

Clean Air Act Litigation Developments

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Clean Air Act Litigation Developments 2003

Citizen Suits

State of New York v. Niagara Mohawk Power Corp., 263 F. Supp. 2d 650 (W.D.N.Y. 2003).

In a citizen suit brought by the State of New York alleging numerous PSD violations, a federal district court judge granted motions to dismiss filed by two groups of defendants. The court concluded, among other things, that the federal statute of limitations applies to the State's claims for civil penalties based on its allegations that PSD permits should have been obtained. In reaching this conclusion, the court ruled that the failure to obtain a pre-construction permit does not constitute a "continuing violation." In addition, the court ruled that certain defendants had not violated PSD permitting requirements because they were not "owners" or "operators" of the facilities involved at the time the PSD violations allegedly occurred.

Background

The State of New York filed a Clean Air Act citizen suit against Niagara Mohawk and nine other companies (the nine companies are referred to as the "NRG Defendants") alleging that the defendants had undertaken a total of 55 projects at two power plants between 1982 and 1999 without obtaining necessary pre-construction permits. The State alleged that the defendants had violated federal PSD permitting requirements as well as related state law provisions.

Niagara Mohawk and the NRG Defendants filed separate motions to dismiss the State's claims. Niagara Mohawk owned and operated the two facilities during the time period that the State alleged the projects in question were undertaken. In June 1999, Niagara Mohawk sold the two facilities to the NRG Defendants.

In its motion, Niagara Mohawk argued that the complaint should be dismissed because the Clean Air Act citizen suit provisions do not authorize suits for "wholly past violations" of pre-construction permitting requirements. It also argued that all the alleged violations occurring more than five years before the State filed its complaint, i.e., all alleged violations

occurring before November 28, 1996, are barred by the federal statute of limitations in 28 U.S.C. § 2462. Niagara Mohawk further contended that the State's separate allegations that it failed to install BACT cannot be the subject of a citizen suit. Niagara Mohawk also maintained that the State's additional claims based on SIP provisions or general state law principles cannot be brought under the federal citizen suit provisions.

In their motion, the NRG Defendants moved to dismiss both the federal and state claims in the State's complaint as applied to them because they did not own or operate the two facilities during the time period in which the projects were undertaken.

Wholly Past Violations

The court disagreed with Niagara Mohawk's argument that the State's claims must be dismissed because the Clean Air Act citizen suit provisions did not authorize suits for "wholly past violations." The court ruled that section 304(a)(3) of the Act, which authorizes citizen suits against any person who constructs a new or modified major emitting facility without a permit, plainly authorizes the type of action brought by the State. It also rejected Niagara Mohawk's reliance on the decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), where the Supreme Court had ruled that the Clean Water Act's citizen suit provision did not provide federal jurisdiction for citizen suits involving "wholly past violations." According to the district court, the language of section 304(a)(3) can be distinguished from the language of the Clean Water Act citizen suit provision, which contains the language "alleged to be in violation" - language which does not appear in section 304(a)(3).

Statute of Limitations

With regard to the statute of limitations issue, the district court rejected the State's position that the statute of limitations had not run because the failure to obtain a PSD permit is a "continuing violation." The court stated that the distinction between pre-construction permits and operating permits is "important" and that "violations of the preconstruction permitting requirements occur at the time of construction, not on a continuing basis." The court noted that the majority of judicial decisions have held that the failure to obtain a pre-construction permit is not a continuing violation. Accordingly, the court concluded that the statute of limitations began to run at the time of construction for each project and therefore that the State's claims for civil penalties for projects undertaken prior to November 28, 1996 are barred by 28 U.S.C. § 2462.

BACT Requirements

The court disagreed with Niagara Mohawk's contentions that the State could not bring a citizen suit based on allegations that Niagara Mohawk had failed to install BACT in connection with the projects (independent of the alleged failure to obtain PSD permits). Niagara Mohawk contended that BACT requirements are not "in effect" and therefore do not satisfy the definition of "emission standard or limitation" in section 304(f), which contains the phrase "in effect." According to Niagara Mohawk, BACT requirements are not "in effect" because the permitting authority will not have determined what constitutes BACT for the units in question. However, the court ruled that a source proposing to undertake a project is obligated to obtain a BACT determination and cannot benefit from having failed to satisfy pre-construction requirements. Accordingly, the court ruled that a claim that a source failed to install BACT is independent from permitting claims. However, the court ruled that the State's BACT claims in this case are subject to the five-year statute of limitations in the same way that permitting claims are.

State Law Claims

The State's complaint also generally alleged that the defendants had violated certain SIP provisions that apparently mirror the federal PSD provisions. In response to Niagara Mohawk's motion to dismiss, the court ruled that these related state law claims were subject to a three-year statute of limitations under New York law and that the state statute of limitations applied both to claims for civil penalties and for injunctive relief.

Claims Against the NRG Defendants

The State claimed that the NRG Defendants had violated PSD requirements even though it was undisputed that they neither owned nor operated the facilities at the time the projects allegedly occurred. According to EPA, the NRG Defendants had violated the Act by operating the facilities in violation of the Act's pre-construction requirements. In addressing these claims, the court ruled that "preconstruction obligations are imposed only upon the person who actually seeks to construct or modify a facility within the meaning of the Act." In this regard, the court explained that the distinctions between the Act's pre-construction permitting program and operating permit program are "critical." Because the failure to obtain a pre-construction permit is not a "continuing violation," the court ruled that the NRG Defendants could not be liable for simply operating facilities that allegedly should have obtained PSD permits in the past.

See United Steelworkers of America v. Oregon Steel Mills, Inc., 322 F.3d 1222 (10th Cir. 2003) (PSD Requirements).

Fair Notice

United States v. Southern Indiana Gas and Electric Co., 245 F. Supp. 2d 994 (S.D. Ind. 2003).

On February 13, 2003, a federal district court judge issued an opinion denying an electric utility company's motion for summary judgment on the issue of whether the utility had received "fair notice" of EPA's interpretation of the "routine maintenance, repair, and replacement" (RMRR) exclusion from the definition of "major modification." In his opinion, the judge concluded that the utility "had fair notice of the EPA's interpretation of routine maintenance."

Background

In its complaint filed in 1999, EPA alleged that equipment replacement projects undertaken by the Southern Indiana Gas and Electric Company (SIGECO) in 1991, 1992, and 1997 were modifications that triggered PSD and NSPS requirements and that SIGECO had not filed to obtain necessary PSD permits before commencing construction. SIGECO maintained that all the projects constituted "routine maintenance, repair, and replacement" and therefore were exempt from PSD and NSPS requirements. The court's opinion addressed SIGECO's motion for summary judgment in which it argued that it had not received "fair notice" of EPA's changed interpretation of the RMRR exclusion prior to undertaking the projects and therefore that EPA could not enforce its changed interpretation. Under the fair notice doctrine, an agency is responsible for ensuring that a regulated party acting in good faith can identify with "ascertainable certainty" how the agency is interpreting a particular regulation.

The Court's Decision

In his opinion, the judge stated that SIGECO did not dispute that EPA's RMRR exclusion analysis involves "a fact intensive, case-by-case determination, taking into account factors such as the project's nature, extent, frequency, and cost." According to the judge, the key issue before him involved the scope of the frequency factor within the routine maintenance analysis. EPA contended that it has always looked at the unit itself to determine if the activity in question occurred frequently with regard to that particular unit. In contrast, SIGECO maintained that EPA has until recently looked at the relevant industry as a whole to see if the types of activities at the unit in question occur frequently throughout that industry.

The first step taken by the judge to determine whether SIGECO received fair notice was to determine whether EPA's interpretation was "reasonable." The judge concluded that

EPA's interpretation, in which the Agency focuses on the frequency of the activity for the unit in question rather than on the frequency in the industry as a whole, was "reasonable and persuasive." According to the judge, EPA's narrow interpretation of the exclusion is consistent with the regulatory language, which applies only to "routine" activities, and with the fact that Congress defined "modification" very broadly. Finally, the court concluded that deference to EPA's interpretation was appropriate because of its technical expertise.

The judge thought it was significant that SIGECO admitted that it had notice that EPA interpreted the exclusion as involving a case-by-case, multi-factor test but was contending only that it did not have fair notice regarding how one of the factors – frequency – was being interpreted. The judge then discussed the language of the RMRR exclusion and EPA's public statements interpreting the exclusion to determine what notice the utility had received before undertaking the projects. The judge found that the language of the exclusion is ambiguous and that a regulated party would not know with "ascertainable certainty" how EPA was interpreting the exclusion based solely on its text. However, he also found that reading the exclusion in context gave notice that it will not be construed broadly.

The judge concluded that EPA's most important public statement interpreting the RMRR exclusion came in the decision in *Wisconsin Electric Power Co. (WEPCO) v. Reilly*, 893 F.2d 901 (7th Cir. 1990). Quoting from a 1988 EPA memorandum discussing the WEPCO projects ("the Clay Memo"), the Seventh Circuit had stated that "EPA makes a case-by-case determination [regarding whether an activity is routine] by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other factors, to arrive at a common-sense finding." After analyzing the *WEPCO* decision, the judge concluded that it "supports the view that the frequency of the project at the particular unit and the frequency of the project within [the] industry are *both* relevant considerations" (emphasis in original).

The judge also concluded that the Clay Memo notified the regulated community that the frequency with which activities occur in a unit's expected life cycle is very significant in determining whether an activity is routine maintenance. In determining whether the regulated community understood the interpretation in the Clay Memo, the judge relied on a 1989 letter sent by the Utility Air Regulatory Group (UARG) to the Department of Energy. Among other things, that letter stated that EPA had "redefined" what constitutes routine maintenance and was including as "routine" only those activities that "are frequently done at that plant." According to the judge, the UARG letter indicated that the utility industry – and most likely SIGECO – had notice of the narrow, unit-focused interpretation of routine maintenance that EPA is advancing in this enforcement case.

The judge also examined two additional public statements made by EPA after the 1992 project but before the 1997 project. In the preamble to the 1992 WEPCO rule, EPA explicitly indicated that it was clarifying the RMRR exclusion by stating that "the determination of

whether the repair or replacement of a particular item of equipment is ‘routine’ under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category.” Although the statement seems to indicate that whether an activity is “routine” is to be based on whether that activity is commonly undertaken within the industry in question, the court read the statement as merely indicating, for example, that it is more “instructive” to look at the utility industry for a utility source rather than the “textile” industry. The judge gave the statement essentially no weight because the judge believed that it was so brief, was contained in a preamble to changes that did not address the RMRR exclusion, and, in the judge’s view, did not establish that the Clay Memo interpretation had changed.

Furthermore, the judge ruled that a determination by the state permitting authority that the 1997 project did not trigger NSR requirements was not entitled to any weight. According to the judge, because the non-applicability determination was not received until 1998, it could not be used to establish that SIGECO lacked fair notice of EPA’s interpretation with regard to the 1997 project.

Based on the foregoing, the judge concluded that SIGECO had fair notice before undertaking the projects that the factors set forth in the Clay Memo would be considered in EPA’s routine maintenance analysis and that due weight would be given to each factor. In particular, the judge believed that SIGECO had fair notice that the frequency factor would not necessarily be the most important factor and that EPA would focus on the frequency of an activity with regard to a particular unit, not with regard to industry practices in general.

See United States v. Ohio Edison Co., 276 F. Supp. 2d 829 (S.D. Ohio 2003) (PSD Requirements).

Justiciability

Tennessee Valley Authority v. Whitman, 336 F.3d 1236 (11th Cir. 2003).

On June 24, 2003, the U.S. Court of Appeals for the Eleventh Circuit issued a decision in the new source review (NSR) enforcement litigation involving the Tennessee Valley Authority (TVA). A three-judge panel ruled that the Court lacks jurisdiction to review certain administrative compliance orders (ACOs) issued to TVA by EPA because the ACOs are not reviewable final agency actions under the Clean Air Act. The Court’s ruling that the ACOs are not final agency actions was based on its conclusion that the Act’s statutory scheme regarding the issuance and review of ACOs is unconstitutional. Because the Court ruled

solely on jurisdictional and constitutional grounds, it did not express any opinion regarding the merits of EPA's allegations that TVA's projects were not covered by the regulatory exclusion for activities that constitute "routine maintenance, repair, and replacement."

Beginning in November 1999, EPA issued ACOs to TVA in which EPA found that TVA had undertaken numerous replacement projects in the past without complying with NSR requirements. After TVA disputed the validity of the ACOs, EPA conducted a special administrative proceeding to review the orders. In September 2000, EPA's Environmental Appeals Board issued a 162-page decision upholding the ACOs in most respects. TVA subsequently challenged that decision and the ACOs in the Eleventh Circuit.

In its decision, the Court ruled that the statutory scheme for the issuance of ACOs is unconstitutional. It concluded that the Clean Air Act accords ACOs the "status of law," e.g., the recipient of an ACO can be liable for civil or criminal penalties for violating an ACO. The Court further concluded, however, that this violates the Due Process Clause of the Constitution because there is no opportunity for a hearing or to otherwise present evidence before an ACO is issued. In addition, the Court concluded that the statutory scheme unconstitutionally prevents federal courts from exercising their full judicial review powers. Accordingly, the Court stated that "[t]he Clean Air Act is unconstitutional to the extent that mere noncompliance with the terms of an ACO can be the sole basis for the imposition of severe civil and criminal penalties." Because it found that the ACOs issued to TVA were invalid as a constitutional matter, the Court ruled that the ACOs had no effect and were therefore not final agency actions.

Finally, the Court specifically stated that, if EPA wishes to pursue the alleged NSR violations, it must bring an action against TVA in district court. (EPA had not brought a district court action against TVA because it had believed that it could not sue another federal agency in the federal courts – a position which the Eleventh Circuit rejected.) Until EPA establishes the existence of NSR violations, "TVA is free to ignore the ACO[s] without risking the imposition of penalties for noncompliance with [their] terms."

See United States v. Duke Energy Corp., 278 F. Supp.2d 619 (M.D.N.C. 2003) (PSD Requirements).

MACT Standards/Section 112

Arteva Specialties v. EPA, 323 F.3d 1088 (D.C. Cir. 2003).

The U.S. Court of Appeals for the District of Columbia Circuit remanded a MACT standard to EPA because the Agency failed to justify the approach it took in considering the

cost-effectiveness of the standard. The Group IV Polymers and Resins MACT standard applies to plants that manufacture polymers and resins, including polyethylene terephthalate resin (PET). The court ruled that EPA had not adequately explained why it aggregated the costs and effectiveness of equipment leak detection and repair (LDAR) requirements on a facility-wide basis rather than considering the costs and effectiveness of each individual control technology that had been proposed.

The decision is significant in that it marked the first time that a court has discussed the cost-effectiveness requirement in section 112(d)(2) of the Act in any detail. Section 112(d)(2) provides that EPA is to “tak[e] into consideration the cost of achieving [the] emission reduction” as well as “non-air quality health and environmental impacts and energy requirements” in setting a MACT standard. The court’s decision makes clear that the cost-effectiveness requirement is an important requirement and that EPA must fully justify the approach it takes in assessing the cost-effectiveness of a proposed standard.

Background

In setting the MACT floor for PET manufacturing plants, EPA selected sensory LDAR, i.e., reliance on human senses to detect leaks. However, for certain types of equipment, EPA prescribed the use of one or both of the following “beyond-the-floor” technologies: (1) “one-time” equipment modifications or (2) “Method 21” LDAR, which uses portable organic vapor analyzers to monitor emissions. In conducting cost-effectiveness analyses, EPA aggregated the costs of the proposed controls on a facility-wide basis for each plant and divided them by the aggregated emission reductions for each plant to obtain a dollar per ton figure for each type of PET manufacturer.

Two companies who owned PET manufacturing plants filed petitions for review of the final MACT standard promulgated in 1996. In addition, they jointly submitted to EPA an administrative petition for reconsideration of the final rule. In response to new data submitted by the two companies, EPA adjusted the costs upward but proposed to deny the petition for reconsideration. The two companies submitted comments in which they maintained, among other things, that EPA should not have aggregated the costs and effectiveness of the LDAR requirements on a facility-wide basis. EPA issued a final denial of the petition for reconsideration, and the companies challenged the denial in the D.C. Circuit.

The petitioners argued that aggregating the costs and effectiveness on a facility-wide basis misrepresents the cost-effectiveness of LDAR provisions with regard to certain types of equipment. In particular, they maintained that EPA’s approach misrepresented the cost-effectiveness of Method 21 because it averages the cost-effectiveness of Method 21 with the cost-effectiveness of the other two controls – one-time modifications and sensory LDAR. According to the petitioners, because the costs of Method 21 are so high, only a separate

analysis of the method for certain types of equipment will accurately reflect the cost-effectiveness of the LDAR provisions.

The Court's Decision

The court concluded that, although aggregating cost-effectiveness may be a permissible approach, the record in the case did not demonstrate that EPA's use of aggregation was reasonable. Although the court made clear that the Act does not prohibit aggregating cost-effectiveness, it could not discern from the record that the petitioners' objections to EPA's approach in this rulemaking had been adequately answered. In defending its approach, EPA additionally argued that because most of the LDAR provisions allow the use of alternative methods, aggregation did not distort the results. However, the court noted that no alternative method exists for certain types of equipment and that, in any event, EPA "did not take into account these particular alternatives in conducting its cost effectiveness analysis." The court remanded the case to EPA "to clarify the PET equipment leak standard after reconsidering its cost effectiveness in accord with this opinion."

Monitoring

Utility Air Regulatory Group v. EPA, 320 F.3d 272 (D.C. Cir. 2003).

The D.C. Circuit declined to address the merits of a challenge to EPA's interpretation of its Part 70 permitting regulations authorizing permitting agencies to conduct sufficiency reviews of the periodic monitoring contained in "applicable requirements." The court ruled that the petitioner lacked standing to challenge the actions in question and that, in any event, the claims raised by the petitioner were not ripe for review.

Background

The case arose when the Utility Air Regulatory Group (UARG) filed a petition for review challenging EPA's interpretation of its permitting regulations as set forth in two decisions by the Administrator addressing petitions for objections to Title V permits and in an instruction manual for permit application forms. The Clean Air Implementation Project (CAIP) intervened in the case in support of UARG's position.

In all the challenged actions, EPA interpreted general language in section 70.6(c)(1) of its regulations as authorizing permitting agencies to conduct sufficiency reviews of the periodic monitoring contained in "applicable requirements." Section 70.6(c)(1) states in relevant part that "[c]onsistent with [section 70.6(a)(3)]," all Part 70 permits shall contain

“monitoring . . . requirements sufficient to assure compliance with the terms and conditions of the permit.” Under EPA’s interpretation of section 70.6(c)(1), which the Agency had not previously advanced, permitting agencies can impose more stringent periodic monitoring in Title V permits even though the applicable requirement itself already sets forth periodic monitoring requirements.

UARG and CAIP argued that the new interpretation was an impermissible attempt to evade the D.C. Circuit’s decision in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). In that decision, the court ruled that EPA’s regulations did not authorize such “wide-ranging sufficiency reviews” by permitting agencies. The court went on to overturn EPA’s Periodic Monitoring Guidance, which purported to authorize such sufficiency reviews, as an unlawful attempt to revise EPA’s regulations without complying with notice and comment requirements. EPA never attempted to rely on section 70.6(c)(1) in unsuccessfully defending the Period Monitoring Guidance.

In this case, EPA contended, among other things, that the *Appalachian Power* decision dealt only with section 70.6(a)(3), which specifically addresses periodic monitoring. According to EPA, this meant that the Agency was free to interpret section 70.6(c)(1) as authorizing permitting agencies to conduct sufficiency reviews.

Ruling of the Court

In its decision, the D.C. Circuit concluded that UARG lacked standing to challenge the actions in question because it could not show that it or any of its members had been injured by EPA’s new interpretation. The court stated that UARG had not shown that the two permit objection decisions adversely affected any UARG member or that the instruction manual had been applied to any UARG member. Moreover, the court stated that UARG had not shown that the manual was binding in any sense on state permitting agencies.

The court also concluded that UARG’s claims are not ripe because EPA’s actions are not sufficiently final. In this regard, the court relied on a rulemaking proceeding involving proposed revisions to section 70.6(c)(1), which EPA instituted on the eve of the oral argument. According to the court, it would be a waste of judicial resources to rule on EPA’s regulatory interpretation when the Agency is considering revising the regulation in question.

Because the court ruled that it lacked jurisdiction over UARG’s challenge, it expressed no view on the merits of EPA’s interpretation. However, at the oral argument, the judges recognized that EPA was engaging in “gamesmanship” in an effort to avoid the results of the *Appalachian Power* decision.

New Source Performance Standards

See United States v. Southern Indiana Gas and Electric Co., 245 F. Supp.2d 994 (S.D. Ind. 2003) (Fair Notice).

See United Steelworkers of America v. Oregon Steel Mills, Inc., 322 F.3d 1222 (10th Cir. 2003) (PSD Requirements).

PSD Requirements

United States v. Duke Energy Corp., 278 F. Supp. 2d 619 (M.D.N.C. 2003).

On August 26, 2003, a district court judge issued rulings on cross-motions for summary judgment in EPA's enforcement action against Duke Energy. (In stark contrast to the decision in *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003), the court's rulings on NSR applicability issues are extremely favorable for industry and, indeed, accept in every respect Duke's arguments on the principal NSR applicability issues. However, the court issued an unfavorable ruling on application of the statute of limitations. The rulings set forth the court's interpretation of applicable legal principles in the case. A trial will be held at which the court will make factual findings and then apply the law to those findings. EPA targeted 29 major replacement projects.

Scope of Routine Maintenance, Repair and Replacement (RMRR) Exclusion

The court stated that the "central disagreement between [the utility] and EPA is whether 'routine' should be defined relative to an industrial category or to a particular unit." The court stated that "[t]hrough the EPA's statements in the Federal Register, its statements to the regulated community and Congress, and its conduct for at least two decades, the EPA has established an interpretation of RMRR under which routine is judged by reference to whether a particular activity is routine in the industry." The court concluded that it has insufficient evidence to make a final ruling that all of the projects are routine, but that "EPA should appropriately bear the burden of making [a showing that projects are non-routine] at trial." The court expressly stated that it "respectfully disagrees" with the contrary RMRR interpretation of the court in the *Ohio Edison* case.

Determination of Net Emissions Increase

The court pointed out that EPA and Duke also presented two competing methods for quantifying emissions increases. EPA advanced the “actual-to-projected-actual” methodology, after abandoning its argument that the “actual-to-potential” test should be applied. Duke argued that an “actual-to-actual” test should be applied under which a comparison is made of “pre-project actual emissions and future ‘actual’ emissions, assuming constant hours and conditions of operation.” The court ruled,

based on the PSD rules, the contemporaneous interpretation of the PSD rules, and the statutory language incorporating the NSPS concept of modification into PSD, post-project emissions must be calculated on an annual basis, measuring emissions in tons-per-year, and in calculating post-project emissions levels, the hours and conditions of operation must be held constant. Accordingly, a net emissions increase can result only from an increase in the hourly rate of emissions.

The court’s analysis contains a wholesale rejection of EPA’s post-1998 NSR applicability interpretations. Notable aspects of the emissions increase analysis are:

- The court began with a review of EPA’s interpretations issued contemporaneously with its adoption of the NSR regulations. It particularly focused on two interpretations issued by Ed Reich, then Director of the Division of Stationary Source Enforcement, in which Reich pointed out that emissions increases resulting from an increase in the hours of operation are “specifically exempt from PSD review” and thus cannot be the basis for finding NSR applicability. The court stated that “these contemporaneous interpretations provide compelling evidence of the rules’ original meaning and cannot simply be ignored out of blind deference to the EPA’s current interpretation.”
- Next, the court reviewed the legislative history of the adoption of the NSR requirements and concluded that, because the NSPS modification definition requires an increase in the maximum hourly rate of emissions, “in order to undergo ‘construction’ as defined in PSD, an existing source must also undergo a ‘modification’ as defined in NSPS, *i.e.*, to undergo PSD construction a physical change must result in an increase in the hourly rate of emissions.” The court concluded that EPA’s “interpretation of the regulations is inconsistent with the congressional design of defining PSD construction in terms of NSPS modification and should therefore be accorded little deference.”

- The court also relied on language in the *WEPCO* decision. The court pointed out that the Seventh Circuit in *WEPCO* “ordered the EPA to determine ‘whether the renovated plant would cause a significant net emissions increase if it were operated under present hours and conditions.’”
- The court then stated that this “remand instruction explicitly sets forth the ‘actual-to-actual’ test advocated by Duke Energy and previously applied by the EPA.” It requires that “the hours and conditions of operation be held constant and places the focus on an increase in the hourly emissions rate.”
- The court also stated that the “fact that the 1980 PSD regulations do not provide the methodology that EPA seeks to apply is further highlighted by the EPA’s decision to add through notice-and-comment procedures the very methodology it now contends the 1980 regulations provide.” This is a reference to the 1992 promulgation of the *WEPCO* rule. The court stated that the “addition of the new *WEPCO* rule appears to have been unnecessary if the 1980 regulations already provided this method.”
- The court also “respectfully disagrees” with the finding in the *Ohio Edison* case that the determination of an emissions increase at existing units should be made through application of an “actual-to-projected-actual” test in which a projection is made of future utilization after a change.

Ruling on Statute of Limitations

The court ruled that the five-year statute of limitations does not bar penalties for construction activities undertaken more than five years prior to EPA’s filing suit, because the failure to obtain a PSD permit is a “continuing violation.” The court concluded that “the requirement of obtaining a preconstruction permit amounts to a condition of operation and establishes ongoing obligations.” The court stated that other courts finding that claims more than five years old are barred have focused on the language regarding construction “to the exclusion of the language in the statute stating that the PSD permit shall set forth emission limitations for that source following the construction activity.” The court ruled that “compliance with these emission limitations is just as integral to achieving the objectives of PSD as the preconstruction analysis and review.” By finding that the statute of limitations did not preclude EPA’s obtaining penalties based on projects commenced more than five years before bringing suit, the court’s ruling conflicted with a number of other courts’ opinions.

United States v. Ohio Edison Co., 276 F. Supp. 2d 829 (S.D. Ohio 2003).

A district court judge in Ohio ruled that Ohio Edison Company violated new source review (NSR) permitting requirements in connection with 11 different projects that it undertook between 1984 and 1998 at its Sammis plant. The court's opinion contains a number of rulings upholding EPA's recent interpretations of the Act and its regulations and rejecting the company's attempt to rely on earlier, contrary interpretations.

In the introductory section of his opinion, the judge characterized EPA's enforcement of the Act's NSR provisions as "disastrous" and states that there was an "abysmal breakdown" in the administrative process following the enactment of the 1977 amendments containing the NSR provisions. The judge described the statutory NSR provisions as clear and criticized EPA and the States for not enforcing them more rigorously in the preceding decades. Among other things, he concluded that Congress intended that the NSR provisions would become applicable to all pre-existing plants.

Scope of the Routine Maintenance, Repair, and Replacement Exclusion

The judge ruled that the routine maintenance, repair, and replacement (RMRR) exclusion must be read narrowly. His conclusion was based in large part on his reading of the decision in *Wisconsin Electric Power Co. (WEPCO) v. Reilly*, 893 F.2d 901 (7th Cir. 1990). According to the judge, the *WEPCO* decision correctly established that the term "physical change" should be broadly construed to mean essentially "any physical change," including any proposed equipment replacements. As a result, the judge believed that it is reasonable to construe the RMRR exclusion narrowly. The judge stated that "[r]outine maintenance, repair and replacement occurs regularly, involves no permanent improvements, is typically limited in expense, is usually performed in large plants by in-house employees, and is treated for accounting purposes as an expense." Moreover, the judge said that the *WEPCO* decision held that EPA is entitled to great deference in determining what is "routine" and upheld EPA's use of the four-factor test (nature and extent, purpose, frequency, and cost) in making such determinations.

Application of the Four-Factor Test to Ohio Edison's Projects

The judge concluded that application of the four-factor test clearly demonstrated that the 11 projects were not "routine." With regard to the nature and extent of the projects in question, the judge found that they were all "large scale" projects involving replacements of numerous pieces of equipment. He also believed that it was significant that the projects all involved some work by outside contractors and that the costs were largely treated as capital expenditures by the company.

The judge found that the primary purposes of the projects were to reduce outages and to extend the life of the units involved. According to the judge, this factor strongly suggested that the projects were not routine.

The judge ruled that the relevant inquiry with regard to “frequency” is how frequently the activity has been conducted at the unit in question, not whether it is frequently undertaken within the relevant industry.

With regard to costs, the judge noted that the total cost of the 11 projects was approximately \$136 million and that most of the expenses were capitalized.

Amount of Emission Increases

In determining the amount of the emission increases from each project, the judge relied heavily on the *WEPCO* decision. In a ruling favorable to industry’s position, he recognized that the *WEPCO* court had held that the “actual-to-potential” test cannot lawfully be used for an existing unit that “has begun normal operations.” According to the judge, “[i]t is clear that Sammis was operational at the time the activities were proposed. Thus, any use of the actual to potential to emit test is not legally supportable.”

With regard to the appropriate emissions baseline, the judge ruled that for those projects that took place prior to promulgation of the 1992 *WEPCO* rule, the source must use the 24-month period “immediately preceding” commencement of the project (even though the regulations do not contain such language). He also rejected Ohio Edison’s argument that for projects commenced after the *WEPCO* rule, the source could rely on the 2-year period with the highest emissions within the 5-year period preceding the project. According to the judge, EPA must specifically determine that the 2-year period is representative of normal source operations.

The judge rejected Ohio Edison’s position that it could rely on evidence of post-change actual emissions to show that a project did not cause a significant net emissions increase. According to the judge, the source must make a projection of future actual emissions *before* undertaking any non-exempt project. In determining the amount of emission increases from each project, the judge relied on the testimony of an expert witness for the government who used an “actual-to-projected-future-actual” approach to calculate emissions increases. The judge also rejected the company’s argument that pre-change hourly emissions rates should be compared to post-change hourly emissions rates to determine whether an actual emissions increase would occur. In addition, the judge ruled that the regulatory exclusion for increases in “hours of operation” only applies if the increase is not accompanied by a physical change.

Fair Notice Defense

Under the fair notice doctrine, a regulated party is not liable for an alleged violation if the agency in question has not provided reasonable notice regarding its interpretation of a statutory or regulatory provision. The judge found that Ohio Edison had fair notice of EPA's narrow interpretation of the RMRR exclusion, despite Ohio Edison's arguments that EPA had been largely silent for many years and that the Agency's later statements were largely contradictory and unclear. According to the judge, "the plain language of the CAA, read together with the routine maintenance exemption, make it clear that the exemption must have a narrow interpretation so as not to swallow the general rule requiring CAA compliance when a modification is made."

In conclusion, the judge found that all 11 projects undertaken by Ohio Edison triggered NSR requirements and that the company was liable for violations in each instance. A trial for the remedy phase is scheduled for March 2004. In the remedy phase, the judge indicated that "the Court may consider air quality, public health, economic impact, and employment consequences. The Court may also consider the less than consistent efforts of the EPA to apply and enforce the Clean Air Act."

United Steelworkers of America v. Oregon Steel Mills, Inc., 322 F.3d 1222 (10th Cir. 2003).

On March 3, 2003, the U.S. Court of Appeals for the Tenth Circuit issued a decision reinstating a citizen suit brought by a labor union in which the union alleged that a steel company had violated NSPS and PSD requirements. The court of appeals reversed a decision by a federal district court dismissing the union's complaint for lack of jurisdiction. First, the court of appeals ruled that the union could bring a citizen suit to enforce the NSPS even though the company had already sought judicial review of EPA's ruling that the NSPS applied to its facility. Second, the court of appeals ruled that the union was not required to provide 60 days notice to the company before filing the citizen suit.

The case arose when the union filed a citizen suit in district court under section 304(a) of the Clean Air Act in which it alleged that an electric arc furnace at the company's facility in Colorado had violated both NSPS and PSD requirements and sought to enforce those requirements against the company. The district court dismissed the case on jurisdictional grounds. It ruled that it lacked jurisdiction over the NSPS claim because the company had already challenged an EPA ruling that the NSPS applied to the electric arc furnace in the Tenth Circuit and that court had exclusive jurisdiction to review the ruling. The district court dismissed the separate PSD claim because the union had not provided 60 days notice that it was bringing suit against the company pursuant to section 304(b).

On appeal, the Tenth Circuit overturned both of the district court's rulings. The court of appeals concluded that, because the union was supporting EPA's NSPS ruling rather than attacking it, the union's citizen suit did not interfere with the court's exclusive jurisdiction to review EPA's ruling. The court of appeals explained that, on remand, the district court could consider staying proceedings in the citizen suit case until the company's challenge to EPA's ruling had been resolved.

The Tenth Circuit further ruled that the 60-day notice requirements in section 304(b) do not apply to an action brought under section 304(a)(3) to enforce PSD/NSR permitting requirements. Since the union's citizen suit involved allegations that the company should have obtained a PSD permit, the court of appeals ruled that the district court had jurisdiction over the PSD claim.

See State of New York v. Niagara Mohawk Power Corp., 263 F. Supp.2d 650 (W.D.N.Y. 2003) (Citizen Suits).

See United States v. Ohio Edison Co., 2003 U.S. Dist. LEXIS 2357 (S.D. Ohio, Jan. 17, 2003) (Statute of Limitations).

See United States v. Southern Indiana Gas and Electric Co., 245 F. Supp.2d 994 (S.D. Ind. 2003) (Fair Notice).

SIP Provision Enforcement

See State of New York v. Niagara Mohawk Power Corp., 263 F. Supp. 2d 650 (W.D.N.Y. 2003) (Citizen Suits).

Statute of Limitations

United States v. Ohio Edison Co., 2003 U.S. Dist. LEXIS 2357 (S.D. Ohio, Jan. 17, 2003)
United States v. Ohio Edison Co., No. 2:99-CV-1181, S.D. Ohio, January 23, 2003

On January 17 and January 22, 2003, a federal district court judge in Ohio issued opinions addressing pre-trial motions in EPA's enforcement action against an electric utility company for alleged failures to obtain PSD permits. In the first decision, the judge rejected the company's argument that the five-year statute of limitations in 28 U.S.C. § 2462 bars EPA's civil penalty claims regarding projects constructed more than five years before EPA's

complaint was filed. In the second decision, the court denied the company's motion for summary judgment in which the company argued that all the projects in question were covered by the exclusion for "routine maintenance, repair, or replacement" (RMRR) activities. The court also denied EPA's motion for partial summary judgment in which EPA argued that certain projects were not covered by the RMRR exclusion. Finally, the court granted in part EPA's separate motion contending that certain defenses asserted by the company lacked merit.

The enforcement action involved allegations by EPA that 34 different projects undertaken by the company at one of its facilities in the 1980s and early 1990s constituted "major modifications" that triggered PSD requirements. All the projects entailed replacement of equipment during scheduled maintenance outages.

The judge's rulings are summarized below:

Whether the Statute of Limitations Bars EPA's Civil Penalty Claims

The company moved for summary judgment on the grounds that 33 of the 34 projects involved in the case were undertaken more than five years before EPA's complaint was filed and therefore that EPA's civil penalty claims for those projects are barred by the statute of limitations in 28 U.S.C. § 2462. The company did not argue that EPA's claims for injunctive relief were barred by the statute of limitations. In opposing the motion, EPA maintained that the statute of limitations had not run because the failure to obtain a PSD permit constitutes a "continuing violation."

In his January 17 decision, the judge rejected the company's position based on his belief that, because a preconstruction permit may contain conditions dealing with the subsequent operation of the facility as well as preconstruction requirements, EPA's theory that a violation continues to exist after the time that construction takes place has merit. The court held that "it is illogical to conclude that a defendant may only be held liable for constructing a facility, rather than operating such facility, without complying with the permit requirements." According to the judge, the impact of the statute of limitations is that EPA can recover civil penalties only for the five-year period immediately preceding the filing of its complaint even though the alleged failure to have obtained a PSD permit occurred more than five years before the complaint was filed.

Whether Projects Are Subject to the RMRR Exclusion

The company also moved for summary judgment on the basis that all the projects undertaken were "routine" within the electric utility industry and that EPA's claims are inconsistent with the statute, the relevant regulations, and EPA's own historical interpretations and applications of the regulations. The company relied in part on the

deposition statements of an EPA contractor, a private consultant, and the Chief of the Ohio EPA air office to show that PSD permits had never been required for the types of equipment replacements in question. The company also argued that the projects were very different from the large projects that the court found were non-routine in *Wisconsin Electric Power Co. (WEPCO) v. Reilly*, 893 F.2d 901 (7th Cir. 1990).

EPA's motion for partial summary judgment was based on the theory that the court should defer in this case to EPA's current interpretation of what is "routine." Among other things, EPA contended that the test for whether an activity is routine hinges on what is routine for the unit in question, not what is routine for the industry as a whole. EPA maintained that the deposition testimony relied upon by the company was irrelevant because the question of whether an activity is "routine" under the regulations is ultimately a legal question. EPA further contended that its conclusion that the projects involved here were non-routine was properly based on the four-part test (nature/extent, purpose, frequency, and cost) upheld by the *WEPCO* court.

In addressing the motions, the court concluded that, "regardless of which approach is adopted, unresolved questions of fact as to the scope and extent of the projects, the treatment of allegedly similar projects undertaken at other plants and the effect of the projects on the environment render summary judgment particularly inappropriate." Accordingly, the court denied both sides' motions involving the RMRR exclusion.

Whether Certain Defenses Raised by the Company Are Valid

EPA filed a separate motion seeking partial summary judgment as to certain affirmative defenses by the company because they are allegedly either legally unsupportable or involve no genuine issues of material fact.

The judge concluded that he considered himself bound by his prior decision in the companion case of *United States v. American Electric Power Co.*, 218 F.Supp.2d 932 (S.D. Ohio 2002), in which he had ruled, among other things, that affirmative defenses based on the Takings Clause of the Fifth Amendment, the Tenth Amendment (powers reserved to the States), and the Commerce Clause were without merit. In addition, the judge ruled that the company's argument that EPA's alleged re-interpretation of its regulations violates the *ex post facto* clause of the Constitution (Congress cannot enact a law punishing someone for conduct that was legal at the time it was undertaken) similarly lacked merit.

***See State of New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650 (W.D.N.Y. 2003) (Citizen Suits).**

See *United States v. Duke Energy Corp.*, 278 F. Supp.2d 619 (M.D.N.C. 2003) (PSD Requirements).

See *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003) (PSD Requirements).

Title V Permit Program

New York Public Interest Research Group v. Whitman, 321 F.3d 317 (2d Cir. 2003).

On February 27, 2003, the U.S. Court of Appeals for the Second Circuit issued a decision addressing the validity of EPA's approval of New York's Title V permitting program as well as the Agency's decisions not to object to three particular Title V permits. The appellate court made three principal rulings: (1) it upheld EPA's full approval of New York's program despite the fact that certain deficiencies existed; (2) it ruled that EPA was not required to issue a notice of deficiency (NOD) with regard to the fully approved program; and (3) it vacated EPA's decisions not to object to three Title V permits where EPA had acknowledged that the permits contained deficiencies. The court's decision is significant in that it contains extensive discussions of EPA's authority in reviewing and approving states' Title V programs and in responding to petitions for objections to Title V permits.

Background

In 1996, EPA granted New York "interim approval" of its submitted program in accordance with section 502(g) of the Act. When EPA granted interim approval, it identified eight deficiencies that needed to be addressed before full approval could be granted. Although the Act provides that interim approval shall expire in no later than two years, EPA repeatedly extended the interim approval for New York's program and for the programs of many other states. To settle litigation subsequently brought by the New York Public Interest Research Group (NYPIRG) and the Sierra Club, EPA agreed to begin administering federal programs in all states whose programs were not fully approved by December 1, 2001.

In response to a notice from EPA inviting comments on deficiencies in state programs, NYPIRG identified nine additional deficiencies in New York's program and requested that an NOD be issued. However, EPA granted full approval of New York's program in February 2002. EPA indicated that the newly identified deficiencies, which it characterized as "implementation" deficiencies rather than substantive program deficiencies, did not prohibit full approval. EPA subsequently responded to NYPIRG's request for an NOD by stating that, although NYPIRG had identified additional deficiencies in the program, New York had

committed itself in a November 2000 letter to rectifying those problems and therefore an NOD would not be issued.

NYPIRG also petitioned EPA to object to various Title V permits that had been issued by New York pursuant to its interim approval authority. In its petitions for objection, NYPIRG alleged the existence of deficiencies that paralleled the deficiencies raised in its comments on the New York program. Three permits are involved in this litigation. EPA denied the petition regarding one permit entirely and denied all but a few claims involving the other two petitions. EPA maintained that, in declining to object to the petitions, it was entitled to invoke a “harmless error rule” implicit in the statutory scheme.

NYPIRG separately sought judicial review of EPA’s full approval decision, its decision not to issue an NOD, and its denial of the petitions for objection. The cases were subsequently consolidated before the court of appeals.

EPA’s Full Approval of New York’s Program

EPA maintained that its full approval of the New York program was valid despite the fact that additional “implementation” deficiencies existed. According to EPA, once a state receives interim approval, it need only correct the specific deficiencies already identified in order to receive full approval. NYPIRG contended that any deficiency of any kind in a program prevents it from receiving full approval.

The court concluded that the relevant statutory provisions are ambiguous and deferred to EPA’s interpretation as a “permissible” reading of the statute. The court found that section 502(g) of the Act is ambiguous because it does not clearly describe the process by which a state with interim approval is to receive full approval. The court further concluded that EPA’s interpretation is permissible because section 502(g) refers to “the changes” that must be made to gain full approval, EPA’s position is consistent with the two-year timetable for obtaining full approval, and the Act provides a separate mechanism in section 502(i) for correcting deficiencies in fully approved programs. The court concluded that, because EPA’s interpretation is entitled to deference, EPA’s decision to fully approve the New York program should be affirmed.

EPA’s Decision Not to Issue an NOD

NYPIRG argued that the same deficiencies that allegedly should have prevented full approval obligated EPA to issue an NOD. EPA acknowledged the existence of these “implementation” deficiencies but maintained that it had discretion to determine whether New York’s commitment to addressing the problems excused the need for a formal NOD.

The court agreed with EPA that the key language in section 502(i) is “[w]henever the Administrator makes a determination” that a state is not adequately administering and enforcing a program, the Administrator “shall” provide notice to the state. According to the court, “[b]ecause the determination is to occur whenever the EPA makes it, the determination is necessarily discretionary.” Moreover, the non-discretionary duty to provide notice arises only after EPA has made its discretionary determination. The court further concluded that, because EPA’s decision whether to provide notice to a state is a completely discretionary enforcement determination, prior precedents establish that NYPIRG cannot obtain judicial review of such a decision.

EPA’s Denial of Petitions for Objection to Title V Permits

With regard to the three permits addressed in NYPIRG’s petitions for objection, NYPIRG argued that if a permit is deficient in any respect, EPA has a non-discretionary duty to object to it. EPA’s position was that a “harmless error rule” applied in such instances. In other words, if the deficiency had not caused any demonstrable harm to the petitioner, e.g., the petitioner commented on a draft permit even though public notice was inadequate, then EPA was not required to object to the permit.

The court concluded that nothing in the statute supports EPA’s reliance on a “harmless error rule” in determining whether to object to a Title V permit. According to the court, although EPA has discretion in deciding whether a permit is deficient, once it decides that a deficiency is present, the Act provides that EPA “shall” issue an objection. Because here EPA acknowledged that each of the three permits contained some deficiencies but did not object, the court vacated EPA’s denial of NYPIRG’s petitions for objection. However, the court declined to provide specific instructions regarding how EPA is to conduct the remand.

See Utility Air Regulatory Group v. EPA, 320 F.3d 272 (D.C. Cir. 2003) (Monitoring)

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