

D.C. Circuit Rejects Low-Risk MACT Off-Ramp

On June 19, 2007, the D.C. Circuit issued its decision on environmental group challenges to the plywood and composite wood products MACT. *NRDC and Sierra Club v. EPA*, Case No. 04-1323. The court held that EPA lacked authority to create a low-risk subcategory and to extend the compliance deadline and vacated those provisions of the rule.

After reviewing the statutory framework for establishing MACT standards, the court briefly reviewed the aspects of the plywood MACT at issue in this challenge. The 2004 plywood MACT created a “low risk” subcategory pursuant to section 112(c)(9)(b) which allowed sources that met the statutory criteria and additional requirements of the MACT standard to be relieved of all emissions reductions requirements upon EPA approval of their low-risk eligibility. The criteria to be met were: (1) that the sources in the low-risk subcategory do not emit carcinogens in excess of the one-in-a-million statutory ceiling; (2) that they do not emit non-carcinogens in amounts exceeding a level adequate to protect an ample margin of safety to protect public health; and (3) that no source emitted any HAP or combination of HAPs in amounts resulting in an adverse environmental effect as defined in subsection 112(a)(7).

The 2006 MACT rule reset the MACT standard compliance date from October 1, 2007 to October 1, 2008. In making revisions to the 2004 rule in response to NRDC’s

reconsideration petition, EPA concluded that the changes to the emissions testing requirements in the 2004 rule had caused many sources to postpone emissions tests necessary to demonstrate eligibility for the low-risk subcategory and to identify their MACT compliance options. As a result, EPA provided an additional year for compliance with the plywood MACT.

The court ruled that “EPA’s interpretation of section 112(c)(9) as allowing it to exempt the risk-based subcategory is contrary to the plain language of the statute,” and thus fails under Step 1 of the *Chevron* statutory interpretation test. The court explains that, while EPA may have broad subcategorization authority, EPA cannot “sidestep what Congress has plainly prohibited.” The court further states that “[w]hatever factors EPA might properly consider for subcategorization, it has no authority to create a low-risk subcategory scheme that allows harmful emissions in a manner contrary to Congress’s statutory scheme.” It points out that EPA may delete from its source list “any source *category*.” (Emphasis added.) EPA did not make a determination that no source in the category would cause a one-in-one-million lifetime risk of cancer, but rather made that determination with regard to the subcategory. The court rejects EPA’s response that Congress used the words “category” and “subcategory” interchangeably. In sum, the court accepts petitioners’ argument that delistings are limited to source “categories,” as distinct from “subcategories.”

The court next ruled on EPA's extending the compliance date by one year when it revised the MACT standard requirements. EPA asserted that it should be authorized to extend the compliance date when it makes "substantial" changes to a MACT standard. The court rules that this is not what Congress envisioned. The court emphasizes that Congress wanted compliance to be "expeditious[]," and that this intent is inconsistent with EPA having the authority to reset compliance deadlines anytime it determines that "substantial" changes were made. The court concludes that, in light of the fact that the emissions standards for the plywood MACT were established in the 2004 rule, and in light of Congress establishing specific exceptions to the 3-year maximum, Congress has spoken on the question and has not provided EPA authority to extend the compliance date in the 2006 rule. □

D.C. Circuit Modifies Scope of Ozone Phase 1 Rule Vacatur

On June 8, 2007, the D.C. Circuit issued a decision on petitions for rehearing and requests for revisions of the court's decision vacating EPA's Phase 1 rule implementing the 8-hour ozone NAAQS. *South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006). In vacating the rule, the court held that EPA must regulate areas with design values for the 8-hour NAAQS in excess of .09 ppm under the prescriptive Subpart 2 of section 181(a)(1), rather than under the more flexible Subpart 1. Under EPA's rule, 76 of the 122 nonattaining areas would have been governed by Subpart 1. In its 2006 decision, the court also held that the 1-hour NSR requirements and certain other Subpart 2 provisions are "control" requirements and could not be exempted from the anti-backsliding provisions.

EPA and industry and environmental group petitioners filed separate petitions for rehearing seeking to have the court reconsider its initial rulings in the case. The court briefly reviewed the petitions of each petitioner and ruled that it found no reason to revise its original decision.

However, the court did grant the request of EPA and environmental group petitioners that the Phase 1 rule be vacated only to the extent that the court sustained challenges to it, rather than vacate the entire rule as it had done in the original decision. Certain states objected to such a partial vacatur on the ground that it would inequitably exempt areas regulated under Subpart 1 under the original rule while the remand is pending. The court was not persuaded by this objection and explained that complete vacatur "would only serve to stall progress where it is most needed." □

Federal Court Issues *Cinergy* RMRR Rulings

On June 18, 2007, the Federal District Court for the Southern District of Indiana issued two opinions in the NSR enforcement action EPA brought against Cinergy Corp. *U.S. v. Cinergy Corp.*, Case No. 1-99-cv-1693-LJM-JMS. One opinion addressed cross-motions of EPA and Cinergy on whether Cinergy had fair notice of (1) the legal standards for the routine maintenance, repair and replacement (RMRR) exclusion, and (2) the legal standards for determining whether a project will cause a significant emissions increase. The other opinion was issued in response to EPA's partial summary judgment motion arguing that major replacement projects at five power plants do not fall within the scope of the RMRR exclusion.

The court's opinions mirror this court's opinions in its consideration of EPA's enforcement action brought against Southern Indiana Gas & Electric. *U.S. v. Southern Indiana Gas & Electric Co.*, 245 F. Supp. 2d 994 (S.D. Ind. 2003) (*SIGECO*). As in *SIGECO*, the court ruled that Cinergy had fair notice of the legal standards for the RMRR exclusion and for determining whether a significant emissions increase would result. In addition, the court granted EPA's motion for summary judgment on the multiple projects at the five power plants, finding that none of the projects comes within the scope of the RMRR exclusion. The court had previously ruled on the appropriate tests to be applied in this case to determine the applicability of the RMRR exclusion and whether an emissions increase test would result. *U.S. v. Cinergy Corp.*, 384 F. Supp. 2d 1272 (S.D. Ind. 2005).

In the fair notice opinion, the court first ruled on Cinergy's claim that it lacked fair notice that the RMRR exclusion rests exclusively on a "frequency at the unit" analysis. The court rejects this characterization of the RMRR test and finds that EPA advocates a "multi-factor test, which is the correct standard." The court also noted that "Cinergy does not contest that determining whether a project fits the RMRR exclusion is fact sensitive and requires a case-by-case approach." The court pointed to numerous EPA memos and other documents which it says put the regulated community on notice that "extensive replacement and life extension projects" may not fall within the RMRR exclusion. The court also notes the absence of any evidence that Cinergy ever sought an applicability determination prior to beginning construction of any of the projects. Furthermore, the court ruled that Cinergy could not use EPA's "silence" on its activities to establish that it

lacked fair notice. The court rules, as it did in *SIGECO*, the regulated community had been "explicitly notified" that EPA considered routine maintenance to be a "narrow exemption." *SIGECO*, 245 F. Supp. 2d 1019.

The court also found that Cinergy had fair notice that emissions increase under NSR should not be determined based upon an hourly emissions increase test. The court noted that EPA had incorrectly applied the emissions increase test which led to the decision in the *WEPCO* case, finding that an actual-to-actual, not an actual-to-potential, test should be applied. However, the court ruled that EPA's improper application of the test did not deprive Cinergy of fair notice of the standards to be applied. The court found that EPA's application of the wrong test was harmless because application of the "actual-to-potential" test was more likely to result in a finding that a PSD permit was required than under the actual-to-actual test which is to be applied.

In ruling on EPA's RMRR summary judgment motion, the court first rejected Cinergy's claim that summary judgment would not be appropriate because the RMRR analysis is fact-sensitive. The court found that there were no genuine issues of material fact and the ultimate question of whether the changes were routine within the meaning of the RMRR exclusion is a question of law. The court rejected what it characterized as "Cinergy's attempt to obfuscate the multi-factor analysis for the RMRR exclusion." It specifically referenced Cinergy's argument that the court should consider whether a project was "massive" and "unprecedented," and whether a project would "significantly or fundamentally change a unit." The court ruled that it would instead apply the four (very ambiguous) factors that

EPA had argued should be applied (nature and extent, purpose, cost, and frequency). The court explicitly noted that it is relevant whether outside contractors and vendors are used, the absolute amount of the cost, whether costs are capitalized, and other factors Cinergy argued should not be considered in determining whether the projects are routine. After reviewing the projects, which reflected a number of factual patterns and including ones costing as little as several hundred thousand dollars and as much as twenty million dollars, the court ruled that each of the projects on which EPA sought summary judgment does not come within the RMRR exclusion. □