EPA Issues GHG PSD and Title V Permitting Guidance

On November 10, EPA issued guidance that is to assist permit writers and applicants in addressing the PSD and Title V permitting requirements for greenhouse gases (GHGs) that begin to apply on January 2, 2011. The document contains a good discussion of how PSD permitting requirements apply in general, and to GHGs in particular under the regulated air pollutant interpretive rule and the PSD and Title V Tailoring Rule. But the principal significance of the guidance document is its discussion of determination of best available control technology (BACT) for GHGs. Only a few pages are devoted to compliance with the Title V program. At bottom, based upon the guidance, it seems clear that the establishment of BACT for GHGs will have the potential to greatly complicate the permitting of projects for which GHG BACT may be required.

Set out below is a brief overview of the guidance document, which follows the organization in the document:

I. Introduction

The introduction provides a brief history of EPA's adoption of requirements aimed at regulating GHGs. It reviews EPA's initial actions in determining when GHGs would become regulated air pollutants and then explains EPA's actions in adopting the PSD and Title V Tailoring Rule to provide for implementation of PSD and Title V to GHGs.

II. PSD Applicability

After reviewing the general rules governing PSD applicability, this section discusses GHG-specific issues. Included in this section are the following:

- Methodology for calculating GHG mass-based and CO_2e-based emissions.

- Determination of PSD applicability for GHGs to (1) new sources and (2) modified sources, with helpful charts explaining PSD applicability criteria for both new and modified sources of GHGs. (Appendices A through D contain useful applicability flow charts).

- Explanation of how "contemporaneous netting" is carried out in assessing PSD applicability for a modification at an existing major stationary source. Unfortunately, this section continues to indicate EPA's position that, in the first step of the applicability analysis, only creditable emissions increases are considered in determining whether a project will result in a significant increase and requires that there be a five-year contemporaneous netting analysis in Step 2

in order to take into account creditable decreases.

III. BACT Analysis

As indicated above, the most significant part of the guidance is the discussion of the determination of BACT for GHGs. The section begins with a discussion of the definition of BACT and a review of the "top-down" BACT process that EPA requires to be carried out in making BACT determinations. In the introduction to this section, EPA emphasizes the importance of GHG control options that improve the overall energy efficiency of a new source or modification in carrying out BACT reviews. In Appendix J to the document, EPA also lists a number of resources that it indicates can be used in performance benchmarking facilities.

A. Determining the Scope of the BACT Analyses

EPA makes several notable observations about the scope of the entity or equipment to which a BACT analysis is to be applied. It points out that the Agency has generally recommended that a separate BACT analysis be carried out for each emissions unit at a facility and encouraged consideration of logical groupings of emissions units "as appropriate on a case-by-case basis." EPA explains that, for new sources, permitting authorities have the discretion to evaluate BACT on a facility-wide basis. For existing sources, EPA wrongly states that its rules are more explicit that BACT applies to those units at which a net emissions increase would occur at the source; then, however, it correctly clarifies that "BACT applies in the context of a modification to only an emissions unit that has been modified or added to an existing facility."

EPA's brief discussion of "GHG-specific considerations" begins to raise concerns, which are elaborated on significantly later, about how BACT will be determined for GHG sources. In discussing GHG for new sources, EPA quotes the language in the BACT definition in section 169, which provides for consideration of "production processes and available methods, systems, and techniques . . . for control of [each] pollutant." Again, EPA confirms that BACT only applies to changed emissions units in connection with PSD permitting of a modification. However, after indicating that EPA historically has interpreted the BACT requirement to be inapplicable to *secondary emissions*, *i.e.*, ones that do not come from the source itself – and a BACT analysis should not include in Step 1 energy efficient options that may achieve reductions in a facility's demand for energy from the electric grid – EPA recommends that permitting authorities consider in Step 4 of the BACT analysis how available strategies for reducing GHG emissions from the stationary source may affect secondary GHG emissions from offsite locations.

B. BACT Step 1—Identify All Available Control Options

EPA makes numerous key points with regard to BACT Step 1 and quite a number of them suggest it anticipates a complicated, overbroad analysis to be carried out:

- At the outset, EPA insupportably indicates that satisfying the statutory BACT requirements requires that the permit applicant focus on technologies that have

been demonstrated to achieve the highest levels of control for the pollutant in question – regardless of the source type in which the demonstration has occurred. Subsequently, however, EPA implicitly narrows this statement by indicating that the control options should "include not only existing controls for the source category in question, but also controls determined through 'technology transfer' that are applied to source categories with exhaust streams that are similar to the source category in question."

- EPA indicates that the potentially applicable control alternatives to be identified and evaluated in the BACT analysis include: (1) inherently lower-emitting processes/practices/designs; (2) add-on controls; and (3) combinations of the controls in (1) and (2).

- Despite some of its statements in the Step 1 discussion, EPA does indicate that it recognizes that the list of options "need not necessarily include inherently lower polluting processes that would fundamentally redefine the nature of the source proposed by the permit applicant."

- EPA makes a number of troublesome statements regarding permitting authority review of a source's design. EPA states that the permitting authority should "take a 'hard look' at the applicant's proposed design in order to discern which design elements are inherent for the applicant's purpose and which design elements may be changed to achieve pollutant emissions reductions without disrupting the applicant's basic business purpose for the proposed facility." In a less than helpful observation, EPA states that "BACT, in most cases, should not be applied to regulate the applicant's purpose or objective for the proposed facility." The guidance states that permitting authorities are not precluded "from considering options that would change the aspects (either minor or significant) of an applicant's proposed facility design in order to achieve pollutant reductions that may or may not be deemed achievable after further evaluation at later steps of the process."

- As the foregoing indicates, EPA's guidance contains numerous statements that are focused on giving permitting authorities the broadest possible discretion in selecting BACT controls. Indeed, EPA states that it "does not interpret the CAA to prohibit fundamentally redefining the source and has recognized that permitting authorities have the discretion to conduct a broader BACT analysis if they desire." "In circumstances where there are varying configurations for a particular type of source, the applicant should include in the application a discussion of the reasons why that particular configuration is necessary to achieve the fundamental business objective for the proposed construction project." EPA states that "a factor that might be considered at later steps of the top-down BACT process, such as whether a process or technology can be applied on a specific type of source (Step 2) or the cost of constructing a source with particular characteristics (Step 4), should not be used as a justification for eliminating an option in Step 1 of the BACT analysis."

- Even where, as an example, EPA recognizes that clean fuel options, which would reduce GHG emissions, can

fundamentally redefine a source, it then limits its apparent recognition that this would not be appropriate by indicating that "permitting authorities can show in *most cases* that the option of using natural gas as a primary fuel would fundamentally redefine a coal-fired electric generating unit."

- EPA focuses its GHG-specific control options on energy efficiency *and* carbon capture and storage (CCS) because it believes "these control approaches may be applicable to a wide range of facilities that emit large amounts of CO_2." EPA states that, initially, "in many instances energy efficient measures may serve as the foundation for BACT analysis for GHGs with add-on pollution control technology and other strategies added as they become more accessible."

- EPA states that there are two categories of energy efficient options that should be considered in Step 1: (1) technologies or processes that maximize the efficiency of the individual emissions unit; and (2) options that could reduce emissions from a new greenfield facility by improving the utilization of thermal energy and electricity that is generated and used on site. EPA then includes explanations about circumstances under which each of these two options should be assessed.

- EPA concludes its Step 1 discussion by stating that EPA classifies CCS as an "add-on pollution control technology that is 'available' for large CO_2-emitting facilities including fossil fuel-fired power plants and industrial facilities with high-purity CO_2 streams (*e.g.*, hydrogen production, ammonia production, natural gas processing, ethanol production, ethylene oxide production, cement production, and iron and steel manufacturing)." It does state that this "does not necessarily mean CCS should be selected as BACT for such sources" and recognizes that many significant other factors (such as technical feasibility and costs of CCS technology) should be assessed at later steps of a top-down BACT analysis.

C. BACT Step 2 – Eliminate Technically Infeasible Options

EPA states that it considers a technology "to be technically feasible if it has been demonstrated in practice or is available and applicable to the source type under review." It considers an available technology to be "'applicable' if it can reasonably be installed and operated on the source type under consideration." A control technology "would not be applicable if it can be shown that there are significant differences that preclude the successful operation of the control device."

While EPA recognizes that the guidance is being issued at a time when add-on control technologies "for certain GHGs or emission sources may be limited in number and in various stages of development and commercialization," EPA includes numerous statements that are aimed at requiring a detailed focus on CCS as a possible BACT option. It qualifies its recognition of the "significant logistical hurdles" that exist for installation and operation of a CCS system, by stating that "*[n]ot every* source has the resources to overcome the offsite logistical barriers necessary to apply CCS technology to its operations" (italics added).

D. BACT Step 3 – Ranking of Controls

After narrowing the list of available controls down to a list of the technically feasible control technologies in Step 2, Step 3 calls for listing the remaining control technologies in order of overall control effectiveness for the regulated NSR pollutant under review – with the most effective control alternative listed at the top and the remaining ranked in descending order of control effectiveness. EPA indicates that control options should be ranked based on their net output-based emissions to ensure that the thermal efficiency of the control option, as well as the power demand of that control measure, is fully considered when comparing options in Step 3. EPA also states that, to best reflect the impact on the environment, the ranking control option should be based on the total CO_2e, rather than total mass or mass for individual GHGs.

E. BACT Step 4 – Economic, Energy, and Environmental Impacts

In Step 4, permitting authorities are to consider the "economic, energy, and environmental impacts arising from each option remaining under consideration." Accordingly, in this step, the consideration of those impacts will either confirm that the top control alternative is appropriate or determine it to be inappropriate. Consistent with existing policy, EPA provides that the "top" control option should be established as BACT unless the applicant demonstrates, and the permitting authority agrees that the energy, environmental, or economic impacts justify a conclusion that "the most stringent technology is not 'achievable' in that case." If the most stringent technology is eliminated in this fashion, then the next most stringent alternative is considered, and so on.

In Step 4, both direct and indirect impacts of the emissions control option or strategy under consideration are evaluated. The economic impacts component is to focus on direct economic impacts calculated in terms of cost effectiveness (dollars per ton of pollutant emissions reduced). The energy impacts analysis is to consider only direct energy consumption and not indirect energy impacts, but is to consider not only electricity generated onsite, but also power obtained from the electrical grid. It may include an evaluation of impacts on fuel scarcity or locally desired fuel mix in a particular area. EPA states that the environmental impacts analysis is to focus on impacts "other than direct impacts due to emissions of the regulated pollutant in question."

In addressing energy, environmental, and economic impacts in the context of GHG control technologies, EPA indicates that the basic rules outlined for considering such impacts for other pollutants should be followed. EPA states that, in determining how to value or weigh any trade-offs in emissions for regulated air pollutants (including GHGs), permitting authorities should "continue to focus on 'significant or unusual environmental impacts that have the potential to affect the selection or elimination of a control alternative.'" However, EPA in a number of statements attempts to minimize the recognition of impacts as a basis for not selecting a particular GHG control technology. EPA does acknowledge that there are certain situations where the costs of a control option are so prohibitive that a "less detailed quantitative (or even qualitative)

analysis may be sufficient." And EPA accepts that "CCS will often be eliminated from consideration in Step 4 of a BACT analysis for a power plant, even in some cases where underground storage of the captured CO_2 near the power plant is feasible."

EPA also recognizes that the consideration of cost effectiveness for GHGs will be quite different than for other regulated air pollutants. It recognizes the obvious reality that the cost effectiveness of a control device for other pollutants will be based on "a significantly lower volume of emissions than the amount of emissions that are emitted by most sources of GHGs." Thus, the cost effectiveness numbers on a per ton basis for the control of GHGs will necessarily be dramatically lower than the cost effectiveness values for control of criteria pollutants that have evolved over time.

Finally, EPA notes that permitting authorities have flexibility when evaluating trade-offs between energy, environmental, and economic impacts. However, it makes this point in the context of stating that a permitting authority may find that "while a control option with high overall efficiency has higher economic costs, those costs are outweighed by the overall reduction of emissions of all pollutants that come from that efficiency."

F. BACT Step 5 – Selecting BACT

EPA makes several statements consistent with existing practice regarding the selection of BACT in Step 5. In setting the BACT limit for the most effective control option not eliminated in Step 4, the permitting authority is to look at the range of performance identified previously and determine a specific limit to include in the final permit. EPA states that, in determining the appropriate limit, the permitting authority can consider "a range of factors, including the ability of the control option to consistently achieve a certain emissions rate, available data on past performance of the selected technology, and special circumstances at the specific source under review which might affect the range of performance." EPA also states that, in setting BACT limits, permitting authorities have the "discretion to select limits that do not necessarily reflect the highest possible control efficiencies but that will allow compliance on a consistent basis, and thus may consider safety factors unique to the particular circumstances of the technology and facility at issue in setting the limits." Finally, EPA states that, in some circumstances, it may be acceptable to establish BACT limits that "can be adjusted or optimized as the performance of the technology becomes clearer after a period of operation."

EPA stresses that the permitting authority bears a responsibility in Step 5 to fully justify the BACT decision in the permit record. EPA states that the applicant's role is primarily to provide information on the various control options and, when it proposes a less stringent control option, provide a detailed rationale and supporting documentation for eliminating the more stringent option.

EPA encourages permitting authorities to consider establishing an output-based BACT emissions limit, or a combination of output- and input-based limits, wherever feasible and appropriate "to ensure that BACT is complied with at all levels of operation." In addition to permits containing specific numerical emissions limits, EPA discusses the potential

for a permit to include conditions requiring the use of a work practice such as an Environmental Management System focused on energy efficiency as part of that BACT analysis. However, design, equipment, or work practice standards may not be used in lieu of a numerical emissions limitation unless there is a demonstration in the record that the criteria for applying such a standard are satisfied.

IV. Other PSD Requirements

EPA appropriately recognizes that the PSD requirements related to the conduct of air quality analyses that may involve air quality modeling and ambient monitoring are not necessary or appropriate for GHGs. As the Tailoring Rule recognizes, the PSD requirements related to NAAQS or PSD increments do not apply for GHGs. However, if PSD is triggered for a GHG emissions source, all regulated NSR pollutants which a source emits in significant amounts, would be subject to the other PSD requirements.

V. Title V Considerations

This section reviews the Title V requirements as they pertain to GHGs. These include the applicability requirements for Title V permitting due to GHG emissions (*e.g.*, when a source will become subject to Title V for the first time due to its GHG emissions) and requirements for permit applications and permit content. Under Step 1 of the Tailoring Rule, no sources become major sources requiring a Title V permit solely as a result of GHG emissions. Beginning in Step 2 of the Tailoring Rule, a stationary source may be a major source subject to Title V permitting requirements solely on the basis of its GHG emissions, provided the source exceeds the thresholds established in the Tailoring Rule.

In addition to generally reviewing the requirements that apply under the Tailoring Rule for Title V, EPA makes several additional notable observations. The Agency correctly recognizes that the GHG reporting requirements for sources under the Mandatory Greenhouse Gas Reporting Rule are currently not included in the definition of applicable requirements under Title V. Accordingly, they do not need to be included in the Title V permit. While sources are to provide emissions information for all pollutants for which they are major in Title V applications, EPA notes that, where the source has no applicable requirements for GHGs, it will not be necessary in many cases to provide anything but emissions descriptions, rather than emissions estimates. EPA points out that its rules do not require sources to pay any Title V fees based on GHG emissions, but that permitting authorities need to review resource needs for GHG-emitting sources and determine if their existing fee structure is adequate.

VI. Appendices

Attached to the guidance are a number of appendices that provide helpful information. The appendices include flow charts related to the applicability of PSD to GHGs and examples that take a variety of approaches for undertaking the required CO_2e and mass-based calculations. The following is a list of the appendices:

- Appendix A. GHG Applicability Flow Chart – New Sources (January 2, 2011 through January 30, 2011).

- Appendix B. GHG Applicability Flow Chart – New Sources (on or after July 1, 2011).
- Appendix C. GHG Applicability Flow Chart – Existing Sources (January 2, 2011 through June 30, 2011).
- Appendix D. GHG Applicability Flow Chart – Existing Sources (on or after July 1, 2011).
- Appendix E. Example of PSD Applicability for Modified Source.
- Appendix F. BACT Example – Natural Gas Boiler.
- Appendix G. BACT Example – Municipal Solid Waste Landfill.
- Appendix H. BACT Example – Petroleum Refinery Hydrogen Plant.
- Appendix I. Resources for GHG Emission Estimation.
- Appendix J. Resources for GHG Control Measures.
- Appendix K. Calculating Cost Effectiveness for BACT.

D.C. Circuit Issues Orders in Greenhouse Gas Litigation, Denies Motions to Stay

On December 10, the D.C. Circuit denied the industry/state stay motions in the four 2010 GHG rule challenges -- the Endangerment Finding; the Johnson Memorandum Reconsideration; the Light-Duty Vehicle GHG Standards; and the PSD and Title V Tailoring Rule. *Coalition for Responsible Regulation v.* EPA, Nos. 10-1131, et al. Consistent with the court's normal practice, the 3-judge panel issued its denial in a brief order. In addition to stating that petitioners had "not satisfied the stringent standards for a stay pending review," the panel's order states "[s]pecifically, . . . petitioners have not shown that the harms they allege are 'certain,' rather than speculative, or that the 'alleged harm[s] will directly result from the action[s] which the movant[s] seek to enjoin.'" [Citation omitted.]

The order states no opinion with regard to whether petitioners had satisfied their burden to show that they would likely prevail on the merits, the other principal prerequisite for issuance of a stay.

The panel's order also states that all four of the GHG rule cases will be scheduled for oral argument on the same day before the same panel.

Earlier, on November 16, the court had consolidated the Johnson Memorandum and Tailoring Rule challenges into a single case.

In a separate December 10 order, the panel directed the parties to jointly submit a briefing proposal by January 3.

On December 14, the D.C. Circuit issued an order in response to EPA's motion to dismiss "grounds arising after" (GAA) challenges filed by the American Chemistry Council ("ACC"), the National Association of Manufacturers ("NAM") Coalition, and the Clean Air Implementation Project ("CAIP"), which ask the court to strike down EPA's interpretation in 1977, 1980 and 2002 NSR rulemakings that PSD permitting can be triggered by a regulated air pollutant for which no NAAQS has been promulgated. Under this interpretation, PSD permitting will be triggered for GHGs without there being a NAAQS pollutant trigger when a GHG increase above Tailoring Rule thresholds is projected from a physical change or change in the method of operation.

The 3-judge panel that considered EPA's motion, the same panel as ruled on the GHG stay motions on December 10, made no ruling on the motion and instead referred it to the merits panel that considers the GAA challenges of CAIP, et al.

The panel also directed the parties to file submissions within 30 days addressing why the GAA challenges should not be held in abeyance until the court resolves the challenges to the four 2010 GHG rules. It is expected that the GAA petitioners, including CAIP, will oppose holding the GAA challenges in abeyance since a favorable ruling on the challenges would require EPA to revise its GHG rules to only provide for BACT to be required for GHGs if a criteria pollutant triggers PSD permitting.

Supreme Court to Hear Climate Change "Public Nuisance" Appeal

On December 6, the Supreme Court granted certiorari in *American Electric Power Co. v Connecticut*, 79 U.S.L.W. 3342 (U.S. Dec. 6, 2010) (No. 10-174). This appeal to the Supreme Court involves a Second Circuit GHG-related decision (*Connecticut v. American Electric Power Co., Inc.*, 582 F.3d 209 (2d Cir. 2009); *see* WR-695)) that allowed "public nuisance" claims filed by several states and environmental groups to proceed. In the original case in the U.S. District Court for the Southern District of New York, the plaintiffs alleged that carbon dioxide emissions from the defendant electric power generation companies contribute to climate change and constitute a public nuisance under federal common law. The district court dismissed the suits, ruling that the claims were barred under the political question doctrine, which excludes from judicial review questions that ought to be addressed by Congress. The Second Circuit reversed and reinstated the lawsuit. It held that plantiffs had standing and had adequately stated a claim to proceed with the nuisance claim.

Briefings and arguments in the Supreme Court will occur in the spring, with a decision probably issuing by June. Justice Sotomayor has recused herself from this case, since she was on the 3-judge Second Circuit panel that heard the case, although she had left that court by the time the decision was issued. The United States, as a defendant on behalf of TVA, expresses the view that the Second Circuit was wrong and that the case should be remanded for reconsideration, in light of EPA's having issued GHG rules since the opinion was issued.

Seventh Circuit SIP Interpretation, Emissions Increase Test Decision

On October 12, 2010, the U.S. Court of Appeals for the Seventh Circuit issued a decision in *United States. v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010), which addresses issues that will be of significance in connection with future GHG and NSR permitting. In reaching a decision that the federal district court could not apply an annual emissions increase test for determining SO2 increases, the court ruled that EPA had not approved an amended state implementation plan (SIP) providing for such a test and thus the SIP's hourly emissions increase test would apply. In ruling on an issue relating to an increase in annual NOx emissions, the court held that future projections in annual emissions must be based upon realistic projections of emissions for the cycling power plant at issue, rather

than for a continuously-operated baseload plant.

The case before the Seventh Circuit involved EPA's NSR enforcement action against the Cinergy power plant that was initiated more than a decade ago. In the most recent round of litigation, a jury had ruled that Cinergy would be liable for NSR violations with respect to only four of the fourteen units at issue. In an earlier appeal to the Seventh Circuit, the court ruled that an annual emissions increase test would apply to units modified after 1994 and the case was returned to the district court for the jury trial applying this test. In the current appeal, the projects at issue were ones that were undertaken prior to 1994 when the annual emissions increase test was substituted in the SIP for the hourly increase test previously approved by EPA.

SIP Interpretation Issue

The first issue addressed by the court was whether increases in SO2 should be determined in connection with projects undertaken between 1989 and 1992 based upon an hourly increase test or an annual emissions test. The court reviewed the history of Indiana's relevant SIP provisions and pointed out that Indiana adopted a definition of modification to conform to the actual emissions standard prior to EPA's actual approval of an hourly emissions increase test in 1982. However, Indiana did not submit a SIP revision for many years, which EPA approved in 1994.

The court reviews the approved language in the pre-1994 SIP and concludes that it provided for an hourly emissions increase test. EPA points out, however, that it had informed Indiana that it was necessary to adopt an annual increase test prior to EPA's approval of the hourly test and Indiana had agreed to revise its definitions to conform to EPA's interpretation. Indeed, EPA had stated that it would "'rule-make on these revised [State] regulations . . . upon their submittal'" in its approval of Indiana's 1981 SIP submission. Thus, EPA argued that Cinergy was on notice that an annual emissions increase test would apply.

The district court accepted this argument, but the Seventh Circuit found it "untenable." The Seventh Circuit points out that the Clean Air Act does not authorize the imposition of sanctions for conduct that complies with a SIP that EPA has approved. The court rules that the fact that Cinergy was on notice that the SIP would be changed does not change the legal reality that the SIP provisions that applied were the ones calling for an hourly emissions increase test. The court indicates its support for the reasonableness of an annual emissions increase test and states that EPA should have disapproved the hourly test. Since EPA did not disapprove the hourly test, the court rules that "the agency must live with it," even though the "blunder was unfortunate."

Significance of SIP Ruling for GHG PSD Permitting

While the Seventh Circuit's ruling is only applicable in states in that circuit, it is a significant ruling with regard to the interpretation and application of SIP provisions. For GHG PSD permitting, it appears that EPA should be bound by a state's *approved* SIP in making determinations regarding GHG permitting, unless EPA finalizes a FIP addressing GHGs for the state.

The actual implications, however, must be determined on a state-by-state basis. The possible implications are numerous. If a state's PSD program only applies to specific air pollutants, and does not apply to GHGs, then it would seem that PSD permitting could not be required by EPA for GHGs until an approved SIP or FIP provision is adopted. (although EPA does not accept this interpretation). States, however, are able to apply state permitting provisions to GHGs when they adopt or interpret their existing provisions to cover GHGs. One question not addressed by the court's ruling is the permissibility of states interpreting their unamended programs to allow use of the major source and major modification thresholds in the PSD and Title V Tailoring Rule. Some states, with EPA support, have indicated that they are planning to interpret their existing rules to allow the application of the Tailoring Rule GHG thresholds. They would presumably do this by finding that the "subject to regulation" interpretation in the Tailoring Rule, which provides for GHGs not to be regulated pollutants unless they are at or above the thresholds, can be incorporated into their programs through interpretation until such time as they adopt the Tailoring Rule provisions as revisions to their existing PSD programs.

Application of the Annual Emissions Increase Test

The second issue addressed by the Seventh Circuit was whether the actual emissions increase test was properly applied in determining NOx emissions increases. (All parties agreed it was applicable to NOx.) The basic question was whether the district judge properly allowed EPA's experts to present testimony based upon a formula used for baseload power plants, rather than one for a cycling plant such as existed at the Wabash facility. The court explained the differences between baseload, cycling, and peaking plants. It pointed out that EPA's experts predicted increases that will be proportionally equal to the increase in capacity, rather than other methods that are used for predicting increased generation from standby capacity. After explaining why EPA's testimony was not appropriate, the court ruled that EPA could not prevail based upon an estimate of emissions for a baseload plant when a cycling plant was at issue. Appellees filed a Petition for Rehearing on November 29, asserting that the plant in fact is a baseload plant, and the court granted the petition on December 1, 2010.

Significance of NSR Ruling

The court's ruling will obviously be most significant in a circumstance where a cycling or peaking plant is at issue in determining annual emissions increases at a power plant. However, the reasoning in the court's opinion supports the logical interpretation that projected emissions increases must be based upon factors that reasonably apply for a particular plant. Thus, the court's ruling should be a helpful precedent in convincing courts that EPA is not permitted to make unrealistic projections in determining projected annual emissions increases.

Wisconsin District Court Finds PSD Permitting Violations Are Ongoing

On October 21, 2010, the Federal District Court for the Western District of

Wisconsin issued a decision in *Sierra Club v. Dairyland Power Cooperative*, CA No. 10-cv-303-bbc, 2010WL 4294622 (W.D. Wisc. Oct. 21, 2010) that finds that violations of the prevention of significant deterioration (PSD) permitting requirements are ongoing violations and thus civil penalties can be obtained for PSD violations for the five years prior to the filing of an action, regardless of when the projects at issue were constructed. The court also ruled that the requirement to install best available control technology (BACT) is a requirement under the Clean Air Act that is independent of the requirement to obtain a PSD permit.

In a lengthy opinion, Federal Judge Barbara Crabb rejects the majority view of federal appellate and district courts that the five-year statute of limitations should begin to run at the time of commencement of construction of a project, with the effect that civil penalties would be precluded for violations of PSD permitting requirements for projects for which construction had been commenced more than five years prior to a complaint being filed. Judge Crabb had previously ruled in *U.S. v. Murphy Oil*, 155 F. Supp. 2d 1117 (W.D. Wis. 2001), that the statute of limitations would preclude PSD civil penalty claims for projects undertaken more than five years before the action, unless the defendant had taken actions to conceal its violations. There, the judge found that the plant's violations had been concealed.

Before addressing the legal issues before the court, the judge states that "defendant modified and thereafter operated each of the eight boilers at [its Alma and Genoa stations] without obtaining appropriate permits authorizing the construction, without meeting [BACT] emissions limits, and without installing appropriate technology to control emissions of pollutants." Thus, the legal questions were whether defendant would be subject to the requirements to install BACT and payment of civil penalties for the 20 out of 22 projects at issue that were undertaken more than five years prior to the action.

BACT as an Independent Violation

After generally reviewing the PSD permitting requirements, the judge first addresses whether the best available control technology and air quality demonstration requirements are independent claims from the requirement to obtain the permit itself. The judge lists the conditions under PSD that must be fulfilled before a major source "'may be constructed.'" Without any real analysis, the judge concludes that the various individual requirements are not subsumed by the requirement to obtain a preconstruction permit. She rules that the Clean Air Act and Wisconsin regulations establish that the BACT and air quality analysis requirements are independent obligations regardless of what the PSD permit requires, and the plaintiff may bring separate claims for defendant's alleged failure to apply BACT and submit air quality demonstrations.

Discovery Rule

Next, the judge considered whether the discovery rule applies under the federal five-year statute of limitations (i.e., the statute of limitations would not begin to run until the plaintiff discovers the violation). The judge points out that she had ruled in the *Murphy Oil* case that the discovery rule would not apply in that instance because the government should have been able to detect violations under the

facts there. However, the judge states that, in general, the discovery rule would apply and the plaintiff could rely on it to toll the statute of limitations if the defendant had taken actions to conceal its violations. After also pointing out that there was a split in the federal courts as to whether the discovery rule would apply in actions for civil penalties under a federal statute, the judge rules that the policy reasons that motivated other courts to apply the discovery rule in environmental cases are applicable in this case, particularly noting the difficulty with which environmental groups would have in identifying violations.

Ongoing Violations

The judge next reviews whether the PSD violations are "ongoing violations." She states at the outset of this section of the opinion that, "[e]ven if the discovery rule did not apply in this setting, there is another reason why defendant's statute of limitations defense fails at this stage: defendant's alleged violations have been ongoing." She then points out that under the ongoing violation theory, "even where the statute of limitations applies to a claim for civil penalties, the statute of limitations does not bar [claims for] violations that are ongoing." The judge points out that the Seventh Circuit has not addressed the question of whether the PSD requirements impose liability for the "operation, rather than only the construction," of a facility that has failed to comply with PSD. She then notes that a division exists among the courts that have addressed the continuing nature of a PSD violation for statute of limitations purposes. Two Federal appellate courts, the Eighth and Eleventh Circuits, have ruled that PSD violations are one-time violations and the Sixth Circuit has ruled that the violation [under the Tennessee permitting laws] is ongoing. She states that district courts in at least seven Circuits have ruled that PSD violations are one-time violations and not ongoing ones. She also states that a number of district courts in the Seventh Circuit (which the Wisconsin court is in) have found that PSD violations are not continuing in nature.

The judge points out that the district courts finding that PSD violations are one-time violations have focused on the "preconstruction" title of the statutory section, the distinction between construction and operating permits, and the language that defines a PSD violation as "*construction*, not *operation*," of a new source or modification without a PSD permit. However, the judge points out that district courts in at least three Circuits have found that PSD violations can be ongoing for statute of limitations purposes. She explains that these courts concluded that the preconstruction and operating requirements under the Act are not separated exclusively into either the PSD program or Title V program, but are intertwined.

Among the court rulings that PSD violations are not continuing or ongoing violations was the decision by Judge Crabb in *Murphy Oil*. However, the Judge now rules that *Murphy Oil* was decided incorrectly with respect to this issue. She focuses primarily on the fact that the PSD requirements to be included in a preconstruction permit are ones that have continuing operation implications. Much of the Court's analysis on this issue is confusing and not well-reasoned. At bottom, though, the fact that the source obtaining a PSD permit is subject to continuing obligations, such as the obligation to install and operate best available control technology, was persuasive in

convincing the judge to find that PSD violations are ongoing ones. She specifically rules that each day a facility operates absent a PSD permit and absent best available control technology, it is committing a violation of the Clean Air Act and cites approvingly the *National Parks* Sixth Circuit case, in which the Court ruled that the failure to obtain a PSD permit "'presents a series of discrete violations rather than a single violation that may or may not be 'continuing' in nature.'" She then makes another confused ruling: "This is a sensible interpretation of the ongoing violation doctrine that does not eliminate the statute of limitations." [Obviously, even when PSD violations are found not to be ongoing in nature, the statute of limitations is not "eliminated."] The judge then states that the plaintiff is permitted to seek civil penalties "only for the five years preceding suit." The judge seems to suggest that there could be some other possible interpretation of the "five-year" statute of limitations.

Title V

The judge also addressed two issues with regard to plaintiff's claims under Title V. Plaintiff makes a number of claims with regard to the filing of incomplete permit applications. The judge rules that, to the extent the submission of allegedly incomplete permit applications is the focus of plaintiff's claim, she agrees with defendant that plaintiff was required to use the objection or appeal process under Title V. However, she notes that plaintiff also argues that defendant violated its Title V permits by falsely certifying compliance after permits had been issued and failed to submit an application for a Title V revision because of its plant modifications. She rules that these are not collateral attacks on defendant's permits and thus plaintiff may proceed with its Title V claim "to the extent it is challenging defendant's false certifications and failure to submit applications and amendments, rather than defects in defendant's Title V permit."

Significance of Decision

As Judge Crabb's opinion acknowledges, her rulings on the ongoing violation issues are in conflict with the overwhelming majority of court rulings, both at the appellate and district court level. Decisions of panels in the Eighth and Eleventh Circuits and numerous federal district courts have ruled that the statute of limitations begins to run on PSD violations at the time of commencement of construction. Also, there are no independent requirements for installing BACT and carrying out air quality demonstrations on which to base an ongoing violation claim if five years have elapsed between the filing of the action and the commencement of construction. In contrast to the Sixth Circuit decision finding an ongoing violation under the Tennessee NSR requirements, Judge Crabb does not point to any unique provisions in the Wisconsin regulations that would justify distinguishing them from the provisions that were considered in the Eighth and Eleventh Circuit decisions.

While Judge Crabb's reasoning is not clear in certain portions, other parts set out the basic argument relied on by courts that have ruled that violations of the PSD permitting requirements are not one-time violations, but rather involve a series of discrete violations for which civil penalties can be obtained for the five-year period immediately preceding the filing of the action. As noted above, the principal focus is on the fact that the PSD

permit itself would have contained a requirement to install BACT which, if required, would continue in effect unless and until amended in a subsequent permit. Judge Crabb's rulings seem to generally indicate an orientation towards accepting PSD interpretations that would result in requirements to install BACT, as reflected in the *Murphy Oil* decision where she found that the actual-to-potential test should be applied in determining whether an expansion of a sulfur recovery unit should have been subject to PSD permitting. In this case, the judge points out that, if the concurrent remedy doctrine were to be found applicable, injunctive relief (i.e. installation of BACT) would not be required if claims for civil penalties were barred under the statute of limitations. In light of her finding that PSD violations are ongoing ones, it was not necessary for her to rule on whether the concurrent remedy doctrine would apply if the statute of limitations had run.

In sum, the Eighth Circuit and Eleventh Circuit decisions and the majority position in federal district courts are encouraging with regard to whether the five-year statute of limitations would bar claims for NSR violations associated with projects undertaken more than five years prior to the bringing of an action. However, the rulings in the minority of cases, including Judge Crabb's decision, means that the issue will continue to be one subject to case-by-case rulings in all Circuits but the Eighth and Eleventh, until there are either additional Circuit Court rulings or a definitive ruling by the U.S. Supreme Court.

Maryland District Court NSR Emission Test Ruling

On September 1, 2010, the Federal District Court for Maryland issued a decision in EPA's action against Westvaco Corporation in connection with the Agency's NSR enforcement initiative. *United States v. Westvaco Corp.,* No. MJG-00-2602, 2010 WL 4068745 (D. Md. Sept. 1, 2010). The ruling was the judge's "second phase decision" in the case and addressed the proper baseline period and post-change emissions determination method to be used in deciding whether Westvaco violated NSR when it constructed its Digester Expansion Project in 1981. Unfortunately, the judge concluded that an "actual-to-potential" test should be applied to determine whether a major modification had been undertaken.

After readily determining that the baseline period for determining NSR applicability would be the two years immediately prior to construction of the project, the judge turned to the question of what emissions increase test should be applied in determining whether NSR was triggered. He first reviewed the language in the NSR regulations that defines "actual" emissions and pointed out that the relevant regulations provide that, when determining the post-change emissions rate, actual emissions shall equal the potential to emit for any emissions unit which "has not begun normal operations." The judge then reviewed the holdings in the *Puerto Rican Cement*, *WEPCO,* and *Murphy Oil* NSR cases. He stressed that the decision in *Murphy Oil* distinguished *WEPCO* and found that an "'actual-to-potential'" comparison was appropriate where there had been physical changes that "went beyond replacing old parts

with equivalent new ones." 143 F. Supp. 2d 1054, 1104 (W.D. Wis. 2001).

Based upon his review of the three prior cases, the judge stated that he had concluded that the post-project emissions rate should be calculated based upon the source's post-project potential to emit. The judge indicated, however, that it would be necessary to determine how potential to emit should be computed and that there were at least three possible measures: (1) the absolute legal maximum emissions; (2) the physical potential to emit, assuming no emission limits; and (3) a maximum anticipated physical actual rate. He deferred the decision on how to compute the post-change potential to emit until subsequent proceedings.

The ruling in this case diverges from recent decisions on the relevant test to be applied under the 1980 NSR regulations. Recent decisions have found that a version of an "actual-to-projected-actual" test would be appropriate for determining emissions increases for projects involving changes at existing emissions units. However, these cases have generally involved repair and replacement projects at electric utilities. In the *Westvaco* case, the judge distinguishes the *WEPCO* case, in which an actual-to-potential test was rejected, on the grounds that *WEPCO* involved like-kind replacements. Instead, he relies heavily on the *Murphy Oil* case where the project did not simply involve replacing existing components. The judge quotes approvingly the statement in *Murphy Oil* that "'although the 'actual-to-potential' test may not be the fairest measure of emissions increases, defendant has failed to cite any legal authority that would support a different test in this case.'" 143 F. Supp. 2d at 1105. In *Murphy Oil*, the Court found that the changes were sufficiently significant to justify a determination that the unit had not begun normal operations. Here, the changes resulted in increased production capability.