

D.C. Circuit Vacates ERP Rule

On March 17, 2006, the D.C. Circuit issued its decision on the state government and environmental group petitioners' challenges to the Equipment Replacement Provision (ERP) rule. *State of New York, et al. v. EPA*, Case No. 03-1380. The court vacated the ERP rule based on its ruling that only "physical changes" that could properly be found to come within the "*de minimis*" doctrine could be excluded from review under the statutory modification definition. The court held that, even though the term "physical change" is ambiguous, the modifier "any" requires that all non-*de minimis* changes be reviewed to determine whether they would result in emission increases. The court points out that EPA states in its preamble that, in the past, only replacement projects that could come within the "*de minimis*" doctrine were excluded from review. This preamble statement, which reflects the recent Agency enforcement position, is obviously contrary to the reality of how the routine maintenance, repair and replacement ("RMRR") exclusion was interpreted and applied for more than two decades.

The court had heard oral argument on February 8 on the challenges to the ERP rule. The three-judge panel consisted of Judges Rogers, Tatel, and Brown. Judges Rogers and Tatel also were on the panel that heard the first NSR reform case in 2005.

EPA's Equipment Replacement Provision Rule

Under the vacated ERP rule, an activity (or aggregations of activities) could qualify if (1) they involved replacement of any existing component(s) of a process unit with a

component(s) that are identical or that serve the same purpose of the replaced component(s); (2) the fixed capital cost of the replacement component(s), plus costs of any activities that are part of the replacement activity, would not exceed 20% of the current replacement value of the process unit; and (3) the replacement(s) would not alter the basic design parameters of the process unit or cause the unit to exceed any applicable, legally enforceable emissions limitation or operational limitation (that would have the effect of constraining emissions).

EPA's Supporting Legal Rationale

Under the ERP rule, activities that would meet the rule's criteria were to be considered to constitute RMRR, which in turn is excluded as a "physical change" under EPA's NSR rules. Section 111(a)(4) of the Act provides that "any physical change or change in the method of operation" of a stationary source that increases emissions is a "modification." EPA's legal justification for the ERP rule was that the term "physical change" is ambiguous and thus EPA should receive deference in interpreting the scope of what constitutes a "physical change." EPA also included extensive justification on why the ERP rule represented a reasonable policy choice by the Agency.

Industry intervenors' brief supplemented EPA's legal rationale by stressing that every activity that would be excluded under the ERP rule would not be considered a modification under the NSPS definition in effect at the time the NSR programs were enacted. EPA's NSPS regulations have provided since their adoption prior to enactment of the NSR programs that only changes that result

in an increase in the maximum achievable hourly emissions rate of a unit will constitute “modifications.” A replacement project that would result in an increase in the hourly emissions rate would involve a change in the basic design parameters of a unit and would not meet the ERP criteria. Thus, replacement projects that would have been excluded under the ERP rule would not be modifications under the NSPS regulations.

Government and Environmental Group Petitioners’ Arguments

At oral argument, the principal argument of petitioners was that the Act is clear on its face that “any” physical change must be evaluated to determine whether it would result in an emissions increase, with the limited exception that changes coming within the *Alabama Power* “*de minimis*” doctrine could be excluded. They pointed out that EPA acknowledges that activities that come within the ERP rule could be considered “physical changes” under some definitions of the term and thus, since the definition covers “any” physical change, EPA must consider all types of physical changes in determining NSR applicability.

The government and environmental petitioners also presented policy arguments asserting that the ERP rule would exclude from consideration replacement projects that would result in thousands of tons of increases in emissions from individual projects. They specifically referred to the projects at issue in the TVA and Ohio Edison enforcement cases. They also asserted that the effect of the ERP rule would be to eliminate from NSR consideration most projects that would have a real impact on emissions.

EPA Arguments

The two lawyers from the Department of Justice who argued on behalf of EPA divided their argument to accord with the *Chevron* two-step inquiry. Under step one, if the statute is clear on its face, the court simply carries out the statutory mandate; under step two, where the statute is ambiguous, the court gives the agency deference if its interpretation is reasonable. The first DOJ

lawyer (Angeline Purdy) argued that the *Chevron* step one inquiry should not govern this case because the statute is ambiguous and not clear on its face. The other DOJ lawyer (C.J. Morris) argued under the second step of the *Chevron* test that EPA’s interpretation of the ambiguous term “physical change” was reasonable.

After arguing that the term “physical change” is ambiguous, Ms. Purdy explained that EPA properly read the “modification” definition to allow it to first determine what meaning of “physical change” to embrace and then consider “any” such physical change in determining whether an emissions increase would result from making the change. She pointed out that EPA’s rule established criteria to reasonably identify physical changes that would come within the scope of “physical change.”

Ms. Morris then presented the case as to why EPA’s construction of “physical change” was reasonable. In addition to reviewing the criteria that would constrain the exclusion of replacement projects from review, she also maintained that the overall impact of the exclusion would not be adverse to air quality. However, in response to the judges’ question about the emissions increase implications of the TVA and Ohio Edison projects, she indicated that EPA had not considered these projects in determining the implications of the rule and this was the reason that EPA had not responded to petitioners’ argument in their brief that thousands of tons of emissions increases resulted from the projects at issue in the *TVA* and *Ohio Edison* enforcement cases. The judges seemed somewhat incredulous that EPA was claiming that there would not be significant overall emissions increases and yet had not considered the projects reviewed in the enforcement actions. The DOJ lawyer did point out that emissions increase calculations for the TVA and Ohio Edison projects had been based upon the emissions increase test in effect prior to the NSR reforms that the court had upheld and thus the emissions increase calculations would not be correct under the current NSR rules.

Judge Rogers also indicated some concern about

the fact that the ERP rule contained no recordkeeping provisions that would assure that sources would comply with the criteria in the ERP rule. However, this issue seemed to be of little import relative to the obvious concern regarding whether EPA lacked authority to promulgate the rule in the first place.

Judge Tatel also asked whether a source could, in effect, rebuild an entire facility over a five-year period by undertaking projects that each involved 20% of the replacement costs of the facility. Ms. Morris pointed out that EPA reviews projects to determine whether they should properly be aggregated and that the reconstruction of a facility in the manner hypothesized was highly unrealistic.

Industry Intervenors' Argument

Bill Brownell of Hunton & Williams argued for industry intervenors in support of the ERP rule. He emphasized that from the outset of EPA's interpretation of the statutory "modification" definition, EPA has interpreted the definition to exclude activities that would not increase the design capacity of a unit. Thus, the activities excluded under the ERP rule would not come within the definition of "modification" under the NSPS regulatory definition that was in place at the time the NSR programs were enacted in 1977. He pointed out that the ERP rule, by only covering activities that would not involve a change in the basic design parameters of a unit, ensured that changes that would result in an increase in emissions rate, production capability and other design parameters would be outside the scope of activities excluded under the rule. He pointed out that the TVA and Ohio Edison replacement projects would be excluded because they would not result in a change in basic design parameters and would satisfy the other criteria under the ERP rule. Of particular significance, there would not be an increase in the maximum achievable hourly emissions rate of units that were being replaced and, accordingly, the replacement projects would not constitute NSPS modifications.

As indicated in the initial paragraph, the court vacated the ERP rule finding that all non-*de*

minimis changes must be reviewed to determine whether they would result in emissions increases. The court's opinion also includes several statements that are significant in terms of future EPA implementation of the RMRR exclusion and Agency rulemaking relevant to excluding replacement projects from NSR review. First, the court indicates that it "today expresses no opinion regarding EPA's application of the *de minimis* exception, given the limits on the scope of the *de minimis* doctrine." Thus, the court opened the door to possible challenges to projects excluded under the RMRR exception as not properly coming within the *de minimis* doctrine. Second, the court indicates that the issue of whether the modification definition requires "an increase in maximum emission rates" was resolved (in the negative) in the first NSR reform rule decision. However, this should not be interpreted as reflecting a negative court view as to whether EPA could permissibly establish a rule providing that changes must involve an increase in "maximum emission rates" in order for the change to constitute a modification. The court simply states that the modification definition cannot be read to "require" an increase in maximum emission rates. □

Eleventh Circuit Upholds Key EPA Denials of Title V Veto Requests

On January 20, 2006, the Eleventh Circuit Court of Appeals issued an opinion addressing issues arising out of EPA's denial of petitions to object to several facilities' Title V permits. *Sierra Club v. Johnson*, Nos. 03-10262 & 03-10263. The court addressed three alleged grounds for EPA to object to issuance of the Title V permits: (1) the Georgia permitting authority's failure to establish a mailing list and issue notice of the opportunity to submit public comments to those on the list; (2) Georgia's issuance of Title V permits that require permittees "to report only monitoring results showing permit deviations rather than monitoring that shows both permit deviations and compliance;" and (3) Georgia's only providing the public with information that it

actually uses in the permit review process, rather than all information in its files that would be “relevant to the permit decision.” The court also addressed the Sierra Club’s standing to challenge EPA’s failure to grant its Title V objection requests. The court granted Sierra Club’s petition for review on the first of the three grounds, but denied it on the two others.

Standing

The court’s opinion contains a lengthy analysis of whether the Sierra Club has standing to challenge EPA’s failure to issue an objection. The Sierra Club’s claim of standing was based on an affidavit of a member who claimed that “the lack of a mailing list reduced the amount of public comment and the likelihood that violations of the permit would be detected, thereby raising the risk of environmental damage and increasing his concerns.” EPA argued that the only people who have standing to challenge an alleged defect in the notice procedures are those who do not get actual notice and would have commented if they had, and that the affidavit did not put the individual in that category. The court concluded that the potential for additional public input was an adequate ground to show an injury on which to base the standing showing.

Failure to Establish and Use a Mailing List

The court’s consideration of the Georgia agency’s failure to use a mailing list in providing notice of the opportunity for public comment was straightforward. After reviewing the Clean Air Act and EPA’s regulations, the court explained that “it is clear that Congress intended for EPA to object to a permit when the public participation requirements for issuing it have not been met.” EPA argued that it was not necessary for the mailing list requirement to be met, because the Sierra Club had not demonstrated that the omission actually resulted in less meaningful public participation. The court was quite dismissive of EPA’s position stating that “EPA is not a board of pardons” and that its “duty is to enforce requirements, not to grant absolution to

state agencies that have violated them.”

Reporting Deviations, Rather Than All Monitoring Results

The court next reviewed the Sierra Club’s position that EPA was required to object to the permits on the ground that they require the permittees to report only monitoring results showing permits deviations rather than monitoring that shows both permit deviations and compliance. The court first reviewed the statutory provision that requires that there be reports at least semiannually of “the results of any required monitoring” and then EPA’s regulation requiring submittal of reports “of any required monitoring,” which must clearly identify “[a]ll instances of deviations.” EPA asserted that the statute and regulations “merely require permittees to submit reports that (1) identify all instances of deviations and (2) are certified by a responsible official.” EPA argued that this approach is reasonable because the permits do require the sources to state affirmatively that no deviations occurred if, in fact, there were no deviations during a particular reporting period. The Sierra Club argued that sources must report “*any* required monitoring,” which means reporting all monitoring data and not just deviations. The Sierra Club argued that EPA has not uniformly taken the position that reporting only deviations is adequate, noting that an EPA staff person had sent the Georgia permitting agency comments on another draft permit asserting that reports should be made of all monitoring and not just reports of deviations. The court pointed out that that permit was issued without the suggested revision and EPA did not object to it. At the conclusion of its review, the court concluded that EPA was entitled to deference to its interpretation of its regulations because it “is not plainly erroneous or inconsistent with the regulations’ plain language, . . . and its interpretation of the statute is reasonable.”

Access to “Relevant” Information

EPA’s regulations require that permitting

authorities make available “materials available to the permitting authority that are relevant to the permit decision.” Georgia interpreted this to only require it to make available information that it actually uses in the permit review process. The Sierra Club argued that the regulations require “public access to all information that is relevant and available to the permitting authority.” EPA argued that the regulations provide for making available “information that the permitting authority has deemed to be relevant by using it in the permitting process.” EPA pointed out that the Sierra Club’s contrary interpretation would “place no boundaries” on the scope of the relevant material. Although the court stated that EPA’s interpretation may not be the one it would have chosen, it concluded that “it is not contrary to the plain meaning of the language,” and that it could not “say that EPA’s interpretation is unreasonable.” Accordingly, the court rejected the Sierra Club’s petition on this ground. □

Change in Emissions Factors Leads to Permit Violations

In a recently-published October 2005 decision, a federal district court issued rulings in a citizen suit that presages the types of actions that commentators have speculated would be brought with increasing frequency based upon Title V monitoring reports under the Clean Air Act. *Sr. Bernard Citizens for Environmental Quality v. Chalmette Refining*, 61 ERC 1909 (E.D. La. Oct. 14, 2005). In this action, the court ruled that the refinery was liable for 2,629 violations of the Clean Air Act based upon the following: (1) reports issued by the refinery indicating 1,273 violations of benzene emissions limits in the refinery's operating permit; (2) refinery reports showing 536 sulfur dioxide emissions violations; and (3) refinery acknowledgement of 820 occasions of noncompliance with New Source Performance Standards for flares and flare monitoring. In this case, the Clean Air Act claims appear to have been based upon both reports filed under EPCRA and the Clean Air Act.

The court's decision contains a number of notable rulings:

- The refiner asserted that clarification of AP-42 emissions factors would result in a change in emissions calculations from levels that were previously in compliance with permit limits to levels that would exceed permit limits. The Louisiana Department of Air Quality (LDEQ) had adopted a rule that stated that “[e]missions increases due solely to a change in AP-42 factors do not constitute violations of the air permit.” The court ruled, as a matter of federal law, that the LDEQ's proposed revision to its SIP has “no legal weight until it is finally approved” by the EPA.” The court also noted that section 116 precludes the enforcement of an emissions standard or limitation which is less stringent than the standard or limitation under the SIP. Accordingly, the court ruled that the LDEQ rule excusing emissions limit exceedances due to changes in emissions factors is not “valid and enforceable” as a part of the Louisiana SIP and did not change the refinery's permit limits.
- The refinery entered into an Administrative Order of Consent with the LDEQ, which established interim emissions limitations and monitoring and reporting requirements. The court ruled that the order represented an understanding between the LDEQ and the refiner under which the LDEQ would forego enforcing the refiner's permit limits, but that this understanding would not excuse the refinery from complying with the terms of its permit. The court ruled that “the import of the relevant authority” is that “courts regularly reject efforts by defendants to rationalize permit violations under federal environmental laws.” The court specifically referenced cases in which courts had rejected arguments that permit limits should have been set at a higher level when a permit

was issued and other cases indicating that the substantive content of a permit should be addressed when the permit is issued or in a request for a modification, not in an enforcement action.

- The court ruled that the refinery's installation of control equipment that would potentially eliminate violations does not moot the citizen group's action for civil penalties.
- The court also ruled that enforcement actions initiated by the LDEQ would not preclude the court's granting of civil penalties. The court quoted from *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 190 (2000), explaining that a "defendant asserting mootness bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."

The court issued a Consent Motion staying its action on the level of penalties until March 15, 2006 to facilitate settlement negotiations. □

Environmental Groups File Cert Petition in *Duke Energy* Case

On December 2005, Environmental Defense and several other environmental groups filed a petition for certiorari seeking to have the Supreme Court overturn the Fourth Circuit's ruling in *U.S. v. Duke Energy*, 411 F.3d 539 (2005). In that decision, the Fourth Circuit held that an emissions increase under the 1980 NSR rule must be based upon whether there is an increase in the source's hourly emissions rate, as is provided under the NSPS modification provisions.

The environmental groups' cert petition attempts to recast the Fourth Circuit decision as one that "invalidates" EPA's 1980 NSR rule. After making this claim, the petition then argues that the Fourth Circuit's decision conflicts with the Clean Air Act,

because challenges to EPA's nationally-applicable rules under the Act can only be brought in the D.C. Circuit. The petition acknowledges, despite its claim to the contrary, that the Fourth Circuit specifically indicated that it was not invalidating the 1980 NSR rule. The petition fails to point out, however, that the Fourth Circuit simply interpreted the rule in a manner that would be consistent with the NSPS rule.

The cert petition also argues that the Fourth Circuit erred by finding that the emissions increase test must be consistent under both the NSPS and NSR rules. The petition references other decisions in which elements of the modification definition have been upheld, even though the regulatory interpretations under the NSR and NSPS programs differed. The environmental groups also argue that the relevant case law does not support the position that regulatory definitions must, in effect, be identical if they are implementing the same statutory definition.

The environmental groups assert that the Fourth Circuit decision will have far-reaching implications. In particular, they point to EPA's issuance of the proposal under which emissions increases for electric utilities would be determined in the same manner under NSR as is currently the case under the NSPS regulations.

EPA decided not to file a petition for certiorari in the *Duke Energy* case. EPA's decision should reduce the chances that the Supreme Court will decide to consider the environmental groups' petition. However, as expected, the Court sought the government's views on the petition. The government indicated that, while EPA had made arguments in the Fourth Circuit consistent with those now being made by the environmental groups, the government believes that the Court should not grant certiorari. It pointed out that EPA now proposes to revise its regulations to specifically provide for basing emissions increases for electric utilities on the hourly emissions test that the Fourth Circuit applied in the *Duke Energy* case. □

Statute of Limitations Precludes Civil Penalties in NSR Enforcement Action, But Not Injunctive Relief

On March 21, 2006, the Federal district court for the Southern District of Ohio issued an opinion ruling on a government motion to strike numerous affirmative defenses of American Electric Power (AEP) in an NSR enforcement action EPA brought against AEP. *New York v. American Elec. Power Serv. Corp.*, Cases No. 2:04-cv-1098 and 2:05-cv-360 (S.D. Ohio, E.D.). Prior to the court's action, AEP had agreed to EPA's request to strike a number of the affirmative defenses and the court issued a ruling striking almost all the others. However, in the ruling of particular significance that will be discussed in this article, the court denied the government's motion to strike AEP's assertion of the statute of limitations defense.

Civil Penalty Claims

AEP asserted that the 5-year statute of limitations in 28 U.S.C. § 2462 and the concurrent remedy doctrine bar EPA's claims. With regard to the statute of limitations defense, the court reviewed decisions of other courts ruling on whether the statute of limitations barred claims for civil penalties for failure to obtain a PSD preconstruction permit more than five years prior to the time a civil action is brought against a company. The court first reviewed a decision of another judge in the Southern District of Ohio in which the judge ruled that it is "illogical to conclude that a defendant may only be held liable for constructing a facility, rather than operating such facility, without complying with the permit requirements." *U.S. v. AEP*, 137 F. Supp. 2d 1060, 1066 (S.D. Ohio 2001). The court in this case indicated that its "reading of the statute at issue presents a narrower statutory scheme" than described in the other *AEP* court's opinion. The court here said that it "declines to base its decision on the perceived logic, or even lack of logic, that a

defendant may only be held liable for constructing a facility, rather than operating such facility, without complying with the permit requirements. This is a legislative choice that lies outside the province of this Court, which is charged neither with formulating policy nor interpreting statutes in accordance with its own policy preferences, but only with adjudicating disputes that arise under the legislatively enacted policy."

Following the court's review of the prior *AEP* ruling, the court reviewed the analysis in *U.S. v. Murphy Oil USA, Inc.*, where numerous court decisions had been reviewed that had held that the statute of limitations "begins to run at the time of construction and does not continue through the operational life of the modified source." 143 F. Supp. 2d 1054, 1084 (W.D. Wis. 2001). The *Murphy Oil* court further ruled that the government "cannot rely on the continuing violation doctrine to toll the statute of limitations" on claims based upon construction that began more than five years prior to time the Clean Air Act action was brought. After reviewing the *Murphy Oil* opinion, the court indicated that it found the analysis in that decision "persuasive." Accordingly, the court denied the government's motion to strike the statute of limitations defense with regard to claims for civil penalties.

Injunctive Relief Claims

The court next considered whether the government also is barred from bringing claims for injunctive relief for construction begun more than five years prior to the action. The court first addressed whether the five-year statute of limitation barred injunctive relief and ruled that, consistent with the majority opinion of other courts, injunctive relief was not barred. The court quoted approvingly from *U.S. v. Telluride*, where the court stated that the "nature and/or extent of injunctive relief may well change because of the lapse of time," but that the court could not conclude, "at this juncture, that all injunctive relief is necessarily punitive in nature" and thus barred under the five-year statute of limitations. 146 F.3d 1241 (10th Cir. 1998). The court next explained that it would not rule at this time that the

“concurrent remedy doctrine,” which provides that “equity will withhold its relief . . . where the concurrent legal remedy,” *Cope v. Anderson*, 331 U.S. 461, 464 (1947), bars injunctive relief claims. The court also quoted from the *Murphy Oil* decision where the court there had ruled that the concurrent remedy doctrine would not preclude claims for injunctive relief “under all sets of circumstances.” The *AEP* opinion does state, however, that the court is not ruling that the five-year statute of limitations “is not possibly relevant.” The court stated that “if the United States should prevail and pursue injunctive relief constituting a punitive remedy, then AEP’s [statute of limitations defense] may – not shall, but *may* – be applicable.” □

applicable statute of limitations would bar the