

D.C. Circuit Issues Title V Monitoring Decision

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. □

Indiana Federal Court Decides Scope of Potential Remedies for NSR Violations

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. □

EAB Issues Decision on Applicability of PSD to CO₂ Emissions

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.

The remand now returns to EPA Region 8, which will be required to determine whether to impose BACT limits on CO₂ in the Deseret permit or to develop a record for deciding not to require such limits. EPA will also be required to reopen the record to public comment, meaning this decision will be made by the next Administration. (See related article.) □

EPA Issues Memorandum in Response to EAB Deseret Opinion

On December 18, 2008, EPA issued its definitive interpretation on the question of when air pollutants become subject to the PSD program. The interpretive memorandum signed by Administrator Johnson rules that regulated air pollutants under the PSD program include only those for which EPA regulations require actual emissions control, not those such as CO₂ for which regulations require only monitoring or recordkeeping. The memorandum was issued in response to the EAB opinion in the Deseret Electric Power permit appeal in which the EAB held that EPA had not issued a binding interpretation on this issue.

The 19-page memorandum sets forth a compelling argument supporting the interpretation EPA issues on policy and legal grounds. The concluding paragraph states

that the interpretation “is based on a reasonable reading of the terms of the regulation, is consistent with past Agency practice, and is not precluded by the Clean Air Act.” For the reasons stated in the memorandum, EPA finds that “it is not sound policy to trigger mandatory emissions limitation under the PSD program on the basis of rules designed for information gathering.” □

Judge Orders New Trial in Cinergy NSR Case

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.”

Each of Cinergy’s attorneys is required 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 13, 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. □

D.C. Circuit Issues Section 112 SSM Decision

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. □

EPA Finalizes Fugitive Emissions Rule

On December 19, 2008, EPA published its final rule providing that fugitive emissions will be taken into account in determining whether a proposed change constitutes a major modification only if the source is within a source category listed under section 302(j) of the Act. 73 Fed. Reg. 77,882. The rule revises the 2002 NSR rule revisions, which provided that fugitive emissions would be taken into account in determining major modifications for all sources, regardless of whether the source category had been listed under section 302(j). □