

D.C. Circuit Vacates EPA's Ozone Phase 1 Implementation Rule

On December 22, 2006, the D.C. Circuit issued its decision on challenges to EPA's Final Phase 1 Rule to Implement the 8-Hour Ozone NAAQS. *South Coast Air Quality Management District, et al. v. EPA*, No. 04-1200, et al. The court vacated the rule and remanded it to EPA for further proceedings. As discussed below, the court's decision creates substantial uncertainty as to the implications of its action. EPA will be required to undertake further rulemaking consistent with the decision to provide states guidance in developing SIPs. However, despite the uncertainty regarding requirements applicable to many areas, states are required to submit ozone SIPs in June of this year and this deadline was not extended by the court.

The principal holdings of the decision are:

- In response to challenges by certain states and environmental groups, the court ruled that EPA must regulate areas with design values for the 8-hour ozone NAAQS in excess of .09 ppm under Subpart 2 of section 181(a)(1) of the Act, rather than under Subpart 1. Under EPA's rule, 76 of the 122 nonattaining areas would have been governed by Subpart 1. It is unclear how many of those areas will now be required to be subject to Subpart 2, which established the prescriptive requirements and classification scheme for attaining the 1-hour ozone NAAQS.

- The court upheld EPA's implementation of the anti-backsliding provision in section 172(e) by providing that areas will not be permitted to be subject to less stringent controls under the new standard, even if they will be included in a lower classification for the 8-hour ozone standard than for the 1-hour standard.
- The court overturned EPA's determination that a number of programs required under Subpart 2 are not "control" requirements, and thus could be exempted from the anti-backsliding provisions. Contrary to EPA's final rule, the court held that states may not be permitted to remove from their SIPs 1-hour NSR requirements, section 185 penalty provisions for severe and extreme areas under the 1-hour standard, transportation conformity demonstration requirements, and attainment contingency plan provisions, because such provisions were found to constitute "controls."
- Rejecting environmental petitioners' challenge, the court upheld EPA's withdrawal of the 1-hour standard, finding that Congress' requirement for EPA to regularly review standards permitted the Agency to revoke the less stringent 1-hour ozone standard.

- The court rejected the National Petrochemical & Refiners Association's (NPRO) contention that EPA acted improperly by translating the classification thresholds in Subpart 2 from 1-hour values to 8-hour values by determining the percentage that each classification threshold in section 181 exceeds the 1-hour ozone standard and setting the 8-hour threshold value at the same percentage above the 8-hour standard. Also, the court rejected NPRO's claim that EPA improperly established deadlines that it recognizes cannot be met for some areas and relied upon the voluntary bump-up provisions of section 181(b)(3).

As indicated above, the effect of the court's decision is to send EPA back to the drawing board with limited guidance regarding how to implement the court's rulings. In particular, it is unclear how the ruling that areas with a design value of .09 ppm must be subject to Subpart 2, rather than Subpart 1, will affect some portion of the 76 areas not attaining the .08 ppm ozone standard that EPA had provided under the Phase 1 rule would be regulated under Subpart 1. Also, it is unclear how the section 185 penalty provisions will apply in light of the court's ruling that they must be kept in SIPs for severe and extreme areas not meeting the 1-hour ozone standard. EPA will presumably provide guidance to states as an interim measure until it undertakes further rulemaking. □

EPA Finalizes Title V Monitoring Rule Interpretation

On December 15, 2006, EPA issued the final Title V monitoring rule interpretation under which EPA clarifies that

“sufficiency reviews” of existing monitoring are not permissible under the Part 70 and 71 regulations. 71 Fed. Reg. 75,422. In 2004, EPA issued this same interpretation of the Title V rules as a final action to a regulatory proposal that had proposed to find that sufficiency reviews were permissible. 69 Fed. Reg. 3202 (Jan. 22, 2004). Subsequently, the D.C. Circuit ruled that EPA's final action finding that sufficiency reviews were not permissible was not a “logical outgrowth” of EPA's proposal to make a regulation change and issue an interpretation indicating that such reviews were authorized. *Environmental Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005).

EPA presents a compelling legal analysis to support its interpretation that the Title V rules do not require or authorize “sufficiency reviews” of periodic monitoring contained in applicable requirements. In particular, EPA points out that section 504(b) of the Act calls for monitoring to be established “by rule” and that other provisions of the Act envision that monitoring will be adopted through rulemaking. However, EPA also states, as it did in its initial Title V rule preamble (with respect to applicable requirements for which no monitoring exists), that EPA has the discretion to require “case-by-case monitoring reviews,” even though it interprets sections 70.6(c)(1) and 71.6(c)(1) as not requiring or authorizing review of periodic monitoring in applicable requirements.

EPA indicates that the action is one step of a four-step strategy for considering programmatic improvements to existing monitoring “where necessary through rulemaking actions.” The three additional steps of EPA's strategy are the following:

- EPA published an advance notice of proposed rulemaking to seek

comments identifying inadequate monitoring in applicable requirements and appropriate methods to improve such monitoring. 70 Fed. Reg. 7905 (Feb. 16, 2005). EPA indicated that it is reviewing comments received in response to that notice and, in the future, will “take appropriate action.”

- EPA published a proposed rulemaking concerning the implementation of the PM_{2.5} NAAQS and, in conjunction with finalizing that rule, plans to issue monitoring guidance that will be made available for public comment. Such material would encourage states and tribes to improve monitoring in SIPs and TIPs relative to implementing the NAAQS.
- EPA also indicated that concerns had been raised that existing rules implementing the enhanced monitoring requirements do not yet address some existing requirements. It notes that some existing rules are not affected by the Part 64 compliance assurance monitoring requirements and indicates that “there continue to be opportunities to improve monitoring in existing requirements, achieve improved compliance, and assure emissions reductions.”

EPA’s interpretation will likely be challenged again by the environmental groups that challenged the prior interpretation to the same effect. □

EPA Issues Proposal to Repeal the “Once-In-Always-In” Policy

On January 3, 2007, EPA’s proposal to repeal the “once-in-always-in” (OIAI) policy was published in the Federal Register. 72 Fed. Reg. 69. The proposal would provide that major sources of hazardous air pollutants (HAPs) that limit their potential-to-emit (PTE) of HAPs such that they become “area sources” could at any time be relieved of the obligation to comply with major source air toxics requirements. If the source is otherwise not subject to Title V permitting, the source could be relieved of its obligations to comply with Title V permitting and compliance assurance monitoring requirements.

In general, the preamble sets forth a strong justification for the proposed repeal of the OIAI policy. EPA compellingly explains the legal basis for the new policy and sets forth a strong policy rationale for allowing major sources that become area sources to no longer comply with NESHAP requirements applicable to major sources. However, EPA raises a number of questions and seeks comment on a number of issues related to implementing the change from major source to area source status and ones related to sources that switch from major source to area source and then back to major source status.

Legal Authority for Proposal

EPA sets forth an excellent discussion of the statutory and regulatory authority for providing that sources that establish limits on PTE such that HAP emissions will be below major source thresholds are properly treated as “area sources” and thus also appropriately relieved of the obligation to comply with requirements that apply to major sources of HAPs. EPA explains that, under the 1995

OIAI policy, the determination of whether a major source that becomes an area source will not be subject to major source HAP requirements is based upon the timing of the change from major to area source status. EPA points out that this policy has created a “dividing line between major and area sources that does not exist on the face of the statute by including a temporal limitation on when a source can become an area source by limiting its PTE.” EPA also states that the OIAI policy was intended as a transitional one that would remain in effect only until EPA undertook notice and comment rulemaking, which it is now doing.

In its discussion of legal authority, EPA sets forth, for the first time, a complete and accurate Federal Register statement of the legal status of the PTE definitions under section 112, NSR, and Title V. (Note: the Clean Air Implementation Project and American Chemistry Council devoted significant resources to successful challenges of the “federal enforceability” requirement in the PTE definition in the three programs.) EPA explains that its definition of “major source” under all three programs initially provided for limitations on emissions from air pollution control equipment and other restrictions to only be taken into account if they were “federally enforceable.” EPA then explains that the D.C. Circuit remanded the section 112 definition to the extent that it required that physical or operational limitations be “federally enforceable.” EPA then quotes from the D.C. Circuit opinion, which held, in part, that:

EPA has not explained . . . how its refusal to consider limitations other than those that are “federally enforceable” serves the statute’s directive to “consider

[] controls” when it results in a refusal to credit controls imposed by a state or locality even if they are unquestionably effective.

National Mining Association v. EPA, 59 F.3d 1351 (D.C. Cir. 1995).

EPA further points out that the court stated that:

It is not apparent why a state’s or locality’s controls, when demonstrably effective, should not be credited in determining whether a source subject to those controls should be classified as a major or area source.

Id.

EPA also explains that, in two additional cases, the court vacated the federal enforceability requirement in the NSR programs (*Chemical Manufacturers Association v. EPA*, No. 89-1514, 1995 WL 650098 (D.C. Cir. Sept. 15, 1995)) and the Title V program (*Clean Air Implementation Project v. EPA*, No. 96-1224, 1996 WL 393118 (D.C. Cir. June 28, 1996)). EPA points out that, under its transitional policies, sources can rely on “state-only enforceable PTE limits” until the Agency responds to the three decisions. EPA then states that it “intends to issue a proposed PTE rule in the near future.”

Implications of the Proposed Action

In discussing the proposal’s implications, EPA explains that, in its 1995 OIAI memorandum, it stated that “without the OIAI policy, facilities could backslide from MACT levels of control and increase their emissions to a level slightly below the major

source thresholds.” EPA then states that, while a source meeting the definition of “major source” in section 112(a) must be required to comply with applicable MACT standards, “a source that takes a PTE limit that limits its PTE to below the major source HAP thresholds does not . . . meet the statutory definition of ‘major source,’ and therefore should not be subject to the requirements applicable to a major source.”

EPA then addresses the concern that sources that have reduced HAP emissions below the major source thresholds in order to meet applicable MACT standards will be able to increase their emissions under the proposed policy. EPA states that “[i]f this rule is finalized, we believe it is unlikely that such sources would, in becoming area sources, increase their current emissions to a level just below the major source thresholds.” EPA points out that “[w]hile this may occur in some instances, it is more likely that sources will adopt PTE limitations at or near their current levels of emissions, which is the level needed to meet the MACT standard[s].” EPA bases this conclusion on a number of factors.

- First, many sources attaining area source status do so because of control devices they install to meet MACT standards. EPA states that it expects that sources that have attained area source status by virtue of a particular control technology will maintain their current level of emissions.
- Second, EPA states that many sources will need to maintain the level of emissions reduction associated with the MACT standard because that level is needed to comply with other requirements, such as RACT, or to be able to engage in emissions netting or emissions trading.

- Third, EPA states that sources will likely take PTE limits at or near their current MACT emissions levels to ensure that their emissions remain below the major source thresholds. Sources have no incentive to establish their PTE limit too close to the major source thresholds “because repeated or frequent exceedances above the PTE could provide the permitting authority reason to revoke the PTE and bring an enforcement action.”
- Fourth, “permitting authorities will likely encourage emission reduction maintenance and impose more stringent PTE terms and conditions on the source the closer the source’s PTE is to the major source thresholds.”
- Finally, and of particular significance, EPA points out that “many sources that take a PTE limitation to become an area source will ultimately be subject to area source standards issued pursuant to section 112.” EPA has issued standards for approximately 20 area source categories and is required to develop such standards for approximately 50 additional categories.

EPA then states that, even if HAP emissions increases do occur at some sources due to their establishing a higher PTE level than would be permissible under the MACT standard, “the increases will likely be offset by emission reductions at other sources that should occur as a result of this proposal.” EPA points out that the proposal provides an incentive for some sources currently complying with MACT that emit above major source thresholds to reduce their HAP emissions to below the major source

thresholds. EPA solicits comments on all of the issues discussed in its review of the implications of the proposal.

Proposed Regulatory Changes and Transitional Issues

As discussed above, the basic policy change would be that the 1995 OIAI policy would be replaced by regulatory language that would allow a major source to become an area source at any time by taking a PTE limit on its HAP emissions. EPA would amend section 63.1 of its regulations by adding a new paragraph (c)(6) that would specify that a major source may become an “area source” at any time by restricting its HAP PTE to below major source thresholds. If a source takes a PTE limit, “it will no longer be subject to major source requirements that apply to HAP emissions, subject to certain restrictions.” EPA explains that the major source requirements “to which the source would no longer be subject, [also] include, but are not limited to, compliance assurance monitoring and title V requirements (assuming the source is not otherwise subject to title V permitting).” As an area source complying with its PTE limit, “the source would nonetheless be subject to any applicable area source requirements issued pursuant to section 112, and Title V if EPA has not exempted the area source category from such requirements.”

The preamble discusses a number of transitional issues that would arise in connection with sources switching from major source to area source status and for sources switching from major source to area source status, and then back to major source status. EPA proposes one restriction to address the situation where sources switch between major and area source status more than once. EPA proposes that, where

“sources that are major sources as of the first substantive compliance date of the MACT standard later take PTE limitations to attain area source status, and then subsequently seek to switch back to major source status,” the sources must, except as indicated below, “meet the major source MACT standard immediately upon that standard again becoming applicable to the source.” This necessitates a revision to 63.6(c)(5), which establishes the ground rules for sources that become subject to major source MACT standards where they previously have been area sources and authorizes time to achieve the MACT standard requirements.

EPA explains that this “immediate compliance” requirement for sources switching from major source status to area source status and then back to major source status should generally be reasonable because the existing affected sources at the major source “were previously subject to the MACT standard.” Therefore, the affected sources “should be able to comply with the standard immediately upon the standard again becoming applicable to them.”

EPA further supports its “immediate compliance” rule for sources switching back to major source status by stating that sources will likely not have removed the controls used to meet the MACT standard. Also, EPA states that, when the cause of the reversion to major source status is the addition of equipment or process units to an existing affected source, the source should still be able to meet the MACT standard upon startup of the new equipment or unit because the equipment or process unit should be accompanied by either a tie-in to existing controls or installation of new controls. EPA solicits comment on whether its assumptions are correct.

EPA states that it has identified one set of circumstances where additional time would be necessary for the source to comply with the major source MACT. This is a situation where major source MACT rules have been amended and either have become more stringent or have been revised to apply to additional emission points or additional HAPs. This could occur due to, for example, reviews carried out pursuant to the eight-year review requirement or as a result of settlements resolving pending litigation over a standard. EPA proposes that a source be allowed additional time if the major source standard is changed such that the source must undergo a physical change, install additional controls and/or implement new control measures. EPA proposes that such sources have the same period of time to comply with the revised MACT standard as is allowed for existing sources subject to the revised standard.

EPA specifically solicits comments on the appropriateness of the proposed immediate compliance rule and whether that rule should be finalized. EPA also asks whether there are other situations other than where there have been revisions to the MACT standard requiring additional time for compliance that would necessitate an extension of the time period for compliance with the MACT standards. EPA also asks for comment on whether it should allow all sources that revert back to major source status a specific period of time in which to comply with the MACT standard. This would be consistent with the approach provided for in section 63.6(c)(5) that was established to deal with the situation where an area source that had never triggered the major source MACT standards becomes a major source. EPA also requests comment on how much time should be authorized for a source to come into compliance, if it were to allow additional time for sources reverting to

major source status. EPA then indicates that, depending upon the comments received, it will consider not finalizing the “immediate compliance, with exceptions, approach” and, instead, allow additional time for all sources reverting back to major source status or, alternatively, retaining the proposed immediate compliance rule and adopting additional exceptions to that rule.

EPA states that it envisions that a request for a compliance extension, if such an option were authorized, would ordinarily be made in the context of the Title V permit application or an application to modify an existing Title V permit. EPA indicates that an option for sources might be to include alternative operating scenarios in a permit to avoid having to reopen and revise the permit if the source chooses to switch source status and again become a major source.

EPA also proposes a second restriction on sources that take PTE limits to become area sources, which relates to those that thereby become subject to section 112 area source standards. Under the proposal, a major source with affected sources subject to a major source MACT standard that switches to area source status would, if EPA has established area source standards for the same affected source, have to comply immediately with those area source standards if the first substantive compliance date has passed or would have to comply by the first substantive compliance date if it has not passed.

EPA bases this restriction on the fact that the area source standard is not likely to be more stringent than the major source MACT standard and the source will likely not need additional compliance time to meet the area source standard. However, EPA provides that the source may obtain additional time, not to exceed three years, under certain

circumstances. Specifically, EPA proposes that, if a source (or a portion thereof) must undergo a physical change or install additional control equipment to meet the applicable area source standard, the source may submit to the permitting authority a request demonstrating the need for additional time up to three years for achieving compliance with the area source standard. EPA states that this authorization fills a gap not addressed in the Clean Air Act.

Under the proposed regulations, sources that reduce their emissions levels and obtain a PTE HAP limit below major source thresholds must meet that limit and all associated conditions, as specified in the relevant permit, on the effective date of the permit. Prior to the effective date of the permit, the source must continue to comply with the relevant major source MACT standard(s) and other conditions in its Title V permit.

EPA states that permitting authorities may deny a request to adopt area source status where the source has changed its status more than once, "if in the opinion of the permitting authority, these actions are an indication that the restrictions on PTE are, in practice, ineffective." It is unclear why switching status more than once would ever indicate the PTE restrictions are ineffective.

Where an area source standard applies and the compliance date for that standard has passed, and the source needs a compliance extension, the source must apply for and obtain the compliance extension before becoming subject to the area source standard. Otherwise, the source will be in violation of the area source standard.

EPA solicits comments on the proposed case-by-case compliance extension date approach for major sources that take PTE limits to

become area sources and thereby become subject to area source standards, and whether the limitations proposed above (*i.e.*, the affected source must undergo a physical change or install additional control equipment in order to meet the area source standard) are appropriate. EPA also solicits comments on whether the compliance date extension provision should be extended to major sources that become area sources only a few months prior to the compliance date of an applicable area source standard.

EPA includes two further conditions on the new policy. First, major sources switching to area source status, and major sources switching to area status and back to major source status, must notify EPA of any standards to which they become subject. Second, EPA states that major sources that are subject to enforcement actions for noncompliance with MACT standards will not be able to avoid enforcement by adopting PTE limits to become area sources. However, sources subject to such enforcement will be permitted to adopt such PTE limits and become area sources, and prospectively not be subject to major source MACT standards.

Finally, EPA states that it does not propose to amend provisions in major source MACT standards that set forth the date by which a source can become an area source and avoid becoming subject to the major source standard. EPA states that such dates have passed for MACT standards and thus it believes those provisions have no current effect. Based upon this interpretation, EPA proposes not to revise those provisions. It solicits comment on whether changes are necessary.

Impacts of the Proposed Amendments

EPA states that it cannot quantify the environmental, economic, and energy impacts of the proposed amendments. It solicits comments on potential impacts, “specifically the number of potential and likely sources that may avail themselves of the approach provided in today’s proposal and additional emission reductions that may be achieved or increases that may occur.”

Comments are due on the proposal on March 5, 2007. □

EPA Presents Initial Response to Title V Task Force Recommendations

EPA’s Title V Task Force issued its recommendations to the Clean Air Act Advisory Committee (CAAAC) in April 2006. EPA’s Title V staff was charged with preparing a response by the time of the next meeting of the CAAAC. At the September 14, 2006 CAAAC meeting, EPA staff presented a report on the status of its deliberations regarding the Task Force’s recommendations.

The EPA staff pointed out that EPA has been considering how to respond, including whether to “tweak” each individual recommendation and how to appropriately implement the recommendations. As suggested in the Task Force’s report, EPA will be using a variety of implementation methods, including sharing best practices, issuing guidance, undertaking rulemakings, deferring to states and using a number of other approaches intended to facilitate improvements. EPA also pointed out that some of the recommendations may be

addressed by ongoing activities. In particular, the “flexible air permitting rule” proposal is due to be released in February 2007, and the periodic monitoring rule proposal is to be issued in the spring of 2007.

Among the recommendations that EPA intends to give priority are:

- Guidance to authorize general citations to applicable requirements.
- Proposal to exempt insignificant emissions units from Title V permitting.
- Best practices for determining when to grant public hearings.
- Directive that written responses are expected to comments on draft and proposed permits.
- Guidance to clarify the current permit revision process.
- Best practices for coordination of NSR and Title V permitting processes.
- Improved EPA processing of pending SIP revisions.

EPA also indicated that other priority areas, not included on its “short list,” are: addressing the recommendation for “short form” compliance certifications; interpreting the applicability of the emergency defense for startup, shutdowns, and malfunctions; and revising the Title V rule to allow broader use of administrative amendment and minor modification processes.

EPA indicated that the issuance of best practices and providing technical assistance could occur within one to two years. Issuance

of guidance would be expected within one to three years and development of new rules would take three years or more (plus time for states to adopt revisions as necessary). □

D.C. Circuit Rejects Challenges to EPA's BART Guidance

On December 12, 2006, the D.C. Circuit issued its decision on challenges to EPA's rule establishing guidelines for best available retrofit technology (BART) determinations. *Utility Air Regulatory Group v. EPA*, Nos. 05-1354, 05-1357. The court rejected challenges brought by the Utility Air Regulatory Group and another industry organization (collectively referred to as UARG) and an environmental group to the BART guidelines.

UARG challenged two aspects of the rule. Of particular interest to non-utility industry, UARG challenged the "collective contribution" provisions under which states would be permitted to determine that BART-eligible sources collectively contribute to visibility impairment in a Class 1 area in order to find that such sources may reasonably be anticipated to cause or contribute to visibility in such an area. The court recognized UARG's "valid concern" that collective attribution might force sources to install BART even when such installations would serve no purpose whatsoever. However, the court found this fear to be "unwarranted." The court ruled that, even if an individual source is found subject to BART in Step 1 of the BART assessment process because of collective attribution, the source can nonetheless challenge the necessity of installing BART in Step 2 and have the impact issue resolved *de novo*. However, the court's

interpretation is unhelpful, to say the least. The court states that, in the Step 2 weighing of five factors, the visibility impact of imposing BART is to be considered and, if "that impact is *zero*," BART would not be required. Based upon this interpretation, the court ruled that EPA's "collective attribution" provision is reasonable.

UARG also challenged the EPA guideline applicable to power plants exceeding 750 MW. UARG argued that such guidelines are "mandatory," but the court ruled that such guidelines were advisory, not mandatory. The court noted that states are required to submit SIPs demonstrating reasonable progress toward meeting the national visibility goal, but indicated that industry did not argue that such "indirect compulsion" violates the statute.

The environmental petitioner, National Parks Conservation Association, challenged the provision under which states opting to participate in the Clean Air Interstate Rule (CAIR) cap-and-trade program need not require affected BART-eligible electric generating units to install BART. The court rejected the claim that the Clean Air Act requires EPA to ensure that a BART alternative will improve visibility at least as much as BART at every Class 1 area and in all categories of days. The court pointed out that, if CAIR is substituted for BART and is not likely to achieve the visibility goal, states must take other measures to achieve reasonable progress at each Class 1 area. The court reiterated its ruling made in an earlier decision that states are free to implement BART alternatives as long as those alternatives also ensure reasonable progress. □