedly narrow reading of the provision. This point is particularly relevant in light of the fact that EPA and state agencies were aware of such projects being undertaken over a number of years throughout American industry yet never indicated that they considered the projects to be non-routine. The EAB also suggests that a source is required to seek an applicability determination from EPA whenever it is possible to read a regulation narrowly – a proposition that could flood EPA and state agencies with applicability determination requests.

In addition, the Board ruled that EPA had not been required to undertake notice and comment rulemaking in connection with its interpretation of the RMRR exclusion. According to the EAB, the Agency had never changed its interpretation of the exclusion and therefore had no obligation to undertake rulemaking.

Determining Whether There Is A “Significant Net Emissions Increase”

The EAB rejected TVA’s argument that a unit’s maximum hourly emissions rate must increase before there can be a “significant net emissions increase” under the PSD/NSR program.

TVA contended that, because Congress intended that the definition of “modification” under the PSD/NSR program be based on the statutory definition of “modification” for the NSPS program and EPA had always interpreted a modification for NSPS purposes to involve an increase in a unit’s maximum hourly emissions rate, such an increase must occur before there can be a “modification” for PSD/NSR purposes. According to the EAB, TVA’s interpretation is not supported by the PSD/NSR regulatory language and likewise is not mandated by the Act.

With regard to determining a unit’s pre-change actual emissions baseline, the EAB ruled against EPA Enforcement. According to EPA Enforcement, there is a strong presumption that the average annual emissions level for *the two-year period immediately preceding the change* is representative of normal operations and thus will be used to establish the pre-change baseline. It contended further that TVA had not overcome the presumption that those two years were representative of normal operations in this case. However, the EAB concluded that TVA’s evidence regarding what constituted normal operations was sufficient to overcome any such presumption. The Board cited testimony that the two-year period with the highest emissions within the preceding five years would be most representative of normal operations because TVA always sought to operate its generator at full capacity, if possible.

The EAB also ruled that EPA Enforcement could not use the “actual-to-potential” test in this case to determine whether TVA’s projects had caused a “significant net emissions increase.” EAB did not rule on the general validity of the actual-to-potential test but instead based its ruling on the language of the compliance order. In that order, EPA Enforcement had stated that the appropriate test was to compare pre-change actual emissions to post-change “projected actual emissions.” Because EPA Enforcement had not based its compliance order on the actual-to-potential test, the EAB declined to let it use that more stringent test in the review proceeding. (The Agency’s confusion would seem to support a general “fair notice” defense in other enforcement proceedings. Sources cannot be on notice as to the applicable

emissions test if EPA itself cannot determine what it believes the appropriate test is.)

At the same time, the EAB rejected TVA's argument that post-change emissions in this case should be based on post-change historical operating data. The EAB stated that, because the Act and regulations contemplate that a source must predict future events to determine whether a PSD/NSR permit will be required by a project, a finding of a violation should be based upon what the source could reasonably have predicted before beginning construction of the project.

After the EAB applied an actual-to-projected future actual test to the projects involved in this case, it concluded that EPA Enforcement had failed to show that many of the projects resulted in a "significant net emissions increase." EPA Enforcement also abandoned some of its claims with regard to particular pollutants. As a result, the EAB concluded that EPA Enforcement had sustained its burden of establishing violations alleged in the compliance order in 21 instances. The EAB found that approximately the same number of allegations had not been adequately supported by EPA Enforcement and therefore vacated those allegations.

Litigation Before the Eleventh Circuit

In addition to seeking reconsideration of the compliance order by EPA, TVA also filed a petition for review of the compliance order in the U.S. Court of Appeals for the Eleventh Circuit. Other electric utility companies filed petitions for review of the compliance order before that court, and one electric utility company was granted leave to intervene in support of the petitioners. (The Clean Air Implementation Project, the American Chemistry Council, and the American Forest & Paper Association have sought leave to file an *amicus curiae* brief in the consolidated cases. That brief discusses the "routine maintenance, repair, and replacement" issue from the perspective of non-utility companies.)

It is unclear what the Eleventh Circuit will do with the cases before it. Despite the parties' earlier suggestions that the Eleventh Circuit proceeding be held in abeyance until the EAB had issued its final

decision in the administrative proceeding to review the compliance order, the court directed the parties to proceed to brief the cases before it. EPA filed its brief as respondent on October 4 and has also filed a motion to supplement the record before the Eleventh Circuit with the administrative record compiled before the EAB in its review proceeding. TVA has filed an opposition to EPA's motion to supplement the record. If TVA decides to seek judicial review of the EAB's decision, its petition for review would be due on November 14. '

EPA Seeks Comments on Title V White Paper on Permit Flexibility

On August 15, 2000, EPA issued and requested comments on Draft Title V White Paper No. 3, which addresses the "Design of Flexible Air Permits." 65 Fed. Reg. 49,803. (The Draft White Paper reflected revisions made to a preliminary draft that had become publicly available in May.) The public comment period on the Draft White Paper ended on September 14.

Draft White Paper No. 3 focuses on specific areas where permitting authorities and sources can develop Title V permit terms that promote operational flexibility at facilities. According to EPA, the Draft White Paper builds upon White Paper Nos. 1 and 2 and EPA's experiences with its Pollution Prevention in Permitting Projects (P4) program. We summarize below the primary mechanisms discussed in the Draft White Paper:

- C **Smart Permits** – The Draft White Paper explains that a "smart permit" is a permit that is written so that it does not impose more restrictive measures than the relevant "applicable requirements" covering that source. For example, the Draft White Paper provides that permitting authorities can use "replacement conditions" in place of minor NSR permit terms that may have become outmoded or that otherwise unnecessarily limit a source's operational flexibility.
- C **Advance Approvals** – The Draft White Paper states that an "[a]dvance approval is the incorporation into a title V permit of

terms which authorize specified future changes to occur such that no further approval or title V permit revision is needed before the source can make these changes.” Thus, under this approach, the source will have already obtained approval for changing from one operating scenario to other operating scenarios and need only note the change in its on-site log or provide notice in some circumstances. The Draft White Paper explains that this approach can apply to many types of changes, including the addition of new process units, modifications to existing units, and the addition of units that are not specifically known but fit a description of categories of particular changes.

C **Permit Terms that Prevent Certain Requirements from Applying** – The Draft White Paper states that another approach for creating operational flexibility is to use provisions that are specifically designed to prevent changes at a facility from triggering certain requirements. In contrast to the advance approval of a change, limits are taken so that a change will not trigger a requirement. Some examples are limits on a source’s “potential to emit” and plantwide applicability limits (PALs).

C **Expediting of Permit Revisions** – The Draft White Paper points out that it is possible to write a permit so that certain permit revisions can be expedited. For example, if a permit contains sufficient details concerning monitoring, recordkeeping, or reporting requirements, it would be possible to change such requirements through the minor permit revision process rather than the significant permit revision process.

The reaction of industry representatives to the Draft White Paper has been positive for the most part. It is believed that certain approaches discussed in the draft would be helpful in providing increased operational flexibility for some sources. However, many industry representatives believe that certain sections of the draft are too prescriptive. For example, the section of the Draft White Paper

addressing monitoring requirements is very detailed and seems to unduly restrict the discretion of state permitting authorities. The Draft White Paper also contains very prescriptive discussions of how permitting authorities are to deal with such issues as missing data and sources’ use of emissions factors.

Certain environmental groups have submitted very negative comments on the Draft White Paper. The groups contend, among other things, that the Draft White Paper would unlawfully amend existing regulations, allow sources to avoid meeting Title V requirements in some instances, and substantially curtail opportunities for public comment. The environmental groups state in their comments that, if EPA finalizes the Draft White Paper as currently written, they will promptly seek judicial review of the final document. ‘

Courts Faced with Question Whether Claims Under Americans with Disabilities Act Are Foreclosed by Clean Air Act

Two cases brought recently under the Americans with Disabilities Act (ADA) have raised novel questions concerning the relationship between the ADA and the Clean Air Act. The plaintiffs in one case – a nonprofit organization and two children with serious respiratory illnesses – brought suit under the ADA in federal district court against the Washington Department of Ecology seeking to enjoin the issuance of permits that authorize wheat stubble burning.^{3/} *Save Our Summers v. Washington Dept. of Ecology*, No. CS-99-269 (E.D. Wash.). In the second case, the same nonprofit organization and different individual plaintiffs brought a similar suit against the State of Idaho arguing that it must take steps to ban wheat stubble burning. *Save Our Summers v. State of Idaho*, No. 00-CV-430 (D. Idaho). In each case, the plaintiffs have alleged that the practice of wheat

3/ Wheat stubble burning is a method used by farmers in certain western states to remove vegetation from their fields and to eliminate pests. Burning of the wheat stubble typically produces large volumes of smoke.

stubble burning has denied them access to public services and facilities such as schools, roads, and parks.

Although the two cases involve a relatively unique factual situation, the legal theory behind the plaintiffs' suits, if accepted by federal courts, could enable groups or individuals to obtain relief that goes beyond measures currently available under the Clean Air Act or state air laws. Beyond that, the same legal theory could potentially be applied to areas regulated by other environmental statutes.

We discuss the two cases below.

Background of Washington State Case

In Washington State, the Washington Department of Ecology (WDE) is authorized to issue permits allowing the burning of wheat stubble if the applicant can meet certain criteria set forth in the state regulations. Among other things, the plaintiffs seek to enjoin the WDE from issuing such permits.

The district court denied the plaintiffs' motion for a preliminary injunction and tentatively concluded that it lacked jurisdiction over the ADA claims. The court believed that it might have no jurisdiction because Congress may have intended that the comprehensive regulatory scheme under the Clean Air Act would generally foreclose any claims arising under other federal statutes involving pollution control. To assist in resolving the jurisdictional issue, the district court requested that the U.S. Department of Justice file an *amicus curiae* brief addressing the question of whether the ADA claims should be foreclosed in this case.

Department of Justice *Amicus Curiae* Brief

The Department of Justice filed its *amicus curiae* brief on September 6, 2000. The *amicus* brief states that the district court need not determine whether the Clean Air Act forecloses ADA claims, because two potentially conflicting statutes should be "harmonized" where possible, and it is possible to do

so in this case.^{4/} According to the brief, any remedy granted under the ADA must take account of the statutory scheme of the Clean Air Act, as well as the state's air laws. The brief stated that the ADA requires that a public entity make "reasonable modifications" to a program to ensure that benefits are not denied, but does not require modifications that would constitute a "fundamental alteration" of an existing program. In assessing what constitutes a "fundamental alteration," a court must examine the program in question, including its policies and objectives. The brief then pointed out three elements of the Clean Air Act scheme that are particularly relevant for this analysis:

- (1) the Clean Air Act establishes uniform national standards for achieving air quality;
- (2) the Act provides that states have broad discretion in achieving ambient standards and meeting the Act's goals; and
- (3) the Act generally provides the states with substantial amounts of time in which to comply with its requirements.

The Department of Justice's brief expressly declined to apply the elements in this case or take a position on the appropriateness of any proposed modifications. It did indicate that the United States might seek an opportunity in the future to comment on modifications supported by either of the parties.

Under the legal theory advanced by plaintiffs in this case, individuals with special respiratory problems could arguably bring suit in virtually any area of the country and challenge a particular permit, standard, or other program element as being inadequate because it has the effect denying them the use of public facilities. For example, although

^{4/} The brief was signed by the Assistant Attorney General for Environment and Natural Resources, the Assistant Attorney General for Civil Rights, and EPA's General Counsel. The ADA provides that the Department of Justice is the federal agency responsible for promulgating regulations to implement its provisions.

NAAQSs are intended to protect “sensitive populations,” they are not intended to protect the most sensitive individuals within a given population. Under this legal theory, plaintiffs might assert that EPA or a state should be required to take measures to protect those most sensitive individuals.

District Court’s Order in Washington State Case

On September 14, 2000, the district court issued an order denying the motion of the Washington Department of Ecology to dismiss the case. At the same time, it denied the plaintiffs’ request that it reconsider its prior order denying the plaintiffs’ motion for a preliminary injunction. In drafting the order, the district court essentially accepted the position set forth in the Department of Justice’s *amicus* brief that the ADA and Clean Air Act could generally be reconciled. Because the court determined that the plaintiffs might be able to establish ADA claims that are not foreclosed by the Clean Air Act, it concluded that the motion to dismiss should not be granted. At the same time, the court stated that the “specific injunctive relief sought by Plaintiffs which would preclude burning or permit issuance appears to be precluded by the CAA . . .” Accordingly, the court concluded that it is unlikely that the plaintiffs will prevail on the merits and that it therefore had not satisfied the requirements for obtaining preliminary injunctive relief.

State of Idaho Case

In this case, the plaintiffs are seeking to compel the State of Idaho to enact measures that would ban the practice of wheat stubble burning. Certain industry agricultural organizations have intervened in the case in support of the State of Idaho. In addition to arguing that the plaintiffs’ ADA claims are completely foreclosed by the Clean Air Act, the intervenors have raised issues that have apparently not been raised in the Washington State case. The intervenors contend that plaintiffs’ legal theory conflicts with the Tenth and Eleventh Amendments to the U.S. Constitution. (The Tenth Amendment provides that powers that are not delegated by the Constitution to the federal government are reserved to the states. The Eleventh Amendment recognizes the general immunity of the states from suits in federal courts.) In arguing that

the relief sought under the ADA claims would be unconstitutional, the intervenors rely upon two recent appellate court decisions indicating that the Eleventh Amendment limits the scope of the ADA as applied to activities undertaken by a state. The district court has not yet issued any substantive rulings in this case.

D.C. Circuit Extends Compliance Deadline for NOx SIP Call Requirements

On August 30, 2000, the D.C. Circuit issued an order giving sources that must install controls because of EPA’s NOx SIP call an additional 13 months in which to comply with the rule’s emission reduction requirements. *Michigan v. EPA*, No. 98-1497, 2000 WL 1341477 (D.C. Cir. August 30, 2000). As a result of the court’s order, the deadline for reducing NOx emissions pursuant to the SIP call has been extended from May 1, 2003 to May 31, 2004.

Under the NOx SIP call rule, states that are subject to the rule are to determine what emission reduction requirements they will impose on sources within their boundaries to meet NOx emission budgets contained in the rule. It is expected that the affected states will impose most of the additional requirements on electric utility sources and certain non-utility industrial sources with large boilers.

The D.C. Circuit’s order extending the compliance deadline for sources was based on the fact that the court had earlier stayed the rule and the obligation of states to submit revised SIPs. In June 1999, the D.C. Circuit stayed the NOx SIP call rule pending further order of the court. On March 3, 2000, the D.C. Circuit issued a decision upholding the NOx SIP call rule in all major respects. *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). Following the decision, the court extended the deadline by which states must submit their SIP revisions to October 30, 2000. Under the rule as promulgated, the deadline had been September 1, 1999.

Based on the later deadline by which states are to submit SIP provisions, industry petitioners moved to extend the compliance deadline for sources.

In granting the industry petitioners' motion, the court explained that it was attempting to preserve the status quo by giving sources the same number of days to comply after SIP provisions are submitted that they would have had if the rule had not been stayed for 13 months.

Although the extension of the compliance deadline is a favorable development for sources that will be regulated under the SIP call, the court's action has created some uncertainty and has raised questions concerning how the SIP call will be implemented. First, some states have indicated that they intend to submit SIP revisions providing for compliance by sources on May 1, 2003, notwithstanding the extension until May 31, 2004. Second, EPA's separate final rule granting certain petitions filed under section 126 of the Act provides that the sources subject to those petitions must comply with that rule by May 1, 2003. Twelve of the nineteen states covered by the NOx SIP call are also covered by the section 126 rule. Third, because some states had already undertaken their attainment planning based on a May 1, 2003 compliance date by sources, some of those states have suggested that they may have to undertake additional attainment planning to take account of the extension. '

Court of Appeals Upholds EPA's Disapproval of Michigan SSM Provisions

The U.S. Court of Appeals for the Sixth Circuit has issued a decision upholding EPA's disapproval of proposed revisions to the Michigan state implementation plan (SIP) that addressed startup, shutdown, and malfunction (SSM) conditions. *Michigan Manufacturers Ass'n v. Browner*, No. 98-3399 (6th Cir. August 24, 2000) (not for publication). EPA had disapproved the revisions primarily because it contended that they improperly provided an "automatic exemption" for sources during SSM conditions. Both the Michigan Department of Environmental Quality (DEQ) and the Michigan Manufacturers Association had filed petitions for review of EPA's action.

The decision is the first court of appeals decision to address directly EPA's "excess emissions"

policy for approval of SIP provisions. Under this policy, EPA maintains that any exceedance of an emissions limit in a SIP provision constitutes a violation, even if the exceedance occurs during SSM conditions. According to EPA, the policy is based on its interpretation of section 110 of the Act as requiring that sources comply with SIP provisions at all times in order to ensure that national ambient air quality standards (NAAQSs) will be met and maintained. The policy was initially set forth in two memoranda issued by the Assistant Administrator for Air in 1982 and 1983 ("the Bennett memoranda").

This case involved proposed SIP revisions which provided that exceedances would be allowable during SSM conditions for certain sources under specified circumstances. In particular, if a source was operated in a manner consistent with good air pollution control practices for minimizing emissions during SSM conditions and met certain notice, reporting, and associated requirements, an exceedance during SSM conditions would not constitute a violation of the relevant standard. After EPA disapproved Michigan DEQ's proposed SIP revisions in 1998, both petitioners sought review of the disapproval in the Sixth Circuit.

The petitioners argued that EPA's excess emissions policy is arbitrary and capricious when applied to exceedances during SSM conditions and that the policy is not supported by section 110 of the Act. They further maintained that the Act grants the states primary responsibility for regulating air emissions within their borders and that EPA cannot mandate the use of specific SIP provisions so long as the state's SIP ensures that the NAAQSs will be achieved and maintained.

EPA argued that the provisions created an "automatic exemption" for sources and therefore were inconsistent with the Agency's interpretation of section 110 set forth in the Bennett memoranda. According to EPA, the provisions in questions were deficient because, among other things, the Michigan DEQ could not require revisions to a source's SSM plan if the plan were inadequate and the provisions defined the term "malfunction" too broadly in that they failed to limit "malfunctions" to events that are "infrequent" and "not reasonably preventable."

In its decision, the Sixth Circuit upheld EPA's interpretation of section 110 and rejected the

petitioners' contentions that EPA had intruded on the state's responsibility to formulate SIP provisions to carry out its intentions. The court concluded that it must defer to EPA's interpretation of section 110 under the principles set forth by the Supreme Court in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).^{5/} Because the court concluded that it could not say that the interpretation of section 110 set forth in the Bennett memoranda is "unreasonable" under the *Chevron* test, it ruled that EPA could apply its "excess emissions" policy in disapproving the proposed SIP revisions. The court also stated that the petitioners had failed to offer evidence that Michigan's proposed rules would not interfere with attainment and maintenance of the NAAQS.

The three-judge panel designated the opinion as being "not for publication." This designation prevents it from being cited as a controlling precedent in any court within the Sixth Circuit and substantially reduces its precedential value in any other court of appeals. '

Court of Appeals Rules That EPA Letters Addressing PSD Applicability Are Not Judicially Reviewable

The U.S. Court of Appeals for the Tenth Circuit has ruled that letters written by EPA Region VIII stating that a proposed power plant project would trigger PSD requirements are not judicially reviewable under the Clean Air Act. *Public Service of Colorado v. EPA*, No. 99-9542, 2000 WL 1224723 (10th Cir. August 29, 2000). The court concluded that the EPA letters, which were sent by Region VIII to the Colorado Department of Public Health and Environment (CDPHE) and a power company official, did not constitute reviewable "final actions" under section 307(b) of the Act.

5/ The court did not address Supreme Court precedents indicating that, because EPA's interpretation was set forth in a memorandum, rather than being the product of rulemaking or an adjudication, it is entitled to less deference than provided under *Chevron*.

The court's decision illustrates some of the legal obstacles that a source may encounter in seeking to challenge EPA's informal interpretations addressing PSD/NSR issues.

Background

The case involved a proposal by a joint venture to build a new power plant near an existing plant owned by Public Service of Colorado (PSCo). PSCo contracted with the owners of the proposed plant to purchase the plant's entire electrical output for use to satisfy peak load demands. Although PSCo would play no role in building or operating the new plant, one of the companies in the joint venture seeking to build the new facility is a subsidiary of the same parent company that owns PSCo.

Because the emissions of the new facility would not exceed PSD "major source" threshold levels, the joint venture submitted a minor NSR permit application to CDPHE. However, CDPHE indicated that it might consider the two facilities to be a "single source" for permitting purposes. As a result, the proposed project would trigger PSD requirements as a "major modification" of an existing facility. CDPHE, which has an approved PSD program and is therefore responsible for making PSD applicability determinations, wrote to EPA Region VIII requesting advice on whether the two plants were under "common control" and therefore would constitute a "single source."

In two separate letters – one to the CDPHE and one to a company official – EPA stated that, based on its interpretation of the PSD regulations, the proposed and existing facilities would constitute a "single source." EPA's belief that there was common control was based on PSCo's contract to purchase the entire output of the new facility and the relationship between PSCo and one of the members of the joint venture. EPA further stated that it believed construction of the new facility would be a major modification of a major source and would require a PSD permit. After reviewing the EPA letter, the CDPHE took no further action on the minor NSR permit application submitted by the joint venture.

PSCo subsequently filed a petition for review of the two letters in the Tenth Circuit.

The Court's Opinion

In addressing the issue of its jurisdiction to review the letters, the Tenth Circuit applied its well-established test for determining whether an agency action is final. Under that test, the court determines the following: (1) whether the action's impact is "direct and immediate"; (2) whether the action marks the consummation of the agency decisionmaking process; and (3) whether the action determines rights and obligations of parties.

The court concluded that the letters did not satisfy any of the above criteria. In particular, the court stated that EPA's letters had no direct and immediate impact on PSCo because PSCo is not the permit applicant. It further concluded that the decisionmaking process had not been consummated because CDPHE had not taken any action on the minor source permit application and, if it denied the application and insisted that the project was subject to PSD, the permit applicants could pursue their appeal rights in state court. Finally, the court ruled that the letters had not determined any rights or obligations because CDPHE, not EPA, will make the initial decision regarding whether PSD requirements will be triggered. Since the court concluded that no final agency action had occurred, it dismissed PSCo's petition for lack of jurisdiction. '

District Courts Rule That Settlements Do Not Preclude EPA Enforcement Actions

Two federal district courts have issued decisions holding that EPA may pursue Clean Air Act enforcement actions against a company even though the company entered into settlements with local agencies that allegedly resolved the same violations. *United States v. LTV Steel Co.*, No. 1:98cv3012, 2000 U.S. Dist. LEXIS 14377 (Sept. 20, 2000, N.D. Ohio), and *United States v. LTV Steel Co.*, No. Civ. A. 98-570, 2000 WL 1511283 (Sept. 29, 2000, W.D. Pa.). Although both cases involved the same company, each case involved different facilities and factual situations. In ruling against the company, each of the district courts rejected arguments that EPA may not engage in the practice of "overfiling" – filing

a federal enforcement action addressing certain alleged violations after a state or local agency has taken enforcement action regarding the same alleged violations. We summarize the two decisions below.

Case in the Northern District of Ohio

EPA brought an enforcement action under section 113 of the Act against LTV, alleging that several violations of SIP requirements had occurred at the company's facility in Cleveland, Ohio. LTV argued that the court should dismiss one of EPA's claims involving alleged opacity violations because the company had previously entered into a settlement with the City of Cleveland regarding that claim. Relying on the Eighth Circuit's decision in *United States v. Harmon Industries, Inc.*, 191 F.3d 894 (8th Cir. 1999),^{6/} LTV maintained that EPA was foreclosed from overfiling under the Clean Air Act. LTV additionally maintained that EPA's claim was barred by the doctrine of res judicata, i.e., the principle that a final judgment on the merits of a claim precludes further claims by those parties (or parties acting "in privity" with them) based on the same cause of action.

In its decision, the district court rejected LTV's position and granted summary judgment for EPA on the claim in question. The court ruled, first of all, that this was not a true overfiling situation because EPA was not seeking to enforce the same requirements as the City. According to the court, EPA had alleged that provisions of the Ohio SIP had been violated while the City had been enforcing its municipal ordinances, which are not a part of the SIP, and had no authority to enforce the Ohio SIP provisions. Moreover, the court pointed out that the settlement agreement expressly stated that it did not bind the Ohio EPA and did not excuse any violations of federal law.

The court further ruled that, even if EPA and the City had sought to enforce the same SIP

^{6/} In the *Harmon* case, the Eighth Circuit ruled that EPA was barred from bringing a RCRA enforcement action against a company because the company was already subject to a state enforcement action and RCRA provides that an authorized state program is to operate "in lieu of" the federal program in that state.

provisions, the rationale of the *Harmon* case would not apply. The court concluded that the language in RCRA relied upon by the Eighth Circuit in *Harmon* was not present in the Clean Air Act and that section 113 of the Clean Air Act apparently anticipated that overfiling could occur. Finally, the court rejected LTV's res judicata argument because it concluded that the claim asserted by EPA was a wholly different claim from the one settled by the City and that EPA had played no role in that settlement agreement.

Case in the Western District of Pennsylvania

In this enforcement action, EPA alleged that LTV's coke production plant in Pittsburgh had violated certain regulations of the Allegheny County Health Department (ACHD). The regulations in question are part of the Pennsylvania SIP. LTV moved to dismiss the case because it contended that it had previously entered into a settlement with the ACHD that had resolved the claims. The company maintained that EPA's enforcement action was barred by the doctrine of res judicata.

The district court ruled that the doctrine of res judicata did not apply because the settlement did not constitute a final judgment on the merits, i.e., the parties had entered into the settlement prior to any judicial or administrative proceeding, and EPA had played no role in that settlement. The court also rejected LTV's argument that the language of the Clean Air Act foreclosed EPA from engaging in overfiling.

The district court additionally ruled against LTV on three unrelated points. First, it disagreed with the company's argument that the Paperwork Reduction Act had been violated because the SIP provisions in question had not been assigned a control number by the Office of Management and Budget. Second, it ruled that the notices of violation (NOVs) issued in this case gave LTV sufficient notice of the alleged violations even though certain pre-1996 violations were not specifically identified. Third, it rejected LTV's claim that EPA could not seek penalties based on continuous emissions monitoring (CEM) data because the data were not an approved method of determining compliance for the SIP provisions in question. '