

Clean Air Act Litigation Developments

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Global Warming

See Deseret Power Electric Cooperative (Bonanza), Appeal No. PSD 07-03, 13 E.A.D. ____ (Nov. 13, 2008) (NSR/PSD Requirements)

MACT Standards/Section 112

NRDC v. EPA, 529 F. 3d 1077(D.C. Cir. 2008)

On June 6, 2008, the D.C. Circuit issued its decision on the challenges of the Natural Resources Defense Council and the Louisiana Environmental Action Network to EPA's section 112(f) residual risk rulemaking for synthetic organic chemical (HON) facilities. Petitioners also challenged EPA's technology review under section 112(d)(6). The court rejected each of the environmental groups' challenges to the residual risk rulemaking and technology review. The panel acting on the challenges was made up of Senior Judge Silberman (who wrote the opinion) and Judges Griffith and Kavanaugh. *Nat. Res. Def. Council v. EPA*, 529 F.3d 1077 (D.C. Cir. 2008).

Section 112(f) Standards

The court first ruled on the environmental groups' challenge that EPA must revise standards to reduce lifetime excess cancer risk to one-in-one million under section 112(f)(2)(A). After reviewing the statutory language, the court concluded that Congress did not set a "bright line" standard and that the statutory language was a "deliberately ambiguous compromise." The court ruled that the residual risk standards are only required to "provide an ample margin of safety to protect public health." Further it concluded that the one-in-one million statutory language only creates a trigger as to whether EPA must promulgate standards that meet the "ample margin of safety" criterion. The court further ruled that the language of the statute specifically referring to the pre-1990 *Benzene* rulemaking bolsters EPA's conclusion that residual risk standards are not required to meet the one-in-one million criterion. Under that rulemaking, EPA had ruled that the "ample margin of safety" standard was met if "as many people as possible faced excess lifetime cancer risk no greater than one-in-one million, and that no person faced a risk greater than 100-in-one million (one-in-ten thousand)." The court referred to the one-in-one million standard as "an aspirational goal."

The court also rejected claims that EPA acted improperly by considering costs in setting the ample margin of safety in the residual risk standards. The court indicated that it recognized that the Supreme Court had refused to find an authorization to consider costs in ambiguous sections of the Act, but ruled that there had been a clear statement of intent to permit consideration of costs under

section 112(f). Since Congress expressly incorporated EPA's interpretation under the *Benzene* standard and EPA considered costs, among other factors, in setting the *Benzene* standard, Congress explicitly accepted consideration of costs in setting the ample margin of safety.

Section 112(d)(6) Technology Review

Next, the court considered the environmental groups' argument that EPA was required to "completely recalculate the maximum achievable control technology – in other words, to start from scratch in meeting its obligation to review, and revise as necessary (taking into account development in practices, processes, and control technologies)" MACT standards "no less often than every eight years." The court ruled that the "review, and revise as necessary" language could not be "construed reasonably as imposing any such obligation." The court stated that even if the Act imposed such an obligation, the environmental groups "have not identified any post-1994 technology innovations that EPA has overlooked."

However, the court did express concern about whether the environmental groups' assertion that EPA improperly considered costs in considering whether to revise the MACT standards had merit. EPA had stated in its notice of proposed rulemaking that "leakless components" should not be considered in determining MACT, because of the high cost of replacing existing components. The court said that this could be "thought in tension with our cases" holding that EPA may not consider costs in setting MACT "floors," but only in determining whether to require "beyond the floor" reductions in emissions. It found that EPA may have done just that in setting the initial floors, but pointed out that the period for challenging those standards has long since passed. The court said that the question was thus raised whether EPA's reaffirmation of its cost-based reasoning in its technology review gives rise to a new opportunity for challenging the apparent defect in the initial floor determinations. The court found that it did not have to decide this question, because, in its final rule, EPA squarely found that there were no "significant developments in practices, processes, and control technologies" and the environmental groups "do not challenge this conclusion." Accordingly, the court found that it was "irrelevant whether EPA considered costs in arriving at the initial MACT floor and reaffirmed that standard in the residual risk rulemaking."

Other Issues

The court also addressed whether EPA erred in relying on data submitted by the American Chemistry Council rather than handling data collection itself, and arguments that the industry-supplied data was defective in several respects. After reviewing the environmental groups' various claims, the court stated its disagreement with claims that the emissions data "was unreliable." The court stated that the challenges "boil[ed] down to one simple point: EPA could have used *better* data in conducting its risk analysis." The court ruled that this misstates the inquiry under the arbitrary and capricious standard, and that "the sole question before us is whether EPA has acted reasonably, not whether it has acted flawlessly." Based upon the record, the court found that EPA had explained why it chose to rely on industry-supplied data and reasonably responded to the environmental groups' objections to its data analysis.

The court noted that the environmental groups raised other issues regarding faulty data and EPA's failure to reduce risk to one-in-one million, but stated that it had rejected those arguments in earlier parts of its opinion and would not address them again. It noted that other arguments had also been made and they had been considered and found to be "without merit."

***Sierra Club v. EPA*, No. 02-1135 (D.C. Cir. Dec. 19, 2008)**

On December 19, 2008, the D.C. Circuit issued its decision in connection with the Sierra Club's challenge of the startup, shutdown, malfunction (SSM) provisions of EPA's regulations implementing section 112 of the Clean Air Act. *Sierra Club v. EPA*, No. 02-1135 (D.C. Cir. Dec. 19, 2008). The Court ruled that the general duty that applies during SSM events is inconsistent with section 112 and vacated the SSM exemption.

After reviewing the relevant provisions of section 112 and the history of EPA's adoption and revision of the SSM provisions of the General Provisions under section 112, the Court first considered whether the Sierra Club had waived its challenge to the SSM provisions by not challenging the 1994 General Provisions rule, which provided that the general duty standard would apply during SSM events. The Court held that EPA's various revisions of the SSM requirements, since the adoption of the 1994 rule had "created a different regulatory construct as to the means of measuring compliance with a general duty." It found that EPA's revisions of the SSM plan requirements had removed the safeguards that EPA initially had argued were necessary to prevent the SSM exemption from becoming a "blanket" exemption. The Court ruled that the various changes that had been made "constructively reopened consideration of the exemption from section 112 emission standards during SSM events" and thus that the petitioner's challenges to the SSM exemption were timely.

The Court next considered whether the SSM provisions are permissible under the Act. The Court pointed out that section 112(d) provides for "emission standards" to be established and that the definition of emission standard under section 302(k) calls for a requirement which limits emissions "on a continuous basis." Based upon the Court's reading of section 112 and the definition of emission standard in section 302(k), the Court held that Congress required that there must be a "continuous section 112-compliant" standard, and that the general duty is not a section 112-compliant standard. It then ruled that, because the general duty is the only standard that applies during SSM events – "and accordingly no section 112 standard governs these events" – the SSM exemption violates the Act's requirement that some section 112 standard apply continuously. Based upon this conclusion, the Court vacated the SSM provisions.

One judge on the three-judge panel dissented and argued that the Court did not have jurisdiction over the Sierra Club's petition for judicial review. Since Sierra Club did not challenge the 1994 regulations within 60 days, the dissenting judge argued that the petition was untimely. The judge stated that none of the provisions to the SSM regulations have resulted in a repromulgation of the general duty requirement in the SSM provisions.

Monitoring

***Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008)**

On August 19, 2008, the D.C. Circuit issued its opinion in *Sierra Club v. EPA*, vacating the 2006 EPA rule that prevented states and local authorities from making "sufficiency" determinations with respect to existing periodic monitoring requirements under the Title V regulations. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008). The two-judge majority held that EPA's rule was "contrary to the statutory directive that each permit must include adequate monitoring requirements." EPA has

taken different positions on this issue in the past and, as a result, there have been several prior decisions on related issues.

The statutory language in section 504(c) of the Act on which the court relied provides that “each permit” is to include “monitoring . . . requirements to assure compliance with the permit terms and conditions.” Consistent with the 1992 Part 70 preamble, EPA’s 2006 rule interpreted the Part 70 rules to prohibit state and local permitting authorities from supplementing existing periodic monitoring requirements. EPA and industry petitioners argued that EPA alone could revise federal monitoring requirements.

The court disagreed, holding that when EPA has not used its authority to provide for monitoring requirements that satisfy the sufficiency directive, the states can fill in the gaps. It found that the “each permit” requirement means that every permit issued must include adequate monitoring requirements. The court also found that the “sufficient to assure compliance” provision in section 70.6(c)(1) of EPA’s regulations means that an insufficient monitoring requirement “has no place in a permit unless and until it is supplemented by more rigorous standards.” EPA had accepted the proposition that some existing periodic monitoring requirements would not assure compliance and so these permit provisions, the court found, do not comply with Title V.

The court rejected arguments that allowing state supplementation would be contrary to the Act’s design and bad public policy, finding neither argument persuasive in light of the “each permit” statutory language. However, it denied Sierra Club’s petition for review of the Part 70 periodic monitoring provisions, finding that they could be read consistent with the court’s ruling on supplementation of monitoring requirements. Since EPA’s interpretation no longer controlled, the Part 70 provisions could be upheld.

One judge dissented, agreeing with EPA that the statute grants the Agency the authority to decide whether state and local authorities can revise existing federal periodic monitoring requirements. He disagreed with the position of industry petitioners that the statute prohibits EPA from allowing state and local permitting authorities to revise such monitoring requirements.

NAAQS

***North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008)**

On July 11, 2008, the D.C. Circuit issued a per curiam decision in *North Carolina v. Environmental Protection Agency*, 531 F.3d 896 (D.C. Cir. 2008), vacating the Clean Air Interstate Rule (“CAIR”) in its entirety. The panel of Judges Sentelle, Rogers, and Brown found “more than several fatal flaws in the rule.” Reasoning that the rule was adopted as “one, integral action,” the panel, in its initial opinion, saw no choice but to vacate the whole rule. In response to rehearing petitions from EPA and other parties, the panel amended its decision by remanding CAIR rather than vacating it because of its importance in meeting air quality goals. Although CAIR only regulates electric utilities, the court’s ruling regarding emissions trading provisions potentially has implications for establishing trading provisions applicable to other sources such as, for example, in controlling greenhouse gas emissions.

EPA promulgated CAIR to address the contribution of upwind state sulfur dioxide (SO₂) and nitrogen oxide (NO_x) pollution to the problems faced by downwind states in meeting the

National Ambient Air Quality Standards (“NAAQS”) for PM_{2.5} and ozone. CAIR was enacted pursuant to 42 U.S.C. § 110(a)(2)(D)(i)(I), a section under the Clean Air Act requiring State Implementation Plans (“SIPs”) to contain adequate provisions prohibiting sources within that state from significantly contributing to NAAQS nonattainment by any other state. While plaintiffs raised many diverse issues in the appeal, the common theme of the court’s decision was that EPA had failed to tie the CAIR regulations to the statutory authority created by the Act.

The petitions for review were filed by state and industry parties. North Carolina argued that downwind states were not adequately protected. Several electric utility companies argued that EPA had exceeded its statutory authority in various ways in promulgating CAIR. And parties from three states argued that all or part of the state should not have been included in CAIR.

The court accepted several of North Carolina’s arguments related to the CAIR trading program, holding that the nationwide approach adopted by EPA did not meet the requirement of reducing each state’s “significant contribution” to nonattainment or interference with maintenance in downwind states. The court found that EPA was required under the statute to measure each upwind state’s contribution to specific downwind states. Even though direct correlation with the impact on downwind states is not required, the court concluded that there must be “some assurance that [the program] achieves something measurable” towards the goal of prohibiting in-state sources from contributing to nonattainment in other states. Further, the court held that CAIR “must actually require elimination of emissions that contribute significantly and interfere with maintenance in downwind nonattainment areas.” The possibility that utilities in a state could trade out of achieving measurable reductions in a particular downwind state did not comport with the statutory command.

The court also agreed with North Carolina that EPA had misinterpreted the Act’s “interfere with maintenance” language by focusing solely on the downwind effects of the identified pollutants. Instead, EPA was required to interpret this language by looking to the upwind states that were contributing to pollution, which might result in the inclusion of states such as Georgia. Lastly, the court agreed with North Carolina that a 2015 compliance deadline ignored the statutory mandate to be consistent with Title I and its 2010 attainment deadlines for PM_{2.5} and ozone. The court rejected several other petitions by the state.

The utility petitioners challenged the method by which EPA calculated the CAIR budgets for the SO₂ and NO_x trading programs, and the court agreed with both challenges. The court concluded that the CAIR SO₂ budget calculation, which for each state was based initially on 50% of its allowances under Title IV, was flawed because EPA did not explain how reducing Title IV allowances adequately prohibited upwind states from significantly contributing to downwind nonattainment. The court also concluded that CAIR’s NO_x budget, which favored coal fired electricity by reducing state budgets to the extent they had units that burned oil or gas, could not be squared with statutory requirements because it relied only on the impermissible basis of fairness and did not relate to the statutory obligation to prohibit contribution to downwind nonattainment.

The court also agreed with utility petitioners that EPA lacked the authority to terminate or limit Title IV allowances through a trading program or by requiring that SIPs include allowance retirement provisions. According to the court, “no statute confers authority on EPA to terminate or limit Title IV allowances, and EPA thus has none.”

As to the so-called border state petitioners, the court denied the petitions of Texas and Florida utilities that part of those states should not have been included in CAIR. The court,

however, granted the petition of Minnesota Power, finding that flaws in the data used in EPA's pollution contribution modeling for the state, which could have resulted in Minnesota not being included in CAIR, deserved a response from EPA. Such flaws included an overstatement of emissions levels at units in the state and a misallocation of heat input projections between units. The court remanded to EPA to consider and respond to these objections.

The D.C. Circuit concluded by calling for EPA to "redo its analysis from the ground up." It found EPA's approach of "regionwide caps with no state-specific quantitative contribution determinations or emissions requirements" to be "fundamentally flawed." This leaves a significant vacuum for potential regulation from EPA or legislation from Congress to assist downwind states in meeting their NAAQS requirements.

The opinion does not foreclose a cap and trade program under the existing Act – indeed, the court surmises that if all its changes are adopted, a "somewhat similar CAIR may emerge." But if EPA were to pursue a CAIR-type program again, it would have to make a number of significant changes under the court's decision. First, the agency must make state-specific determinations about which states contribute significantly to nonattainment or interfere with maintenance for downwind states. Second, EPA must select a compliance date that is "as expeditious as practicable." Third, EPA would have to determine another method of setting state budgets. Fourth, any replacement program would have to require states to actually eliminate emissions contributing significantly to downwind problems. And finally, EPA would be required to review the modeling data for certain states under the court's discussion of Minnesota Power's petition. These requirements are a tall order for EPA, and several members of Congress have indicated strong interest in acting to respond to the D.C. Circuit's decision.

NSR/PSD Requirements

United States v. Alabama Power Company, No. 2:01-cv-00152 (N.D. Ala., July 24, 2008)

In a ruling in EPA's NSR enforcement action against Alabama Power ("AP"), an Alabama federal district court issued another decision on how the routine maintenance, repair and replacement ("RMRR") exclusion should be applied. *United States v. Alabama Power Company, No. 2:01-cv-00152 (N.D. Ala., July 24, 2008)*. The issue was whether applicability of the exclusion should be based upon whether activities are "routine in the industry," or "routine at the unit." Confirming its prior ruling on the RMRR exclusion, the court held that the proper test is what is routine in the industry. It also held, however, that RMRR is determined based upon a multi-factor test and rejected AP's argument that if the work is routine in the industry this is dispositive. The court issued its earlier rulings prior to the *Duke Energy* Supreme Court decision, in which the high court held that emissions increases are not to be based on an hourly emissions test, as the Alabama court and the *Duke* lower courts had held.

EPA filed its enforcement action against AP in 1999, arguing that major replacement projects undertaken at five plants between 1985 and 1993 qualified as major modifications. AP countered that these changes fell under the RMRR exclusion. AP argued that the projects were routine in the industry and thus constituted RMRR, citing EPA's 1992 WEPCO rule preamble and a number of other prior EPA statements. The preamble stated 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.”

The court first analyzed what level of deference was owed to EPA. It noted that where Congress has legislated a broad mandate or goal to agencies, courts will accept reasonable “gap filling” as legally binding. Changing interpretations by agencies, the court said, are also permissible so long as they create no unfair surprises to regulated entities. However, EPA’s interpretations in the context of an enforcement action are entitled to less deference, and EPA’s argument in this case sounded “in litigation strategy more than regulatory interpretation,” so it was entitled to reduced deference.

The court next analyzed the appropriate method for applying the RMRR exclusion. The court agreed with the government that EPA’s 1992 preamble was not dispositive. But the court also pointed to EPA’s contradictory response to a request from Congressman Dingell, where the agency noted that it was likely that it would undertake very few enforcement actions based on utility replacement projects. It also noted that, based on EPA’s 2002 final NSR rule discussing its approach to RMRR, “a facility could spend millions of dollars on equipment replacement or repair without triggering NSR.”

The court found that there was general agreement that RMRR is a multi-factor test, but that the point of disagreement was over the frame of reference – whether it is the industrial category, or the particular unit. AP argued that a stipulation by EPA that the projects in question were of a type commonly performed within the industry was dispositive, but the court disagreed. It found no authority that “the inquiry ends if the work is routine within the industry.”

After considering prior case law and EPA’s interpretations, the court found that: “Using a plant-specific test for activities that occurred as far back as 1985, when it was patently obvious what [AP] was doing, and the EPA said and did nothing by way of enforcement to require any of the work to be permitted, strikes the court as a ‘gotcha’ test.” While it agreed with EPA that the agency could change its interpretations as conditions changed, the court said it did “not believe EPA can, in an enforcement action filed in 1999, ignore what it said and did back in the 1970’s, 1980’s, and 1990’s up until the filing of this action.”

The court held that “RMRR will not be analyzed solely by reference to the industry, but judged under the multifactor *WEPCO* test, and the analysis shall be ‘with reference to the industry as a whole, not just the particular [AP] unit at issue.’” (citing *United States v. E. Ky. Power*, 498 F.Supp.2d 976, 993 (E.D.Ky. 2007)). The *WEPCO* factors are the nature and extent, purpose, frequency, and cost of the project. However, the court did not grant full summary judgment, finding a material factual dispute based upon application of the multifactor test.

***United States v. Cinergy Corp.*, No. 99-1693, 2008 WL 4585421 (S.D. Ind. Oct. 14, 2008)**

On October 14, 2008, the Federal Court for the Southern District of Indiana denied partial summary judgment to Cinergy and other utilities on a motion related to the scope of possible remedy in an NSR enforcement action in *United States v. Cinergy Corp.*, No. 99-1693, 2008 WL 4585421 (S.D. Ind. Oct. 14, 2008). In the prior jury verdict in the case on liability, the defendants were found to have violated NSR in constructing four of the 14 projects at issue in the trial. They sought partial summary judgment for the remedy phase, arguing that injunctive relief could only apply prospectively and could not take into account past health and environmental impacts. The court disagreed, finding

that retrospective relief to remedy the effects of past pollution is permissible under the Clean Air Act.

Under section 113 of the Act the court has equitable jurisdiction to award, among other things, “any other appropriate relief.” Defendants argued that this does not include relief for past harm because the purpose of the NSR provision is achieved through the limited prospective remedy of installing BACT technology. The court found that since there was no clear statutory command limiting the scope of the equitable relief it can grant, it has the authority to remedy and mitigate past harms caused by Act violations. It pointed to the statutory purpose to “to protect and *enhance* the quality of the Nation’s air resources.” *See* section 101 (emphasis added). It also did not find that the legislative history of section 113 in the 1990 amendment that added “any other appropriate relief” included any limit on its authority to grant equitable relief.

Finally, the court rejected the argument that at this point in the case it should exercise its discretion not to grant equitable relief for past harm, finding that this issue merited full factual development at trial.

This case is significant as it is the first NSR utility case to reach the remedy phase and is thus the first ruling of its kind. The court’s decision could lead to the granting of remedies beyond BACT such as more stringent controls or Supplemental Environmental Projects. However, the court did indicate that a significant delay in bringing NSR claims may justify barring or limiting equitable relief.

***U.S. v. Cinergy Corp.*, No. 99-1693 (S.D. Ind. December 18, 2008).**

In May of 2008, a jury found that Cinergy Corp. did not trigger new source review (NSR) permitting for 10 of 14 major utility replacement projects at issue in the case. The jury found that it was reasonable for Cinergy not to have projected that the 10 projects would result in a significant emissions increase and thus the NSR requirements had not been violated. On December 18, the judge in the case set aside the ruling and ordered a new trial. *U.S. v. Cinergy Corp.*, No. 99-1693 (S.D. Ind.). Cinergy’s success in the trial had been the most positive recent development for industry in any of the NSR cases.

The judge’s ruling is based upon the fact that a Cinergy witness had been paid as a consultant to Cinergy and this had not been disclosed during the trial. The judge found that the witness “perverted the truth” when he represented himself as a retiree rather than a paid consultant of the company. During the trial, Cinergy made a point of referring to “hired experts” of the plaintiffs and contrasted them with Cinergy’s own “engineer” witnesses. The judge found that Cinergy “integrated the court into its duplicity” with the request to allow the witness to observe the trial from the courtroom “because he’s retired” and that “prejudiced the fairness of the trial.”

The judge required each of Cinergy’s attorneys to provide the court with a written statement detailing any knowledge the attorney may have had of the consulting agreement with the witness. The judge has scheduled a hearing for January 2009 to determine whether Cinergy’s attorneys should be barred from practicing before the court or if the company must pay the legal costs incurred by EPA, New York, New Jersey, the Hoosier Environmental Council, and Ohio Environmental Council in the previous trial.

***Deseret Power Electric Cooperative (Bonanza)*, Appeal No. PSD 07-03, 13 E.A.D. ____ (Nov. 13, 2008)**

On November 13, 2008, the Environmental Appeals Board (“EAB”) issued its ruling in the *Deseret Power Electric Cooperative* case, in which the EAB was asked to decide whether BACT was required for CO₂ emissions in the coal-fired power plant’s PSD permit. *Deseret Power Electric Cooperative (Bonanza)*, Appeal No. PSD 07-03, 13 E.A.D. ___ (Nov. 13, 2008). The EAB held that EPA has the discretion to require BACT for CO₂ and was incorrect in finding that it was constrained by Agency precedent. It ruled that it could not sustain EPA’s decision based on the record, and remanded the case to EPA to reconsider whether to impose such limits and to develop an adequate record for its decision. The Board recognized that the issue had broad implications and recommended that EPA consider addressing the question in an action of “nationwide scope,” rather than through individual permits.

The Sierra Club had petitioned the EAB arguing that the *Massachusetts v. EPA* decision established that CO₂ was an “air pollutant” under the Clean Air Act (“CAA”) and that section 821 of the 1990 Amendments, requiring monitoring and reporting of CO₂ emissions, made CO₂ “subject to regulation” under the plain meaning of the Act. As a result, they argued BACT was required for CO₂ under sections 165(a)(4) and 169(3) of the Act.

EPA countered that the term “subject to regulation” was ambiguous and open to reasonable Agency interpretation. It further argued that EPA historically interpreted “subject to regulation” to mean “subject to actual emissions controls.” EPA also contended that section 821 was not “under” the Act, since it was not officially incorporated into the Act.

The EAB rejected the Sierra Club’s argument that “subject to regulation” had a plain meaning, finding that the phrase was ambiguous and open to interpretation. It found that Congress had not considered the question of BACT regulation for CO₂ and did not draft language sufficiently specific to answer whether this was required. The Board also rejected Sierra Club’s argument that the use of the word “regulations” in section 821 informed the meaning of “subject to regulation” under sections 165(a)(4) and 169(3).

However, the Board also rejected EPA’s argument that it had historically interpreted the phrase “subject to regulation” to mean subject to actual emissions controls, and that therefore the Agency’s interpretation was constrained. The EAB found no express statements to this effect in the administrative record. Also, the EAB found EPA’s reliance on the list of pollutants in the 1978 Federal Register preamble unpersuasive. Although the preamble did not list CO₂, the list was introduced by the word “includes,” implying that these were only examples, and the preamble also stated that “subject to regulation” covered any pollutant regulated under 40 C.F.R. Subchapter C. In addition, the Board was unconvinced by EPA’s reliance on the 2002 rulemaking defining “regulated NSR pollutant.” It said that the definition of “regulated NSR pollutant” was not limited to actual control of emissions, and the fourth part of the definition repeated the statutory language. It found no indication that the preamble’s list of pollutants, which also did not include CO₂, was intended to interpret “regulated NSR pollutant.”

The EAB also rejected EPA’s argument that memoranda by Lydia Wegman (1993) and Jonathan Cannon (1998) established that EPA was constrained by its historical interpretation. The Board found that the memos confused the record rather than establishing a consistent interpretation. It said the Wegman memo was of questionable validity after *Massachusetts v. EPA* and had limited legal analysis, and the Cannon memo had since been formally withdrawn.

Further, the EAB rejected the alternative argument that section 821 was not “under” the

Act. The Board found this interpretation inconsistent with EPA's prior statements regarding the section, noting several examples where it seemed to treat section 821 as part of the Act. Also, the EAB ruled that Congress intended section 821 to be enforceable under the Act, and was unconvinced by EPA's argument that it could enforce section 821 through the Act without that section being part of the Act.

The second issue in the case was whether EPA violated the public participation provisions of Sec. 165(a)(2) by not considering certain alternatives to the facility. The EAB denied review on this issue, finding that EPA did not have an independent obligation to analyze alternatives that were not identified during the public comment period. Since no parties raised the alternatives the Sierra Club wanted considered, there were no grounds to raise this issue.

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