

Clean Air Act Litigation Developments

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Clean Air Act Litigation Developments 2004

Citizen Suits

***Ellis, et al. v. Gallatin Steel Co., et al.*, 390 F.3d 461 (6th Cir. 2004).**

On October 26, 2004, the Sixth Circuit considered appeals by plaintiffs and defendants in a case brought against Gallatin Steel and Harsco by neighboring landowners. The case involved numerous state and federal claims. The principal Clean Air Act rulings of interest related to the court's overturning a permanent injunction against Gallatin and Harsco that included the assignment of a court-appointed expert to monitor compliance, and the court's upholding the district court's dismissal of PSD claims under the "abstention doctrine."

Factual and Procedural Background

The plaintiffs alleged fugitive dust violation claims based on the fact that dust originating from the Gallatin and Harsco plants had settled on their property. They had spent over 8,000 hours monitoring the steel manufacturing and slag processing operations of the defendants. Plaintiffs sent a 60-day notice letter in December 1998, and less than 60 days later EPA filed an enforcement action in the federal district court. In July 1999, the plaintiffs filed their first citizen suit alleging, among other things, numerous violations of the Clean Air Act. Four months later, in December 1999, the plaintiffs filed a second citizen suit alleging additional violations. In January 2000, the district court granted summary judgment against the Ellises on all but three of their claims in their first citizen suit because they had failed to give proper notice of the claims. The remaining three claims were consolidated with the plaintiffs' second citizen suit. In October 2000, EPA amended its complaint and proposed a consent decree to resolve the federal claims. The plaintiffs agreed that EPA's claims overlapped with the plaintiffs' then existing claims. Subsequently, the plaintiffs were permitted to intervene in the EPA's enforcement suit. In July 2002, the district court granted EPA's motion to enter its consent decrees with Gallatin and Harsco. The consent decrees provided for civil penalties and injunctive relief, including various compliance measures.

In September 2002, the district court ruled on opposing summary judgment motions in the remaining citizen suits. The court concluded that the consent decrees operated as *res*

judicata to bar relief based on all past violations up to the date the court entered the decree. Subsequently, the court held a bench trial concerning plaintiffs' second citizen suit and granted plaintiffs relief with regard to fugitive dust that crossed the property lines after entry of the consent decrees. In addition to granting relief under state nuisance law provisions, the court granted plaintiffs the permanent injunction described above under the Clean Air Act.

Both the plaintiffs and defendants sought to have the Sixth Circuit review the district court's rulings on every issue on which the court ruled against them. As noted above, the two Clean Air Act issues of particular interest relate to the Sixth Circuit's overturning the district court's granting of a prospective injunction to plaintiffs for post-consent decree fugitive dust violations and the Sixth Circuit's upholding the district court's ruling dismissing the plaintiffs' PSD claims.

Overturning Injunctive Relief Granted to Plaintiffs Under Citizen Suit Authorization

Gallatin and Harsco challenged the grant of injunctive relief based on plaintiffs' post-consent decree fugitive dust claims arguing: (1) that plaintiffs did not satisfy traditional standards for obtaining injunctive relief because they never notified EPA about the violations, never asked the Agency to enforce the consent decree, and did not give the remedial requirements of the consent decree sufficient time to work; and (2) that the alleged post-consent decree violations constitute "new" claims that must separately comply with the Clean Air Act notice provisions.

The Sixth Circuit agreed with Gallatin and Harsco and reversed the district court's grant of injunctive relief. The court pointed out that the consent decrees cover the same types of fugitive dust claims covered by the injunction, that the decrees are forward-looking and apply to "continuing" violations of the Act, that the decrees "reserve all rights to deal with anything that happens in the future," that the decrees impose stipulated monetary penalties, that there is no evidence that EPA failed to enforce the decrees, and that EPA was not notified that additional violations had occurred. The court also ruled that the citizens were required to file a second 60-day notice. It stated that the original 60-day notice did not satisfy the notice requirement for commencing an action regarding new claims alleging the inadequacy (or alleged under-enforcement) of a consent decree proposed and negotiated by EPA.

Two environmental attorneys have made public statements claiming that the Sixth Circuit decision could totally undermine Clean Air Act citizen suits in the states in that Circuit. Their outrage is directed at the fact that EPA is able to bring an action after receiving a 60-day notice from citizens and negotiate a consent decree that will preclude the citizens obtaining separate relief, with the result that they very well may not be able to recover attorneys' fees. This claim is overblown and has little merit. At most, the court's decision

shows, as many decisions have held in the past, that citizens must satisfy all prerequisites to prevail.

Dismissal of PSD Claims Under “*Burford* Abstention Doctrine”

The other principal Clean Air Act issue of interest relates to questions regarding the district court’s dismissal of plaintiffs’ PSD claims against Harsco. Whether Harsco was required to obtain a PSD permit turned on whether Harsco and Gallatin constituted a single source or two separate sources. Initially, the Kentucky air agency concluded that they are separate sources and that only Gallatin would be required to obtain a PSD permit. Subsequently, the agency reversed its position and ruled that they are a single source and that Harsco should be covered by a PSD permit as well. The later Kentucky ruling was challenged by Gallatin and Harsco, and this issue was being reviewed by the state agency and courts while the plaintiffs’ claims were being pursued.

The court ruled that the pending administrative posture offered a classic case for applying “*Burford* abstention.” The court ruled that “where the state has supplied a concentrated and comprehensive review process that is currently addressing the very subject of these federal claims,” this unusual situation counsels “*Burford* abstention.” The court also ruled that federal review would be disruptive because it would require the district court to revisit earlier Kentucky decisions regarding whether Gallatin and Harsco are a single source, “an issue committed by the Clean Air Act to state resolution.” Accordingly, the court upheld dismissal of plaintiffs’ PSD claims.

See Covington v. Jefferson County, 358 F.3d 626 (9th Cir. 2004) (Standing)

MACT Standards/Section 112

Sierra Club v. EPA, 353 F.3d 976 (D.C. Cir. 2004).

On January 13, 2004, the D.C. Circuit upheld EPA’s MACT standard for primary copper smelters. The court’s decision rules on a number of key issues that arise in connection with challenges to EPA’s adoption of MACT standards. Each issue and the court’s holding on it are briefly discussed below. The court points out that this is the “latest in a series of challenges” to MACT standard rulemakings.

Particulate Matter (PM) as a Surrogate

In the *National Lime* case, the court confirmed that “EPA may use a surrogate to regulate pollutants if it is ‘reasonable’ to do so.” 233 F.3d 625, 637 (D.C. Cir. 2000). Sierra Club argued here, however, (1) that EPA set the standard on the basis of what PM control can achieve, not on what the best performing sources actually achieve; and (2) that PM as a surrogate is not “reasonable.”

Sierra Club’s argument that the standards were not based upon what the best performing sources actually achieve was premised on the position that EPA failed to take into account the control that could be achieved through “altering ore inputs.” The court reviewed the record in the rulemaking and concluded that EPA had not based the standard on what emissions levels PM control could achieve but, instead, had properly based the standards on what the best performing sources were achieving.

The court next reviewed whether it was reasonable for PM to be established as a surrogate. It reviewed it under the three-part analysis established in the *National Lime* case. Under that analysis, PM is a reasonable surrogate for hazardous air pollutants (HAPs) if (1) “HAP metals are invariably present in... PM;” (2) “PM control technology indiscriminately captures HAP metals along with other particulates;” and (3) “PM control is the only means by which facilities ‘achieve’ reductions in HAP metal emissions.” 233 F.3d at 639. If these criteria are satisfied and the PM emissions standards reflect what the best sources achieve, “EPA is under no obligation to achieve a particular numerical reduction in HAP metal emissions.” *Id.* The court then reviews the record and determines that each of these tests were met in the MACT standard setting process.

EPA Consideration of Alternatives to the PM Standard

Sierra Club argued that EPA’s using PM as a surrogate was arbitrary and capricious in light of standards promulgated for other industries under which PM was not similarly used as a surrogate. The court reviews EPA’s analysis in which it explains that a surrogate was needed in light of the impracticality of setting individual standards for each metal due to the variability of HAPs in copper ore stocks and then reviews EPA’s reasoning for using PM as the surrogate. Based on its review, the court concludes that EPA adequately considered alternatives to the PM standard.

Opacity-Based Emissions Standard

EPA established an opacity standard as a method for controlling fugitive HAP

emissions. Sierra Club challenged the use of opacity as a surrogate for HAPs, and argued that it could not be defended as a work practice or operational standard under the relevant statutory prerequisites. The court accepted EPA's reasoning that opacity is an indicator of the level of particulate matter emitted and, thus, minimizing visible emissions will increase the amount of PM captured and vented to a control device. The court also concludes that EPA established the opacity-based standard according to the statutory criteria for MACT, not as a work practice or operational standard.

EPA's Rejection of Beyond-the-Floor Standards

Sierra Club argues that EPA should have established standards that are more stringent than the "MACT floor" for primary copper smelters. Sierra Club's principal argument is that EPA could have set more stringent standards by requiring that smelters use cleaner copper ore. EPA responded that it properly rejected ore-switching because (1) it is not permitted to consider ore-switching as a control strategy, and (2) substitution of cleaner ore stocks is not feasible. Although the Clean Air Act includes "substitution of materials" as a means for reducing emissions, the court points out that the legislative history indicates that EPA is not to consider substitution of raw materials used as feedstocks or material inputs in mining and extraction industries. Without resolving the statutory question, the court accepts EPA's explanation that the substitution of cleaner ore stocks was not a "feasible basis on which to set emissions standards."

Sierra Club also argued that EPA improperly rejected establishment of standards at the level of the 1986 NESHAP for copper smelters. The court pointed out that the 1986 NESHAP level was set under old section 112, which was premised on a "risk-based methodology." The court explained the distinction between new section 112 MACT standards and the predecessor NESHAP standards and concluded that EPA acted reasonably by not adopting the 1986 NESHAP standard as a beyond-the-floor standard.

The court also rejects Sierra Club's claim that EPA was arbitrary and capricious by not responding to a commenter's contention that the standard should be set at a specific level because one state air permit limits emissions to that level. The only support for the achievability of that standard was the commenter's statement that it was "evidentially achievable" because it was included in a state permit. The court held that EPA was justified in not responding to that assertion and quoted a portion of the medical waste incinerator decision in which the court found that the absence of any type of quantification of benefits or costs means that EPA has no basis for finding that emissions reductions, "taking into account the costs," are "'achievable' as the statute uses the word." 353 F.3d at 989, quoting *Sierra Club*

v. *EPA*, 167 F.3d 658, 666 (D.C. Cir. 1999).

Non-Air Quality Environmental Effects

Sierra Club also argues that EPA refused to consider “non-air quality health and environmental impacts,” as required under section 112(d)(2). Sierra Club interprets this provision to require consideration of “impacts of deposition, persistence, toxicity and bio-accumulation of metal HAP emissions on people, welfare and the environment.” In other words, Sierra Club argues that “non-air quality . . . impacts” are just like air quality impacts, except that “the impact is not delivered directly through the air but instead, for example, by ‘deposition.’” EPA views the “non-air quality . . . impacts” provision differently. EPA’s position is that the impacts referenced are those health and environmental impacts that “may result directly or indirectly from measures that will achieve the emission reductions.” The court reviews the statutory language and concludes that EPA’s interpretation is correct. It heavily relies on the fact that the statute establishes a two-phase approach to adopting emissions standards, with the first phase being a technology-based approach and the second a risk-based approach. The court points out that “Sierra Club’s interpretation would collapse the technology-based/risk-based distinction at the heart of the Act, undermining the central purpose of the 1990 amendments” by incorporating a risk-based requirement in the establishment of the technology-based MACT standards.

Monitoring

Sierra Club’s first monitoring argument is that parameter monitoring is, in this situation, inadequate to “provide a reasonable assurance of compliance” because the monitoring control device is not the only factor affecting emissions. It also asserts that temperature, content of gas streams and other factors also affect emissions. The court did not address this issue because it found that the sections of the administrative record cited by the Sierra Club refer only to pre-proposal letters not to public comments. Thus, the argument was waived because it was not raised below.

Sierra Club also argues that EPA’s failure to require continuous monitoring violates section 114(a)(3), providing for “enhanced monitoring” for major stationary sources. The court reviews the statutory language in the decision in the compliance assurance monitoring case, *NRDC v. EPA*, 194 F.3d 130 (D.C. Cir. 1999), and points out that enhanced monitoring does not require continuous or direct emissions monitoring. It accepts EPA’s judgment that the parametric monitoring required will satisfy the statutory standard of “sufficiently reliable

and timely information for determining compliance.” The court states that the “use of parameter monitoring verifies compliance with the required standard by showing that the control device continues to operate at the level achieved during emissions testing.” 353 F.3d at 991.

Alleged Violation of Endangered Species Act

Sierra Club argues that EPA violated the Endangered Species Act by failing to consult with the Fish and Wildlife Service and the National Marine Fisheries Service before taking action that could affect endangered species. The court summarily dismissed this claim, pointing out that “adverse environmental effects” are to be considered during the second, risk-based phase, not in setting MACT standards.

Monitoring

Sierra Club v. TVA, Case No. CV-02-HS-2279-NW (N.D. Ala.)

The District Court for the Northern District of Alabama ruled that TVA had not violated opacity limitations, even though continuous opacity monitors (“COMs”) at its Tuscumbia, Alabama power plant recorded approximately 9,000 exceedances of the opacity limitations. The State Implementation Plan provided that Method 9 was the reference method for the opacity standard. Sierra Club argued that the COMs provided “credible evidence” of violations and thus the court should find TVA to be in violation of the opacity limitations based upon COM data.

Factual Background

The TVA Tuscumbia plant operates four boilers for generating electricity. During the period that the alleged violations occurred, there had been no determination of violations based upon Method 9. Throughout the period, however, TVA operated COMs which, as indicated above, recorded about 9,000 exceedances. The Alabama Department of Environmental Management (“ADEM”) adopted a “credible evidence” rule, which took effect on May 20, 1999, to allow data other than reference method tests results to be considered in determining violations.

Pre-Credible Evidence Rule Exceedances

The court ruled that, until the credible evidence rule took effect in Alabama, data from Method 9 was the exclusive basis for determining violations. Since no Method 9 data was available showing violations, the court granted TVA's summary judgment motion with respect to the alleged violations occurring before May 20, 1999.

Post-Credible Evidence Rule Exceedances

Sierra Club and TVA agreed that the COM data was properly considered after the credible evidence rule took effect. However, TVA argued that the COM measurements were “subject to a 2% *de minimis* rule.” ADEM adopted a 2% *de minimis* rule under which up to 2% of COM-determined exceedances would not be considered violations of the opacity limitation. However, the 2% *de minimis* rule had not been formerly adopted at the time of the alleged violations and has yet to be included as a part of the Alabama SIP.

TVA argued that the opacity limitation – “when translated from its original formulation which was inherently based on **periodic** Method 9 compliance test – is not violated as long as non-exempt COMS readings greater than 20% do not occur more than 2% of the time.” TVA further argued that, unless the 2% *de minimis* rule is used, the opacity limitation requirement is changed from one requiring “periodic compliance to one requiring continuous compliance.” It pointed out that it would be “literally impossible” for any power plant to always be below 20% and that “statutory construction dictates that an impossible result not be required.”

ADEM supported TVA’s position. When ADEM adopted the 2% *de minimis* rule, it stated that the proposed revision “would serve to codify the practices that [the] Department has been and is currently utilizing regarding COMS data.” ADEM indicated that other jurisdictions had adopted the 2% standard and the court stated that its “own research into other state’s regulations confirms that to be true.”

The court pointed out that another federal district court had ruled in *National Parks Conservation Ass’n, Inc. v. Tennessee Valley Auth.*, 175 F. Supp. 2d 1071 (E.D. Tenn. 2001), that the Tennessee DEC had properly applied a 2% *de minimis* exclusion for opacity exceedances, even though the 2% limitation had not been included in the Tennessee SIP. The court pointed out that the requirement to use COM data on a continuous basis resulted in the “emission limit [being] more restrictive than that otherwise specified in the SIP (i.e., Method Nine).” The Tennessee district court ruled that EPA approval was not required because, under the SIP, a more restrictive standard is to be included in a source’s permit and such permits are incorporated as a part of the SIP.

The Alabama court ruled that it had found no language in the SIP that would prevent TVA and the State of Alabama from establishing a more restrictive opacity limit than that included in the regulations. It also ruled that it had determined “that a continuous monitoring system is more restrictive and stringent than the opacity limit standard set out in the regulations.” It pointed out that ADEM had used the 2% *de minimis* guidelines for years before the lawsuit was brought and, even though not specifically approved by EPA, TVA

reasonably believed that ADEM's practices were "facially valid." Accordingly, the court found application of the 2% *de minimis* standard to be the proper standard to be applied and ruled that TVA was entitled to summary judgment on the alleged violation claims for the post-May 20, 1999 period, as well as for the period prior to that date.

See Sierra Club v. EPA, 353 F.3d 976 (D.C. Cir. 2004) (MACT Standards/Section 112).

New Source Performance Standards

See United States v. Westvaco Corp., CA No. MJG-00-2602 (D. Md. Aug. 27, 2004)(PSD Requirements)

Nonattainment Designations

Sierra Club v. EPA, 356 F.3d 296 (D.C. Cir. 2004).

On February 3, 2004, the D.C. Circuit issued the latest of its decisions on the ozone nonattainment SIP for the Washington, D.C. Metropolitan Area. The court vacated EPA's "conditional" approval of the SIP revision, but upheld the specific elements that Sierra Club challenged.

EPA's Conditional Approval of Ozone SIP Revision

The first issue the court addressed was EPA's conditional approval of the D.C. area nonattainment SIP. The plan revision that had been submitted identified a number of specific measures to be implemented. However, it did not include measures required for severe ozone nonattainment areas that relate to reasonably available controls, 3% per year emissions reductions, and contingency controls. Instead, the jurisdictions within the D.C. area submitted letters to EPA in which they committed to adopt specific measures not included in the plan revision.

Based upon its review of the SIP revision and commitment letters, EPA conditionally approved the nonattainment plan under its authority in section 110(k)(4). That provision provides that EPA may approve a plan revision based upon a "commitment of the State to

adopt specific enforceable measures” within a year after approval of the plan revision. EPA argued that the letters had satisfied the provisions of section 110(k)(4), because they constituted a “commitment” to adopt specific enforceable measures. The court held that the letters did not identify “specific” measures, but simply were a commitment to adopt “unspecified” measures, “with the specifics to be named later.” The court stated that EPA’s construction of that statutory provision had been rejected in cases decided in the 1990’s dealing with EPA’s approval of “committal” SIPs. Accordingly, the court vacated EPA’s conditional approval of the nonattainment SIP revision.

Review of Elements of Ozone Plan

The court also ruled on Sierra Club’s attacks on the substance of two elements that were included in the D.C. area SIP revision. Sierra Club first challenged EPA’s approval of the attainment demonstration, arguing that it was not based on acceptable modeling or other analytical method. Sierra Club also challenged the rate-of-progress (ROP) plans, arguing that they were based on an outdated emissions model. The court rejected both challenges and found EPA’s action on each issue to be reasonable.

Under section 182(c)(2)(A), a serious or severe ozone nonattainment area SIP revision “must be based on photochemical grid modeling or any other analytical method determined” by EPA to be at least as effective. The area’s attainment demonstration began with an analysis using the Urban Airshed Model, a photochemical grid model. Using the three worst ozone days in making nonattainment predictions, the model also predicted nonattainment on three days in 2005. However, further analysis led to the conclusion that the model had either over-predicted or, in one case, the ozone level was anomalous and should not have been considered. The court reviewed EPA’s analysis of the attainment demonstration and concluded that it was reasonable. It rejected Sierra Club’s position that the attainment demonstration had to be based “solely” upon the photochemical grid model, finding that the statute is ambiguous on this issue and EPA’s interpretation is reasonable. It also noted that it might have been unreasonable for the additional factors not to have been taken into account.

Sierra Club next argued that EPA should have rejected the ROP plans because they were not based on the latest motor vehicle emissions model, MOBILE6. The plan was based on MOBILE5. MOBILE6 was released one month before the ROP plan was submitted. The court upheld EPA’s position that it would not require states that have already submitted SIPs, or will submit SIPs shortly after the release of MOBILE6, to revise their SIPs. The court accepted EPA’s view that requiring revision of the plans each time a new model is announced would lead to significant costs and potentially endless delays in the approval process. Accordingly, it found that EPA’s action was neither arbitrary nor capricious.

Deadline for Submission of ROP Plans

Sierra Club also challenged EPA's establishment of a date for submission of post-1999 ROP plans that was later than the statutory deadline for such submittals. EPA had established the later date because the Agency did not extend the attainment deadline for the area to 2005 until after the date had passed for submission of such plans. The court held that, under section 182(i), EPA had the authority to adjust statutory deadlines other than attainment dates when it reclassifies an attainment area. The court also pointed out that it had previously ruled on this same issue in an earlier decision and that the Sierra Club's argument here was "indistinguishable." Accordingly, it rejected this challenge.

PSD Requirements

Alaska v. EPA, 540 U.S. 983 (2004).

On January 21, 2004, the Supreme Court issued its decision in *Alaska Dep't of Env'tl. Conservation (ADEC) v. EPA*, upholding EPA's issuance of a stop-construction order under sections 113(a)(5) and 167. Justice Ginsburg wrote the majority opinion in this 5-4 decision. EPA's order was based upon its finding that the prevention of significant deterioration (PSD) permit issued to Teck Cominco Alaska, Inc. (Cominco) did not establish technology requirements that are consistent with the definition of best available control technology (BACT) under the PSD program. The Supreme Court's decision affirms the ruling of the U.S. Court of Appeals for the Ninth Circuit in *State of Alaska v. EPA*, 298 F.3d 814 (9th Cir. 2002).

Cominco operates a large zinc mine on the North Slope in Alaska. The company sought a PSD permit to increase capacity of one of its six generators and construct a new generator to provide power for additional mining equipment. ADEC initially identified selective catalytic reduction (SCR) as the most stringent technology technically and economically feasible. However, Cominco proposed Low NO_x burners for the new generator and all six existing generators, rather than install SCR on the proposed new generator and modified generator. EPA objected to this proposal and subsequently ADEC issued a second draft PSD permit finding Low NO_x burners on the new and modified units by themselves to be BACT. In its determination, ADEC indicated that, because of a lack of data from Cominco, it could make no judgment as to the SCR's impact on the mine's operation, profitability and competitiveness. Nonetheless, it concluded that SCR imposed a "disproportionate cost" on the mine.

Majority Opinion

The first issue the majority opinion addresses is whether EPA may issue a stop-construction order if a state permitting authority's BACT selection is not reasonable. After reviewing the legislative and regulatory history of the PSD program, the Supreme Court held that EPA does have this authority. The Court ruled that EPA reasonably interpreted the Clean Air Act's BACT definition and properly concluded that the Act mandates a determination of BACT consistent with the statutory definition. The Court accepted EPA's argument that state permitting authorities' statutory discretion is constrained by the terms "maximum" and "achievable" in the BACT definition. The Court further accepts EPA's argument that sections 113(a)(5) and 167 empower the Agency to block a state agency's unreasonably lax BACT determination. The Court points out that EPA has consistently taken the position that it had this oversight authority over state BACT decisions.

The Court next explains its reasoning for rejecting ADEC's arguments that EPA's interpretation is impermissible. ADEC argued that the Clean Air Act BACT definition unambiguously gives "the permitting authority" by itself the right to make the judgment as to what technology qualifies as "best available." EPA's enforcement role should be limited to assuring that permits contain a BACT limitation and that procedural requirements are met. ADEC also made a number of policy arguments to support why permitting authorities are best positioned to make determinations regarding whether a technology is "unavailable" in a particular area. The Court acknowledges that states have the initial responsibility to make BACT determinations, but then rules that this does not mean that EPA has no authority with respect to "unreasonable" state agency BACT determinations. The Court strongly rejects the argument that EPA's authority is limited in this way. It concludes that EPA's role is to act in the unusual case in which a state permitting authority has determined BACT arbitrarily. The Court points out that EPA bears the burden of demonstrating that the Agency has acted reasonably when there is a challenge to an EPA stop-construction order, just as it does in an EPA-initiated civil action.

The Court next considered whether EPA properly exercised its statutory authority. The Court first explains that the standard of review is whether EPA's finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The Court reviews the permitting history of Cominco's project and finds that there was no factual basis in the record to justify ADEC's switching from its conclusion that SCR is economically feasible in May 1999 to a finding that it is economically infeasible in September 1999. The Court specifically highlights ADEC's "forthrightly" acknowledging that it could not reach a judgment on SCR's economic impact on the mine because of its not having received relevant financial data from Cominco. The Court then stated, in light of that acknowledgment, ADEC could not simultaneously

conclude that there would be threats to the mine's operation and competitiveness and use those reasons as the basis for finding SCR economically infeasible. Based upon its review of the record, the Court finds that EPA did not act arbitrarily.

Dissenting Opinion

In a dissent written by Justice Kennedy, the 4-judge minority reviews the same statutory provisions as the majority but reaches the opposite conclusion. The dissent rejects the majority's conclusion that EPA has a "broad oversight role" to ensure that a state's BACT determination is "reasonably moored to the Act's provisions." Instead, it finds that the statute "contemplates no such arrangement."

Justice Kennedy explains that the "permitting authority," here ADEC, is "to determine" what constitutes BACT. His opinion quotes the dictionary definition of "determine": "[t]o decide or settle . . . conclusively and authoritatively."

Justice Kennedy's opinion then points out that the Act does not direct a state to "find as BACT the technology that results in the 'maximum reduction of a pollutant achievable for [a] facility' in the abstract." He recognizes that for a state "to do so without regard to the other mandatory criteria would be to ignore the words of the statute." The Act requires a "more comprehensive judgment." He points out that the permitting authority is to take into account "a set of contextual considerations," namely the "energy, environmental, and economic impacts and other costs" to identify BACT "on a case-by-case basis."

Justice Kennedy strongly takes exception to the fact that the majority opinion reached the narrow view of the scope of the state's discretion "only by wresting two adjectives, 'maximum' and 'achievable,' out of context." EPA has the authority to enforce PSD requirements, but that authority does not limit the state's "latitude and responsibility to balance all the statutory factors in making their discretionary judgments."

The minority's opinion states that EPA's authority to correct arbitrary and capricious BACT is exercised when EPA approves a state's PSD permit program, because EPA must assure that the state provides "an opportunity for state judicial review." 61 Fed. Reg. 1882 (1996). The Court then reviews the other procedures that must be followed in connection with the issuance of permits, and in particular points out that any person who participated in the comment process can pursue an administrative appeal of the state's decision, followed by judicial review in state courts. In addition to ruling that EPA can seek review of a decision in state court, the minority states that EPA may have the authority to seek review of a decision in federal court, but does not reach a conclusion with regard to that "option."

The dissent also points out the anomalous result that could occur if a state court had already upheld the BACT determination made by ADEC. In that situation, under the majority's opinion, EPA could, in effect, overrule a decision of a state court. The dissent points out that this is a "serious flaw" because the arrangement would "violate the well-

established rule that the judgments of Article III courts cannot be revised by the Executive or Legislative Branches.” The principle that judicial decisions cannot be reopened “at the whim of the Executive or the Legislature” is essential to preserving “separation of powers and judicial independence.”

The minority also finds another deficiency in the scheme the majority rules is in the Act. The opinion points out that there is nothing in the Court’s analysis that would prevent EPA from issuing an order setting aside a BACT determination months, or even years, later. It concludes that “Congress cannot have intended this result.” The Act explicitly provides for a “preauthorization process,” which “underscores the need for finality in state permitting decisions, making implausible an interpretation of the statute that would allow a *post hoc* veto procedure.” The majority had responded that the case involved preconstruction orders issued by EPA, “not post-construction federal agency directives.” However, the dissent points out that this provides no assurance since the logic of the majority’s reasoning would in the future allow EPA’s “belated interventions.” The majority dismissed this possibility by stating that “EPA, we are confident, could not indulge in the inequitable conduct ADEC and the dissent hypothesize while the federal courts sit to review EPA’s actions.” The dissent then points out how weak the authority the majority cites is for the proposition that EPA could not intervene belatedly. “State agencies rely on [that authority] at their own risk.”

United States v. Westvaco Corp., CA No. MJG-00-2602 (D. Md. Aug. 27, 2004)

The U.S. District Court for the District of Maryland issued a series of rulings in connection with EPA’s New Source Review enforcement action brought against Westvaco alleging that a series of projects at the company’s Luke Mill Plant in Maryland violated the NSR requirements. The most significant ruling was with regard to whether a power boiler could be considered an emissions control device for a digester and, as a consequence, part of the same emissions unit. If so, physical changes at the digester could potentially provide the basis for finding that BACT controls would be required on the power boiler.

Factual Background

EPA filed an NSR enforcement action against Westvaco claiming that a series of projects denominated as the “Digester Expansion Program” should be found to have triggered NSR permitting. None of the equipment installed or changed directly released pollutants into the air, but the court stated that the projects resulted in increased production of pulp and paper at the mill. Although the power boilers were not physically altered, the boilers produced greater amounts of steam and emitted greater amounts of pollutants as a result of the changes that were made. A central question as to which the court made no determination was

whether a non-condensable gas including total reduced sulfur compounds produced by the digesters and “evaporators” was burned in a power boiler during the digester improvement program. Westvaco contended that its system to burn such gases in the power boiler was shut down prior to the improvement program and remained down during the time it was completed.

Westvaco also undertook a second series of improvement projects that was called the “Mill-Wide Expansion Program.” Here again, the equipment installed or modified did not directly emit pollutants into the air and the power boilers were not physically altered. However, EPA and Westvaco agreed that two power boilers were “control devices” for total reduced sulfur emissions.

Ruling on Scope of Emissions Unit

The central issue considered by the court was whether the power boilers should be included as a part of a multi-part “emissions unit” that would include digesters and other equipment. If so, a change to the digester could potentially result in the need to install best available control technology on the power boilers. The court pointed out that the pertinent provision of EPA’s regulations provides that:

A major modification shall apply best available control technology for each regulated [] pollutant for which it would result in a significant net emissions increase at the source. This requirement applies to each . . . **emissions unit** at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

40 C.F.R. § 52.21(j)(3) (emphasis added).

The court reviewed several EPA interpretations under which EPA stated that air pollution control equipment could be considered as part of the operational design of an emissions unit. Another interpretation stated that a process unit and its associated control equipment were “integral parts of a single emissions unit.”

EPA claimed that the power boilers should be considered to be a “control device” for a multi-part unit that was “modified” as a part of the physical changes to the digesters and other equipment. The court ruled that EPA was entitled to deference with regard to interpretation of its own regulations because its interpretation was not “plainly erroneous or inconsistent with the regulation.” Westvaco argued that the court should not apply EPA’s interpretations because other EPA interpretations suggested that control devices were not parts of emissions units subject to BACT. However, the court ruled that EPA’s interpretations could be applied retroactively because the other interpretations were, at most,

“dictum.” Also, EPA’s interpretations would “serve the statutory interests of curbing harmful emissions from modified stationary sources.”

The court concluded that power boilers could be part of a multi-part emissions unit if they were a “control device” for the equipment that was altered or installed. The court further found that a power boiler could be part of an emissions unit that included a variety of different equipment at a pulp and paper mill. The court ultimately concluded that a power boiler would be considered a part of a multi-part emissions unit *if it was actually used to burn non-condensable gases or total reduced sulfur compounds from other equipment or had the potential to be utilized to burn such pollutants*.

Applicability of PCP Exclusion

Another interesting aspect of the opinion, although not a part of a final ruling, was the court’s recognition that Congress “must be presumed to have been aware of the extensive NSPS regulations interpreting § 7411(a)(4)’s definition of ‘modification.’” It further stated that “when Congress adopted § 7411(a)(4) by reference into the PSD part of the statute, it presumably intended for these NSPS rules to apply in the PSD context.” The court made these statements in connection with its finding that the pollution control project exclusion could potentially apply as a defense to one of the plaintiff’s claims.

The central factual issue with regard to the applicability of the PCP exclusion was whether the power boilers’ burning of gases was a system of pollution control that was “less environmentally beneficial” than the system it replaced. EPA had determined that the new system was in fact less environmentally beneficial than the system it replaced. EPA had argued that the system Westvaco used was less environmentally beneficial because Westvaco could have used other more beneficial “alternate systems.” The court pointed out that EPA is to compare the replacement system to the system replaced, “not to some hypothetical system or ‘best possible’ system.” The court found that “the benchmark for the ‘less environmentally beneficial’ determination is the . . . control system employed by Westvaco before improving the power boilers, a system whereby [the non-condensable gas] was burned in the Mill’s lime kiln.” The court ultimately ruled that neither EPA nor Westvaco was entitled to summary judgment on this issue.

The court also found that Westvaco’s failure to notify EPA of its intention to avail itself of the PCP exclusion should not “somehow preclude [] applicability” of the PCP exclusion.

In Re: Rochester Public Utilities, PSD Appeal No. 03-03, EAB , August 3, 2004.

The EPA Environmental Appeals Board (“EAB”) issued a ruling interpreting the scope of the term “emissions unit” under the NSR requirements in the context of a permit appeal in which the petitioner argued that BACT should be required when new steam lines were to be installed at a power plant. The Minnesota Center for Environmental Advocacy petitioned for EAB review of a PSD permit issued by the Minnesota Pollution Control Agency (“MPCA”) to Rochester Public Utilities (“RPU”) for its Silver Lake Power Plant.

Factual Background

RPU proposed to install a steam line to run from its Silver Lake Plant to the Mayo Clinic’s Prospect Utility Plant. The steam from the Silver Lake Plant would be used to generate electricity at the Mayo Plant. As a result of the addition of the steam line, the RPU Plant would have an approximate 50% increase in its annual coal consumption rates.

The MPCA found that the project would constitute a major modification, but determined that the BACT requirement would only apply if there was modification to an “emissions unit.” The MPCA ruled that RPU’s project would not physically modify an “emissions unit” because the project involved construction on the steam pipes, rather than the boilers. As a result, the MPCA approved the permit without requiring BACT on the boilers.

Scope of “Emissions Unit” Under Modified Definition

The EAB stated that the petitioner apparently accepted the fact that BACT would not be required for the project under the definition of “emissions unit” as it existed prior to the NSR reforms. One aspect of the reforms was the addition of a specific reference to “electric utility steam generating units.” Thus, the narrow issue before the EAB was whether EPA had intended to expand the scope of the term “emissions unit” by specifically referencing electric utility units. The EAB found that EPA had not intended to expand the scope of the term, pointing out that one of EPA’s findings was that fewer projects would be subject to NSR under the reforms. Also, EPA did not evidence any intent to impose BACT on modifications to steam pipes for electric utility units. The EAB indicated that it disagreed with the arguments that the petitioner submitted and, as a result, it denied review of the environmental group’s petition.

In a supplemental opinion, one of the EAB judges indicated that the project at issue should result in BACT being required for the boilers since there would be increased coal consumption. He indicated that he believed that the term “emissions unit” should be construed to encompass the steam lines at RPU’s facility and included a 13-page analysis explaining why he believed BACT should be required under EPA’s rules in such a situation.

He stated that EPA should conduct a rulemaking proceeding “if it wishes to continue on the path that it is currently following.” A second judge indicated that he believed the regulations could be read consistently with EPA’s historical interpretation and was disinclined to call into question that interpretation. A third judge stated that she would leave for another day the expression of her views on the questions addressed by her two colleagues.

See Ellis, et al. v. Gallatin Steel Co., et al., 390 F.3d 461 (6th Cir. 2004) (Citizen Suits)

Standing

Covington v. Jefferson County, 358 F.3d 626 (9th Cir. 2004).

On February 5, 2004, a three-judge panel of the Ninth Circuit issued a decision in which the court reviews a district court decision in a citizen suit case involving a landfill alleging violations of the Clean Air Act and the Resource Conservation and Recovery Act. The ruling on standing with respect to the Clean Air Act claim and a concurring opinion of one judge on that issue are particularly noteworthy.

The plaintiffs alleged that Jefferson County violated the Clean Air Act by not following federal procedures to account for removal or recapture of CFCs and other ozone-depleting substances before disposal or recycling. The district court held that the plaintiffs lacked standing, finding that there was no evidence of a leak of ozone-depleting substances and that the violation of the Act caused no injury to the Covingtons. The appellate court first finds that the district court’s conclusion that there were no leaks of ozone-depleting substances “cannot stand in this summary judgment context” because the plaintiffs’ affidavits stated that they had observed liquids and gas escaping.

The Ninth Circuit panel finds that the plaintiffs meet all of the prerequisites for standing. The finding with regard to whether there was injury in fact would, if accepted by other courts, be of particular import. The court stated that the “evidence of leakage” presented by the plaintiffs “is sufficient to show injury in fact because the failure to comply with [the Act] has increased the risk of harm” to the plaintiffs’ property. Their observation of leaking liquids has caused them to “fear that this liquid will contaminate their property.” The court then states that, as a result of this fear, “[plaintiffs’] enjoyment of their property is diminished by the attested leaks.” The court concludes its analysis of injury in fact stating that a “credible threat of risk to their home yields the loss of enjoyment of property.”

The concurring opinion of Circuit Judge Gould would, if accepted by courts, have

much more far reaching consequences. Judge Gould indicates that there is an alternative theory based on stratospheric ozone degradation upon which the plaintiffs may have standing to advance their claims. The judge states that he “feel[s] it appropriate to set forth this theory because of potential application in any other cases where widespread or even global environmental impact is threatened by federal statutory wrong.” 358 F.3d at 648. The judge states that he will “reserve judgment” on the question posed in his concurrence because the argument was not briefed by the parties and its resolution is not necessary to decide the case. In other words, he provides an advisory opinion in his concurrence. He says that he sets forth his “preliminary views” because he believes “that the issues raised inevitably may have to be confronted in the future if and when plaintiffs relying on federal statutes raise claims of injury based on globally-shared harm with no unique personal injury.”

Judge Gould first reviews the science with regard to the release of CFCs degrading the stratospheric ozone layer. After pointing out that stratospheric ozone gives humans necessary protection from “otherwise life-threatening ultraviolet-B (UV-B) radiation,” the judge states that the plaintiffs, along “with every person on this planet, face an increased risk of [maladies such as skin cancer, cataracts, and suppressed immune systems] if the landfill releases CFCs into the air.” Judge Gould acknowledges that the release of fluids and gases “from about hundred or so discarded refrigerators in rural Idaho” may be “perhaps minor,” but states that “the cumulative harm from continuing unrestrained release of CFCs from thousands of landfills over decades of time, presents a clear picture of risk to the environment.” He then states that “[w]hile the landfill here only contributes to a fraction of overall ozone depletion, it cannot be doubted that the actions of the landfill operators, to a degree, increase ozone depletion, which in turn increases UV-B radiation reaching the earth, which in turn increases the risk of maladies that flow from increased UV-B radiation, to the detriment of every person on the earth.”

Having concluded that the landfill’s release of CFCs “contributes to a process that can cause global harm if not restrained,” he recognizes that this alone does not resolve the standing question. He correctly points out that the plaintiffs suffer no greater injury than any other person and “that poses a very challenging question under some standing precedents.” Under certain precedents, the existence of a widely shared injury would appear to compel the conclusion that the injury was not “concrete and particularized.” He characterizes this interpretation as “injury to all is injury to none” for standing purposes. He argues that this interpretation is not compelled by precedent. He states that the Supreme Court’s precedents “may be read to support a general rule of standing along these lines: If the injury is not concrete, there is no injury in fact even if the injury is particularized; and if the injury is concrete and particularized, there is injury in fact even if the injury is widespread.” In other words, “[c]oncreteness of injury, so long as it is particularized, appears to be the touchstone for the injury in fact element of standing.” 358 F.3d at 651-652.

Judge Gould then reviews whether the injury suffered by the plaintiffs is “concrete” rather than “abstract and indefinite.” He concludes, not surprisingly in light of his preceding views, that it is concrete for several reasons. First, he asserts that the “marginal increase in the risk of serious maladies,” even though it “can cause only a small increase in risk to the world, including threat” to the plaintiffs, has no bearing on whether the increased risk to the plaintiffs is concrete. He states that the risk of “deadly serious maladies” “minimizes the required probability of their occurrence for injury in fact purposes.” Second, he points to the fact that Congress recognized the individual nature of the harm from CFCs by providing “an explicit grant of a right to citizen suit.” 358 F.3d at 652. Finally, he cites the *Laidlaw* Supreme Court decision as recognizing a “less concrete injury” as sufficient. In *Laidlaw*, the alleged harm resulted from plaintiffs refraining from using a river because of subjective fears of its pollution. Notwithstanding the judge’s view, there is a significant difference between interference with an individual’s “recreational, aesthetic, and economic interests,” and fears of skin cancer, cataracts and depressed immune systems that might result from a systemic pollution problem. 358 F.3d. at 654.

Undaunted by the absence of a nexus between the pollution and the theorized injury, Judge Gould indicates his belief that the plaintiffs’ injury from increased risk of maladies caused by ozone depletion, which will follow from the mishandling of materials at the landfill, is “concrete and particularized.” He then proceeds to conclude that the other prerequisites for standing also “appear satisfied.” *Id.*

***Honeywell International, Inc. v. EPA*, 374 F.3d 1363 (D.C. Cir. 2004).**

On July 23, 2004, the D.C. Circuit overturned EPA’s authorization of two substitutes for HCFC-141b. In that decision, the Court made two rulings of particular interest. The first dealt with whether a market competitor has standing to challenge a rule that will adversely affect its economic interests. In this case, the Court found that Honeywell, the competitor, did have standing. The second is whether the Court has the authority to remand rather than vacate a Clean Air Act rule when the Court finds that the rule violates EPA’s statutory authority. In a split decision, the Court ruled that section 307(d)(9) of the Act compels it to vacate such EPA rules. In a one-paragraph per curiam opinion issued on January 7, 2005, the judges reconsidered the ruling on vacatur and stated that it found it “unnecessary” to decide whether section 307(d)(9) requires vacatur.

Standing of Competitor

In this case, the petitioner (Honeywell) argued that EPA premised its approval of the

HCFC substitutes on the economic impact of denying a competitor's petition for approval of the substitutes. Honeywell claimed that the relevant Clean Air Act section does not permit EPA to consider economic factors in the approval process. EPA argued that Honeywell did not have standing to bring an action to protect its commercial interests. EPA asserted that Honeywell's interest "is nothing more than a concern [about] EPA's alleged regulatory laxity." EPA relied on cases holding that commercial interests lacked prudential standing to enforce regulatory burdens against competitors, because "when those interests and those of the statute are not aligned, such suits '[c]arr[y] a considerable potential for judicial intervention that would distort the regulatory process.'"

The Court reviewed the basic principles of Article III standing and then focused specifically on when a competitor seeking to protect its commercial interests might have standing. It pointed out that, where “there is reason to believe that a party’s interest in statutory enforcement would advance rather than hinder, the operation of a statute, the Court can reasonably assume that Congress intended to permit the suit.” It further ruled that the Court has held that cases rejecting competitors’ rights to protect their commercial interests are “inapposite when a competitor sues to enforce a ‘statutory demarcation,’ such as an entry restriction, because ‘the potentially limitless incentives of competitors [are] channeled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation.’” The Court ruled that the Clean Air Act statutory authority at issue was sufficiently aligned with Honeywell’s competitive interest to make it “a suitable challenger” to enforce the Act’s terms.

**Vacatur, Not Remand,
Is Only Proper Remedy**

After deciding that EPA acted improperly in considering economic factors in adopting the rule at issue, the Court considered the proper remedy to correct EPA’s error. Judges Sentelle and Randolph initially ruled that, because Honeywell’s challenge was a substantive challenge to EPA’s statutory authority to promulgate the rule at issue, the only permissible remedy was vacatur of the rule.

The Court reviewed section 307(d)(9) of the Act, which it pointed out governs challenges under the Act rather than the Administrative Procedure Act. It provides that “the Court may *reverse* any . . . action found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” The Court stated that the ordinary meaning of the term “reverse” could only be read to authorize the Court to vacate the impermissible portions of EPA’s rule. The judges stated that they were only aware of one case under the Act holding that remand, rather than vacatur, is the proper remedy for a decision finding that EPA exceeded its statutory authority under the Act. Judge Randolph issued a separate concurring opinion in which he explained he believes that vacating and remanding unlawful agency action, rather than simply remanding, should always be the preferred course. Judge Rogers dissented from the ruling that vacatur was the proper remedy and indicated that remand was preferable because EPA might be able to support its rule through further explanation and the “consequences of vacating may be quite disruptive.”

On reconsideration, in a per curiam opinion, the Court ruled that it finds it “unnecessary” to decide the issue of whether section 307(d)(9) requires a court to “vacate erroneous action” of EPA. The opinion further stated that “[e]ven if § 307(d)(9) gives a court discretion to remand without vacating,” Judges Sentelle and Randolph would vacate EPA’s

rule. Judge Rogers concurred with the withdrawal of the earlier finding that vacatur was required, but dissented from the vacatur of the challenged rule.

Title V Permit Program

***Ohio Public Interest Research Group (Ohio PIRG) v. Whitman*, 386 F.3d 792 (6th Circ. 2004).**

On October 21, 2004, the Sixth Circuit Court of Appeals considered the question whether EPA was required to issue a notice of deficiency to Ohio when EPA concluded that there were deficiencies in Ohio's operation of its Title V permit program. Ohio PIRG focused on several areas EPA had identified for improvement, including Ohio's failure to abide by Title V reporting requirements with respect to deviations caused by malfunctions. Ohio PIRG also challenged EPA's interpretation that minor NSR changes do not constitute "Title I modifications."

Ohio PIRG based its challenge on language in section 502(l)(1). That provision states:

Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State[.]

Ohio PIRG's argument was that EPA is required to issue a notice of deficiency (NOD) when any inadequacies are found.

EPA responded that its recognition of deficiencies did not constitute a determination that Ohio was not "adequately administering and enforcing" its Title V program. EPA takes the position that Congress gave the Agency discretion under the Clean Air Act to determine whether Ohio is not "adequately administering and enforcing" its Title V program when implementation improvements are needed. The court pointed out that EPA's interpretation is supported by decisions from two other federal courts of appeal.

In *New York Public Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003), the Court addressed the same legal question regarding whether EPA was required to issue a NOD when it identified inadequacies in New York's Title V program. The Second Circuit in the *NYPIRG* case found that the phrase "Whenever the Administrator makes a determination," grants EPA discretion whether to make a determination regarding a state is

adequately administrating and enforcing its permitting program. Only when that determination is made is EPA required to issue a NOD. *Id.* at 330-31. In *NYPIRG*, the Court concluded that EPA's decision not to issue a NOD was equivalent to "an agency's decision not to invoke an enforcement mechanism provided by the statute." *Id.* at 332. The Sixth Circuit also reviewed a number of other decisions in which similar language had been interpreted to give EPA discretion as to whether to act.

Ohio PIRG argued that, even if the court concluded that EPA's action constituted enforcement and thus is presumptively unreviewable under Supreme Court and other federal court decisions, Ohio PIRG could rebut the presumption where Congress has provided guidelines for the Agency to follow in exercising its enforcement powers. In *Heckler v. Cheney*, 470 U.S. 821 (1985) the Supreme Court ruled that where Congress has indicated "an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2), and courts may require that the agency follow that law. . . ." *Id.* at 834-35.

The Sixth Circuit ruled, however, that Congress had not provided specific guidance for EPA to follow in exercising its oversight of state implementation of permitting programs and that the only guidance is regarding "what is required *after* a determination of inadequacy is made." Accordingly, the court ruled that it was "unable to review the EPA's refusal to issue a NOD, as the determination upon which its issuance hinges is committed to agency discretion by law, and the Act leaves us with no standards by which to judge the EPA's non-enforcement decision."

The court also considered Ohio PIRG's challenge to EPA's interpretation that minor NSR changes do not constitute Title I modifications. The court ruled that Ohio PIRG's challenge of EPA's interpretation was not timely made. It stated that EPA's solicitation of public comments regarding implementation of the Title V program did not start a new clock for parties to challenge the Title V regulations. The court reviewed the case law addressing whether EPA's solicitation of comments had created a renewed opportunity for comment and objection on the one hand and, on the other, those cases where there is no indication that EPA is reconsidering its underlying regulations. The court ruled that EPA had not reopened its regulations for public comment but rather "merely sought public comment on whether state Title V programs were acting in accordance with those regulations," including the interpretation of what constitutes a Title I modification.

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