Clean Air Act
Litigation Developments

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Clean Air Act
Litigation Developments
2002

Citizen Suits

See Sierra Club v. Whitman, **No. 01-01991** (D.D.C., January 30, 2002) (Title V Permit Program).

Justiciability

Sierra Club v. EPA, 292 F.3d 895 (D.C. Cir. 2002).

The D.C. Circuit issued a decision that will likely have an impact on a broad range of judicial challenges to federal agency rulemaking actions, including EPA's rulemaking actions under the Clean Air Act. The court found that the petitioners had not established that they had standing under Article III of the Constitution to challenge the regulation in question – a hazardous waste listing decision under RCRA. In so ruling, the court emphasized that a petitioner that is not regulated by a rule must make a detailed showing to establish its standing to bring suit to challenge that rule. The court also created a set of procedural requirements to be met in future cases involving standing issues.

As a result of the decision, petitioners seeking to challenge EPA rulemaking actions under the Act – whether industry or environmental petitioners – will frequently face a greater burden in establishing that they have standing to bring suit.

Background

The case involved petitions for review filed by the Sierra Club and the Environmental Technology Council challenging a RCRA regulation that listed certain wastewater sludges as "hazardous." The petitioners contended that the rule listing the sludges did not contain sufficiently stringent conditions regarding disposal of the sludges.

The Sierra Club did not address the issue of standing in its opening brief, but EPA raised the issue in its answering brief. In its reply brief, the Sierra Club alleged that some of its members "live, work, and recreate" in communities adversely affected by sludges from some of the chemical plants in question. Furthermore, following the filing of the reply brief, counsel for the Sierra Club submitted to the court representations concerning the standing of individual members.

The Court's Ruling

According to the court, the key issue confronting the Sierra Club was whether at least one of its members satisfied the Article III requirements for standing, i.e., whether a member would suffer a concrete injury resulting from the regulation that would be remedied by a favorable decision. The court ruled that, unless a petitioner's standing in a rulemaking challenge is "self-evident," i.e., the petitioner is an "object of the action," the petitioner must initially address the issue of standing and "supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review." According to the court, the petitioner may meet its burden by citing record evidence relevant to its standing claim or by attaching affidavits that are relevant. The court expressly rejected the Sierra Club's contentions that nothing in the appellate court rules requires it to submit affidavits to establish standing in a court of appeals and that representations of counsel concerning standing have traditionally been regarded as sufficient.

Moreover, the court indicated that in all future cases where standing is not "self-evident," the petitioner must address its standing in its opening brief (assuming that the issue has not already been addressed through a motion to dismiss and responses). According to the court, "[r]equiring the petitioner to establish its standing at the outset of its case is the most fair and orderly process by which to determine whether the petitioner has standing to invoke the jurisdiction of the court." The court stated that petitioners would no longer be allowed to wait and address standing for the first time in their reply briefs in response to an agency's claims that the petitioner lacks standing.

In this case, the court rejected as inadequate the Sierra Club's showing that at least one of its members would be harmed by the regulation. The Sierra Club, after being granted an additional opportunity to offer proof of its standing, submitted a statement of counsel containing representations regarding the standing of members along with lists containing 28 mailing addresses and maps. The court gave no weight to counsel's representations because they involved matters beyond the scope of his knowledge and thus did not constitute evidence. Although the lists purported to be addresses of members near the relevant plants in Louisiana and Texas, the court found that the Sierra Club had provided no evidence that the members lived at the addresses when the petition for review was filed and continue to live at those addresses. In summary, the court found that the Sierra Club had failed to show that there was a "substantial probability" that a single member would be adversely affected by the listing regulation in question.

Finally, the court found that the other petitioner, the Environmental Technology Council, lacked "prudential standing" to challenge the regulation, i.e., the ETC's interests were not in the "zone of interests" that Congress intended to protect in enacting the relevant RCRA provisions. The court determined that, although the ETC had not attempted to articulate the basis for its standing, its interests presumably involved promoting more stringent control requirements and thereby furthering the business interests of its members. Citing D.C. Circuit precedents involving the ETC's predecessor, the court ruled that such interests did not fall within the zone of interests protected by the statute.

Tennessee Valley Authority v. EPA, 278 F.3d 1184 (11th Cir. 2002)

The U.S. Court of Appeals for the Eleventh Circuit issued a decision holding that it has jurisdiction to consider the merits of challenges by the Tennessee Valley Authority (TVA) and other petitioners to EPA's actions in enforcing the Clean Air Act's PSD provisions against TVA. The Eleventh

Circuit's ruling means that it will address the validity of EPA's interpretation of the "routine maintenance, repair, and replacement" exclusion and other issues in the next phase of this litigation.

The consolidated cases involve the validity of an administrative compliance order (ACO) issued to TVA by EPA. In the ACO, EPA stated that numerous maintenance, repair, or replacement projects carried out by TVA at 14 of its facilities over two decades had triggered PSD requirements and that TVA had failed to obtain necessary permits. The ACO also directed TVA to undertake numerous remedial actions, including the installation of controls that allegedly should have been installed when the projects were undertaken. In response to TVA's contentions that the ACO was unlawful, EPA Administrator Browner directed EPA's Environmental Appeals Board (EAB) to review the validity of the ACO under procedures created specially for purposes of addressing the ACO. The EAB subsequently issued a decision upholding most aspects of the ACO. In particular, it ruled that most of the projects listed in the ACO were not covered by the regulatory exclusion for "routine maintenance, repair, and replacement." TVA and certain private utility companies filed petitions for review in the Eleventh Circuit challenging the ACO, EPA's letter granting reconsideration of the ACO, and the EAB's decision.

In ruling that it has jurisdiction over the petitioners' challenges, the court rejected the following arguments raised by EPA: (1) that TVA lacks independent litigating authority to conduct this litigation; (2) that there is no justiciable case or controversy because both TVA and EPA are Executive Branch agencies whose leaders serve at the pleasure of the President; (3) that the EAB decision is not a reviewable final action; (4) that EPA's actions are not reviewable because TVA has not followed the procedures set forth in two Executive Orders dealing with inter-agency disputes; and (5) that the private utility company petitioners lack standing to challenge actions taken against TVA.

We summarize each of the court's principal rulings below:

TVA's Independent Litigating Authority

EPA contended that the court lacks jurisdiction to consider TVA's petitions for review because TVA lacks independent litigating authority to bring such suits over the objection of the Attorney General. However, the court concluded that, since TVA's creation in 1933, TVA has represented itself in litigation using its own attorneys. Relying upon three cases in which the courts had ruled that TVA had independent litigating authority, the Eleventh Circuit held that EPA's contentions had no merit in this case.

Justiciable Case or Controversy

EPA argued that no case or controversy exists because TVA and EPA are both Executive Branch agencies whose leaders serve at the pleasure of the President. According to EPA, this means that the dispute regarding the validity of the ACO could not give rise to an Article III case or controversy. EPA further maintained that an Executive Branch agency can bring suit against another Executive Branch agency only under the following conditions: (1) the agency is an independent regulatory agency; (2) the real party in interest is a private party; or (3) a criminal investigation or prosecution is involved. The Eleventh Circuit concluded that the cases cited by EPA do not establish that these three situations are the only instances in which Executive Branch agencies can litigate against one another. The court determined that the proper test under governing case law is a two-pronged test: (1) whether the issue

involved is "traditionally justiciable" and (2) whether true adversity exists between the agencies. The court then concluded that this case satisfies the two-pronged test.

Finality of the EAB Decision

In addressing EPA's arguments that the EAB decision was not a final agency action, the court applied the familiar two-part test for finality: (1) whether the action marks the "consummation" of the agency's decisionmaking process; and (2) whether the action determines the "rights or obligations" of parties. EPA asserted that the second element of the test was not satisfied because EPA cannot bring a *judicial* enforcement action against TVA. The court disagreed with EPA because it concluded that there can be concrete adversity between two Executive Branch agencies and that an agency's action can determine the rights or obligations of a party regardless of whether it can be enforced through a judicial enforcement action.

Effect of Executive Orders

EPA argued that the court lacks jurisdiction over the challenged actions because of two Executive Orders which provide that certain disputes between Executive Branch agencies are to be resolved by referring the matters to the Attorney General or the Office of Management and Budget. The Eleventh Circuit concluded that the Executive Orders did not prevent it from hearing TVA's challenges and rejected EPA's related exhaustion, ripeness, and separation of powers arguments. The court ruled that, because there is no statutory requirement that TVA exhaust its administrative remedies, the Executive Orders do not prevent a court from exercising its jurisdiction. It also ruled that the legal and factual issues in the cases appeared to be ripe and that a court need not necessarily wait until the agencies have followed the dispute resolution procedures in the Executive Orders. Finally, the court determined that judicial review here did not present a constitutional separation of powers question because: (1) the President or the Attorney General could step in at any time and resolve the dispute; and (2) Congress has provided a statutory judicial review procedure in section 307(b)(1) of the Act that covers final actions such as this one.

Standing of Private Parties

EPA maintained that the private utility companies that filed separate petitions for review lack standing to pursue their claims. According to EPA, those claims are highly speculative and the interests involved do not fall within the "zone of interests" protected by the statute. The private petitioners alleged that, because their systems are integrated with those of TVA, the relief sought by EPA would require them to increase power production to compensate for the impacts on TVA's operations. The court agreed that those allegations were sufficient to establish injuries in fact and that those injuries would be fairly traceable to E{AEGAS actions. In addition, the court concluded that the interests involved were included within the general interests protected by the Clean Air Act.

See United States v. Southern Indiana Gas and Electric Co., No. IP 99-1692-C-M/F, 2002 WL 1629817 (S.D. Ind. July 18, 2002); 2002 WL 1760699 (S.D. Ind. July 26, 2002); 2002 WL 1760752 (S.D. Ind. July 26, 2002); 2002 WL 31427523 (S.D. Ind. Oct. 24, 2002) (PSD Requirements).

American Forest and Paper Ass'n v. EPA, 294 F.3d 113 (D.C. Cir. 2002)

On June 28, 2002, a three-judge panel of the D.C. Circuit denied a petition for review challenging EPA's decision not to remove methanol from the list of "hazardous air pollutants" under section 112(b) of the Act. In upholding EPA's decision, the court gave broad deference to E{AEGAS interpretation of the relevant statutory provisions and to EPA's judgment regarding the scientific and technical issues involved.

The case arose when the Association filed a petition with EPA in 1996 requesting that it delist methanol as a HAP pursuant to section 112(b)(3)(C). That provision states that EPA is to "delete a substance from the list [of HAPs] upon a showing by the petitioner or on the Administrators own determination that there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the [*sic*] human health or adverse environmental effects."

In support of its administrative petition, the Association relied on certain studies on the human health effects of methanol exposure and proposed a "safe exposure level" – a level below which it is expected that there would be no adverse human health effects from lifetime inhalation exposures. In May 2001, EPA issued a notice denying the petition and indicating that it disagreed with the Association's analysis of the relevant studies in certain respects. The Association subsequently sought review of EPA's action in the D.C. Circuit.

The Association raised three principal arguments in support of its challenge to EPA's decision not to delist methanol. First, the Association contended that EPA had misread the statute as allowing it to deny a petition based merely on speculation that adverse effects would occur. But the court stated that EPA's reading of the statutory criteria for delisting was entitled to great deference by a reviewing court and that its interpretation here "easily passes muster." According to the court, EPA reasonably read the statute as placing a burden upon a petitioner of affirmatively demonstrating that emissions of the substance in question may not be reasonably anticipated to cause adverse effects – not merely that EPA cannot determine that the substance will cause adverse effects.

Second, the Association attacked EPA's analysis of the relevant studies and its calculations as being arbitrary and capricious for a number of reasons. For example, the Association maintained that EPA arbitrarily attributed the adverse effects associated with one study with methanol exposure even though the study did not conclude that methanol exposure had caused those effects. With regard to the Associations arbitrary and capricious arguments, the court emphasized that an "extreme degree of deference" is due EPA when it is "evaluating scientific data within its technical expertise." The court concluded that in each instance raised by the Association the Agency had sufficiently established that its judgments were reasonable and supported by the record.

Finally, the Association claimed that EPA had violated the express statutory directive that it "may not deny a petition solely on the basis of inadequate resources or time for review." However, based on its review of the record, the court concluded that EPA had addressed the Association's petition

thoroughly and that it had repeatedly requested additional submissions from the Association before determining that the petition was complete. Thus, the court concluded that the Agency had reasonably found that the Association had not met its burden under the statute.

NAAQS

American Trucking Assn's v. EPA, 283 F.3d 355 (D.C. Cir. 2002)

In a unanimous decision, a three-judge panel of the D.C. Circuit upheld EPA's revised national ambient air quality standards (NAAQSs) for ozone and particulate matter against the remaining challenges by industry, state, and environmental petitioners. The panel, which consisted of the same judges who had initially invalidated the standards on constitutional grounds, rejected petitioners' arguments that EPA's actions in setting the levels for the standards are arbitrary and capricious.

The consolidated cases were remanded from the Supreme Court to the D.C. Circuit to allow that court to consider previously unaddressed arguments that certain elements of the standards are "arbitrary and capricious." *Whitman v. American Trucking Assn's*, 531 U.S. 457 (2001). The Supreme Court had reversed the D.C. Circuit's earlier decision that EPA's interpretation of the Act resulted in an unconstitutional delegation of legislative authority from Congress to the Agency. The D.C. Circuit had found that EPA's approach in setting the standards violated this nondelegation doctrine because it was not based on a set of "intelligible principles." The D.C. Circuit had remanded the standards to EPA so that it might identify principles that would limit its standard-setting authority and concluded that it was unnecessary at that time to address petitioners' arguments that the standards were also arbitrary and capricious. Because the Supreme Court reversed the court's unconstitutional delegation ruling and additionally rejected industry petitioners' argument that EPA was required to consider implementation costs in setting such standards, the Supreme Court remanded the cases to the D.C. Circuit so that it could address "all preserved challenges" to the standards.

On remand to the D.C. Circuit, the various petitioners raised three broad sets of issues. First, certain industry and state petitioners urged the court to vacate the revised PM standard – a new PM2.5 standard – because EPA allegedly had failed to articulate and apply the Act's requirement that primary NAAQSs be "requisite to protect" the public health. They pointed to the Supreme Court's language that EPA is to "set air quality standards at the level that is 'requisite' – that is, not lower or higher than is necessary – to protect the public health with an adequate margin of safety." Those petitioners further raised specific claims as to why the PM2.5 standard is "arbitrary and capricious." Second, environmental petitioners maintained that the revised PM standard is too lenient to protect against known adverse health effects. Third, industry and state petitioners challenged the revised ozone standard on the same general basis as they challenged the revised PM standard.

Before evaluating the petitioners' "arbitrary and capricious" claims, the D.C. Circuit addressed industry and state petitioners' related argument that the D.C. Circuit's prior decisions in the litigation already establish that EPA failed to apply the "requisite to protect" requirement in setting the primary standards. According to those petitioners, EPA's failure to appeal this holding to the Supreme Court meant that the holding is controlling, i.e., it was "law of the case," and governs the disposition of the remaining "arbitrary and capricious" claims.

The panel disagreed with the position that its prior decisions had established such a holding. It explained that the statements relied upon by petitioners were made in the context of determining whether EPA could show that "intelligible principles" governed its NAAQS rulemaking authority, i.e., whether EPA had perhaps relied upon the "requisite to protect" requirement to limit its authority to set NAAQSs and thereby avoid constitutional problems. The court indicated that its statements did not apply to the narrower issue of whether EPA reasonably exercised its authority to promulgate standards that are not "arbitrary and capricious."

Industry and State Petitioners' Challenges to the Revised PM Standard

The industry and state petitioners raised a number of specific arguments that EPA acted in an "arbitrary and capricious" manner in promulgating the PM2.5 standard. We summarize below the courts rulings on each of the principal arguments.

- The court rejected petitioners' contentions that EPA failed to apply a permissible legal standard or any legal standard at all in setting the PM2.5 standard. The petitioners relied upon a statement by EPA that it was not required to establish a "safe level" of PM2.5 before adopting a standard and EPA's statement that its approach would "go beyond" what was needed to protect public health. The court concluded that both statements were being quoted out of context and did not support petitioners' position that EPA had failed to apply the "requisite to protect" requirement.

- The court disagreed with petitioners' assertion that EPA must quantify in some detail its decisionmaking process. In particular, it explained that EPA is *not* required to "establish a measure of the risk to safety it considers adequate to protect public health every time it establishes a [NAAQS]."

- The court held that EPA was not required to consider whether PM2.5 emissions might increase ozone levels or levels of a different PM component. According to the court, such a requirement would "hamstring" the Agency in setting protective NAAQSs.

- The court rejected petitioners' "confounder" argument, i.e., the argument that various factors such as other pollutants, temperature, and humidity might account for the associations in studies that EPA attributed to PM2.5. The court stated that it had already decided that issue in EPA's favor in its first decision and that, in any event, the record established that the results were consistent in a number of different studies.

- The court declined to consider petitioners' argument that the daily PM2.5 standard (as opposed to the annual PM 2.5 standard) was "arbitrary and capricious." The court concluded that the petitioners had failed to challenge the daily standard in their briefs in the initial case and therefore could not belatedly raise the issue.

- Finally, the court disagreed with petitioners' position that EPA was obligated to obtain and make public the data underlying certain key studies relied upon by EPA. It ruled that the Act itself contains no requirement that underlying data be obtained and made public and that such a requirement would be "impractical and unnecessary."

Environmental Petitioners' Challenges to the Revised PM Standard

The environmental petitioners claimed EPA should have set a stricter *daily* primary PM2.5 standard rather than relying almost exclusively on the *annual* PM2.5 standard. They contended that EPA set the daily standard at the highest level it considered in the record and that such a lenient standard will do little to prevent harmful, short-term pollution events.

In addressing the environmental petitioners' arguments, the court deferred to EPA's expertise in analyzing the relevant studies concerning the health effects of PM. EPA explained that existing data are insufficient to allow EPA to separate the health effects of long-term average PM2.5 concentrations from those of short-term peak concentrations. The court specifically deferred to EPA's conclusion that setting a relatively stringent annual PM2.5 standard will most effectively ensure that adverse health effects are minimized.

The environmental petitioners also challenged the validity of the *secondary* PM2.5 standard, contending that the standard is inadequate to improve visibility in the western United States. However, the court noted that in its first decision it had concluded that Congress did not intend for the secondary NAAQSs to eliminate all adverse visibility effects and that the Agency could properly rely on the regional haze program to mitigate visibility effects caused by PM2.5.

Industry and State Petitioners' Challenges to the Revised Ozone Standard

These petitioners argued, first of all, that EPA had failed to apply "any legal standard" in setting the ozone NAAQS. However, the court disposed of this argument in the same way that it disposed of the similar argument raised in the challenge to the PM standard. According to the court, "EPA has no obligation either to identify an accurate 'safe level' of a pollutant or to quantify precisely the pollutant's risks prior to setting primary NAAQS."

The petitioners additionally raised two specific arguments regarding the primary ozone NAAQS: (1) that EPA had failed to determine whether attainment of the old one-hour ozone standard would leave an unacceptable public health risk and (2) that none of the alternative eight-hour standards considered by EPA (0.07 ppm, 0.08 ppm, or 0.09 ppm) is significantly more protective than the old standard.

With regard to the argument regarding EPA's failure to find that the old standard is inadequate, the court referred to several places in the record where EPA or the Clean Air Scientific Advisory Committee (CASAC) stated that the old one-hour standard was inadequate. Although the court believed that the petitioners' criticism of EPA's selection of a final standard had "some force," it nevertheless concluded that EPA had "engaged in reasoned decision-making" in selecting the 0.08 ppm level. Among other things, the court found that, because there were no human clinical studies at ozone concentrations below 0.08 ppm, it was reasonable for EPA to set the standard at a somewhat higher level, at least until additional studies become available.

Finally, the petitioners challenged the secondary ozone NAAQS because EPA allegedly failed to account for factors other than ozone that affected crop yields. However, the court rejected this approach, stating that EPA is to protect public welfare from the adverse effects of ozone regardless of whether other factors such as temperature, rainfall, and pests may cause more crop damage.

At the conclusion of its opinion, the court denied all the petitions for review except to the extent that any of the prior judicial opinions requires further action by EPA. In particular, EPA must still develop a new interpretation of the Act for implementation of the revised ozone standard, and it must address any possible health benefits resulting from ground-level ozone.

PSD Requirements

State of Alaska v. EPA, 298 F.3d 814 (9th Cir. 2002)

The U.S. Court of Appeals for the Ninth Circuit issued a decision upholding three orders issued by EPA that effectively invalidated a PSD permit issued by the Alaska Department of Environmental Conservation (ADEC). The permit had been issued to Teck Cominco Alaska, Inc., which operates a large zinc mine on the North Slope. In upholding EPA's orders, the court concluded that EPA has broad authority to overrule a state's determination regarding what constitutes BACT.

Background

The case involved a PSD permit issued by ADEC to the company so that it could increase the capacity of one of its six generators and construct a new generator to power additional mining equipment. In issuing the permit, ADEC determined that the use of Selective Catalytic Reduction (SCR) technology for the modified generator and the new generator would be economically infeasible and that BACT for the project should be based on the installation of low NOx burner technology on all of the company's generators.

Upon reviewing the proposed permit, EPA maintained that BACT for the modified and new generators must be based on SCR and issued a "Finding of Noncompliance Order" directing ADEC to withhold issuance of the proposed permit because it allegedly would violate the Act and Alaska's SIP. Despite the order, ADEC immediately issued the PSD permit as proposed. EPA subsequently issued two orders to the company to prevent it from beginning construction until EPA determined that the permit complied with the Act and the SIP.

Both ADEC and the company filed petitions for review with the Ninth Circuit challenging the three orders. In a March 2001 decision, *Alaska v. EPA*, 244 F.3d 748 (9th Cir. 2001), the court rejected EPA's arguments that the orders were not judicially reviewable final orders. The court subsequently directed the parties to file supplemental briefs addressing EPA's authority to issue the orders.

The Court's Decision

After reviewing the language of the Act and its legislative history, the court concluded that "although the state has discretion to make BACT determinations as the permitting authority, the Act provides for EPA enforcement when the state issues a permit based on an improper determination" and "that EPA has the ultimate authority to decide whether the state has complied with the BACT requirements of the Act and the state SIP." The court then rejected petitioners' arguments (1) that EPA may not overrule a state's BACT determination on projects where the state is to exercise discretion and (2) that EPA's authority is limited to enforcing "objective requirements," e.g., that the source obtain a

permit, that the state permitting authority make a BACT determination, and that the state permitting authority consider the statutory factors in making the BACT determination. Instead, the court ruled that EPA had authority to decide whether ADEC had adequately justified each element of its BACT determination.

Finally, the court found that EPA's decision that ADEC's BACT determination was unsupportable was itself not arbitrary and capricious and would be affirmed. The court explained that, in applying the "top-down BACT" approach, ADEC was obligated to determine that SCR constituted BACT unless it could show that SCR was economically infeasible. According to the court, the record failed to show that any of the circumstances in which a control option could be rejected based on cost considerations were present. Instead, ADEC had sought to justify its determination by relying upon the mine's contribution to reducing unemployment rates in the area and the excessive costs of SCR technology in relation to the competitive status of the mine. The court concluded that ADEC's justification was unacceptable under the top-down approach and that EPA had properly determined that it was arbitrary and capricious.

United States v. Southern Indiana Gas and Electric Co., No. IP 99-1692-C-M/F, 2002 WL 1629817 (S.D. Ind. July 18, 2002); 2002 WL 1760699 (S.D. Ind. July 26, 2002); 2002 WL 1760752 (S.D. Ind. July 26, 2002); 2002 WL 31427523 (S.D. Ind. Oct. 24, 2002)

A federal district court in Indiana issued four separate pre-trial rulings on important issues in EPA's enforcement action against a utility company for allegedly undertaking "major modifications" of a coal-fired power plant without obtaining PSD permits. The enforcement action was brought as a part of EPA's November 1999 NSR enforcement initiative. We discuss each of these rulings in more detail below.

Compliance with the Congressional Review of Agency Rule Making Act (CRA)
2002 WL 31427523 (S.D. Ind. Oct. 24, 2002)

In a motion for summary judgment, the company argued that EPA had violated the CRA by establishing a new agency rule or policy without submitting a report to Congress on the rule or policy as required by that statute. In particular, the company maintained that EPA had changed its interpretation of the exclusion for "routine maintenance, repair, and repair" in such a way that the Agency created a new rule or policy. In support of its contentions, the company submitted four declarations from former high-ranking EPA and DOE officials.

In response, EPA argued that the court lacked jurisdiction to review its compliance with the CRA based on a provision in that statute stating that no "determination, finding, action, or omission under this chapter shall be subject to judicial review." The Agency further contended that it had not changed its interpretation of the "routine maintenance" exclusion and that, in any event, it had not promulgated any pertinent rule or policy triggering CRA requirements.

The district court rejected EPA's argument that it lacked jurisdiction over the company's CRA claim. The court concluded that the language of the provision restricting judicial review was ambiguous. According to the court, it was unclear whether the prohibition on judicial review applied to actions of both administrative agencies and Congress or only to actions of Congress. Because of this ambiguity,

the court examined the statute's legislative history and concluded that Congress had intended that the judicial review prohibition would only bar review of actions taken by Congress itself.

With regard to the merits of the company's claim, the district court ruled that the company had failed to show that EPA had violated the CRA. The court stated that the question before it was whether EPA had promulgated a new rule or policy addressing the "routine maintenance" exclusion after March 1996 – the effective date of the CRA – without following the CRA's reporting requirements. The court then ruled that the declarations of former high-ranking officials were inadmissible as evidence to demonstrate EPA's pre-1996 interpretation of the exclusion. According to the court, although the declarations addressed the background of the statutory and regulatory PSD/NSR provisions, they did not establish what the law was with regard to the PSD regulations and did not aid the court in determining EPA's pre-1996 interpretation of the "routine maintenance" exclusion. The court opined that the question of how the PSD regulations worked was one of law, not fact, to be determined by the court.

The court further concluded that the Seventh Circuit in *Wisconsin Elec. Power Co. (WEPCO) v. Reilly*, 893 F.2d 901 (7th Cir. 1990), had upheld EPA's four-part test for applying the "routine maintenance" exclusion – the same test that EPA purports to be using at the present time. It also rejected the company's attempt to rely on EPA's 2000 letter to the Detroit Edison Company to establish that EPA had changed its interpretation of the exclusion sometime after March 1996. The court believed that EPA applied the basic test upheld in the *WEPCO* case in the Detroit Edison letter and concluded that "the Detroit Edison letter does not represent the kind of departure from WEPCO and the language of the CAA that [the company] ascribes to it, and it does not constitute a new, post-1996 rule under the CRA." As a result, the court denied the summary judgment motion on this question.

PSD Applicability Determination Prior to Construction of a Project
2002 WL 1629817 (S.D. Ind. July 18, 2002)

In its motion for partial summary judgment, the company contended that there was no evidence that, following the completion of certain projects, the projects caused any actual emissions increase. According to the company, this established that the company had not been required to obtain PSD permits.

In opposing the company's motion, EPA argued that the company was required to predict the amount of any emissions increase before commencing construction. EPA maintained that the company's "wait and see" approach conflicts with the statutory language and the purpose of the PSD program.

The court agreed with EPA's position and expressly adopted the relevant portion of the Environmental Appeals Board's decision in *In re: Tennessee Valley Authority* (EAB, September 15, 2000) addressing this issue. In that decision, the Board concluded that, because the PSD provisions of the Act create a pre-construction permitting program, PSD applicability determinations must always be made before commencement of construction. The Board stated that a facility must predict post-project emissions before commencing construction and that post-modification emissions data alone cannot establish that the modification did not trigger PSD requirements. Based on its adoption of the Board's decision, the court denied the company's motion for partial summary judgment on this point.

Applicability of General Statute of Limitations
2002 WL 1760752 (S.D. Ind. July 26, 2002)

The company also argued in its motion for partial summary judgment that the five-year general statute of limitations in 28 U.S.C. § 2462 bars EPA's claims for civil penalties with regard to projects undertaken in 1991 and 1992. EPA argued in its opposition that the statute of limitations had not begun to run because the alleged failures to obtain PSD permits for those projects were "continuing violations."

In its decision, the court drew a sharp distinction between preconstruction permits and operating permits. The court concluded that the failure to obtain a preconstruction permit – in contrast to the failure to obtain an operating permit – is a discrete violation that occurs at the time of construction and therefore does not constitute a continuing violation. In this regard, the court stated that "[a] significant majority of district courts that have considered the issue have concluded that violations of PSD preconstruction permits do not constitute violations that continue past the completion of construction." The court noted that the statute of limitations, which expressly addresses civil penalties, would not bar EPA from seeking injunctive relief with regard to the 1991-1992 projects and had no impact on civil penalty or other claims involving projects undertaken in 1997.

Effect of State PSD Non-Applicability Determination
2002 WL 1760699 (S.D. Ind. July 26, 2002)

The company sought partial summary judgment regarding projects constructed in 1997 based on an express determination of the Indiana Department of Environmental Management (IDEM) that the projects were not subject to PSD requirements. In opposing the motion, EPA argued that IDEM's determination was incorrect and that the Agency was not bound by that determination.

The projects in question involved refurbishing a unit at a power plant by replacing steam tubes in a secondary superheater, replacing sections of a turbine with new blades of a more advanced design, and making other miscellaneous repairs. In response to formal requests from the company, IDEM had issued a written determination that the activities in question constituted "routine maintenance, repair, and replacement" and therefore were not subject to PSD requirements.

In arguing that EPA cannot attack IDEM's non-applicability determination, the company maintained: (1) that the Act makes such State determinations binding on EPA; (2) that IDEM is EPA's agent for implementing the delegated PSD program and that EPA is bound because of the agency relationship; and (3) that EPA is equitably estopped from asserting a view that is inconsistent with IDEMs determination.

The district court rejected the argument that the Act makes IDEM's non-applicability determination binding on EPA. According to the district court here, "the plain language of [section 113 of the Act] indicates that in such a situation the Government is not precluded from acting. Indeed, that section's broad language provides that the Administrator can bring an action whenever it finds that any person has violated 'any requirement or prohibition' of 'an applicable implementation plan or permit.' There is no language in the Act that precludes the Government from initiating an enforcement action if a source has already obtained a permit – or in this case, an applicability determination – from a state agency." In doing so, it declined to follow two decisions *(United States v. AM General*, 34 F.3d 472 (7th Cir. 1994); and *United States v. Solar Turbines*, 732 F. Supp. 535 (M.D. Pa. 1989)), which both indicated that

EPA could not bring an enforcement action against a source that had obtained an NSR/PSD permit from the state agency authorizing the project involved.

With regard to the argument that EPA was bound because IDEM was acting as its agent, the court ruled that EPA had not delegated all of its enforcement authority to IDEM. The court concluded that the Act and the letters delegating EPA's authority to administer and enforce the federal PSD program had expressly reserved EPA's right to independently enforce the PSD provisions.

The court also summarily rejected the company's argument that EPA was "equitably estopped" from bringing an enforcement action. It ruled that the company should have been aware that EPA had retained enforcement authority and that the company had not shown that EPA had engaged in any affirmative misconduct that would have caused the company to rely on the non-applicability determination to its detriment. Accordingly, the court denied the company's motion for partial summary judgment insofar as it was based on IDEM's non-applicability determination.

See Tennessee Valley Authority v. EPA, 278 F.3d 1184 (11th Cir. 2002) (Justiciability).

Regional Haze

American Corn Growers Ass'n v. EPA, 291 F.3d 1 (D.C. Cir. 2002)

In a decision that will have major impacts on EPA's regional haze program, the D.C. Circuit issued a decision vacating the provisions in EPA's 1999 regional haze rule addressing the requirement for certain sources to install the best available retrofit technology (BART). The D.C. Circuit concluded that EPA's use of a "group-BART" approach in the rule contravened the statute. However, the court rejected industry petitioners' arguments that EPA's establishment of a "natural visibility" goal and a "no degradation" requirement in the rule is unlawful. Because the court believed that, on remand, EPA likely will significantly alter key elements of the rule, it declined to address various challenges made by the Sierra Club to the rule.

Background

Section 169A of the Act provides that EPA is to promulgate regulations requiring States to revise their SIPs in order to make "reasonable progress" toward achieving the national visibility goal – the "prevention of any future, and the remedying of any existing, impairment in visibility in mandatory class I areas when impairment results from man-made air pollution." Moreover, section 169A provides special requirements for any major source placed into operation between 1962 and 1977 that emits pollutants that "may be reasonably anticipated to cause or contribute to any impairment of visibility" in a class I area. If the State determines that a source meets these statutory criteria, the source must install controls that constitute BART. Once a State determines that a source is subject to BART requirements, the State is to consider the following five factors to decide which controls constitute BART for the source in question: compliance costs; energy and nonair quality environmental impacts; the existing pollution control technology; remaining useful life; and the degree of visibility improvement which may reasonably be anticipated to result from the technology.

In the 1999 regional haze rule, EPA provided that States are to revise their SIPs to achieve a goal of attaining "natural visibility" in class I areas within 60 years. In implementing the statutory BART requirements, EPA emphasized a "group-BART" approach. EPA used the group-BART approach in two ways. First, the rule stated that, in determining whether there was a contribution to visibility impairment, the States must consider the collective contributions of all sources within a geographic area. Second, the rule provided that, although four of the five statutory factors were to be applied on a source-specific basis, the fifth factor – the degree of visibility improvement that will result – was to be applied on a group basis.

Ruling on BART Provisions

Industry petitioners maintained that EPA's group-BART approach conflicts with the statute and is arbitrary and capricious. By a 2-1 vote, the three-judge panel ruled that the group-BART provisions "are contrary to the text, structure, and history" of the Act and "are inconsistent with the Act's provisions giving states broad authority over BART determinations." The court first examined EPA's use of group-BART in directing the States how to determine what constitutes BART. The court concluded that EPA could not provide that the States apply four of the statutory factors on a source-specific basis but mandate that the remaining factor of "visibility improvement" be applied on a group basis. According to the court, the rule's "splitting of the statutory factors is consistent with neither the text nor the structure of the statute. . . . To treat one of the five statutory factors in such a dramatically different fashion distorts the judgment Congress directed the states to make for each BART-eligible source." The court pointed out that, under EPA's approach, a State could never reasonably determine that particular controls are too costly for an individual source because the regulations compel the State to compare the costs of controls for that source with the collective benefits resulting from emissions reductions from an entire group of sources. As the court stated, "[u]nder EPA's take on the statute, it is therefore entirely possible that a source may be forced to spend millions of dollars for new technology that will have no appreciable effect on the haze in any Class I area."

The D.C. Circuit also found that, aside from consideration of the statutory factors in determining what constitutes BART, the group-BART approach is inconsistent with the Act's provisions giving States broad authority in determining which sources should be subject to BART. The court explained that, under the Act, it is the State – not EPA – which must determine whether a major source that otherwise satisfies the statutory criteria will cause or contribute to visibility impairment in class I areas and therefore is subject to BART requirements. The court concluded that, because of the group-BART approach, the rule "ties the states' hands and forces them to require BART controls at sources without any empirical evidence of the particular sources contribution to visibility impairment in a class I area."

Ruling on Visibility Goal

The industry petitioners argued that EPA exceeded its statutory authority by adopting regulations that establish a return to "natural visibility" as the goal of the regional haze program and that conflict with the statutory PSD program. According to the industry petitioners, the rule's natural visibility goal exceeds the Act's national visibility goal of "prevention of any future, and remedying of any existing, impairment in visibility . . . ." They also maintained that, because the Act's PSD provisions authorize the States to allow some air quality degradation in attainment areas, the rule's natural visibility goal and its requirement that there be no degradation of visibility conflict with the statutory PSD provisions.

The court rejected industry petitioners' arguments and ruled that EPA's implementation of the national visibility goal was entitled to deference. According to the court, "[a]gency regulations that aim to remedy any existing impairment of visibility and prevent any future impairment – as the statute commands – will of necessity aim to achieve a state of natural visibility."

The court likewise concluded that the regional haze rule did not conflict with the Act's PSD provisions. It stated that EPA had reasonably construed the PSD program and the regional haze program as "complementary regulatory regimes." In this regard, the court pointed out that "the natural visibility goal is not a mandate, it is a goal." From this, the court concluded that States already have flexibility in making reasonable progress toward this goal. In particular, the court stated that short-term emissions increases due to new sources subject to PSD were not inconsistent with the long-term goal of achieving natural visibility.

The Sierra Club's Issues

The Sierra Club argued that the regional haze rule did not go far enough to achieve visual improvement in several respects. In particular, the Sierra Club contended that the criteria for measuring or assuring "reasonable progress" were too lenient and that EPA had acted contrary to law in extending the statutory deadline for submission of state haze control plans. However, the court concluded that "our decision to invalidate the group-BART provisions renders [the Sierra Club's] entire cluster of challenges unripe for disposition." The court indicated that the Sierra Club could raise its challenges again, if appropriate, once EPA completes the remand on the rule's BART provisions.

Statute of Limitations

See United States v. Southern Indiana Gas and Electric Co., No. IP 99-1692-C-M/F, 2002 WL 1760752 (S.D. Ind. July 26, 2002) (PSD Requirements).

Title V Permit Program

LaFleur v. Whitman, 300 F.3d 256 (2d Cir. 2002)

The U.S. Court of Appeals for the Second Circuit issued a decision affirming EPA's determination not to object to a Title V permit for a combination waste processing/chemical processing facility. The key issue was whether the facility owner was required to obtain a PSD permit in connection with the construction of the new facility. The court of appeals held that EPA properly rejected the citizen petitioners' contentions that the portion of the facility engaged in chemical processing (ethanol production) triggered PSD requirements. The court's decision contains a lengthy discussion concerning the determination of a facility's "primary activity" for PSD purposes as well as EPA's "embedded facility" doctrine.

Background

The case involved an effort by the company to obtain a Title V operating permit in connection with the construction of an innovative waste processing/chemical processing facility in Middletown, New York. The facility is designed to process municipal solid waste from surrounding jurisdictions while also producing ethanol for commercial purposes. The New York State Department of Environmental Conservation (NYSDEC) issued a Title V permit to the company in July 2000.

Numerous petitioners filed a petition pursuant to section 505(b)(2) of the Act requesting that EPA object to NYSDEC's issuance of the permit. They maintained that the permit should have provided that the facility is subject to PSD requirements. The Administrator subsequently issued a decision denying that petition and upholding the Title V permit. *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC,* Petition No. II-2000-07 (May 2, 2001). In that decision, EPA ruled that the primary activity of the facility would be waste processing rather than chemical processing. This was significant because, under the statute and regulations, a chemical process plant has a major source cutoff of 100 tpy while a waste disposal plant has a major source cutoff of 250 tpy. Because the facility's potential to emit would not exceed 250 tpy for any regulated pollutant, PSD requirements would not be triggered by the facility's primary activity. At the same time, EPA also concluded that the portion of the facility engaged in chemical processing might trigger PSD requirements because it would be considered an "embedded"chemical process plant under EPA's long-standing policy. However, EPA found that the emissions attributable to the embedded chemical process plant would be less than 100 tpy for SO_2 and all other regulated pollutants.

Certain petitioners (two citizens residing near the facility, trustees of a nearby shopping center, and their consultant) filed a petition for review in the Second Circuit challenging EPA's decision not to object to the permit. The petitioners made two principal arguments regarding why E{AEGAS denial of the petition should be reversed. First, they contended that EPA had improperly weighed the evidence in determining that the "primary activity" of the facility would be waste processing rather than chemical processing. In particular, they maintained that EPA had erred in basing its determination on the projection that 70 percent of the facility's revenues would come from processing of municipal wastes. Second, the petitioners attacked EPA's conclusion that the potential to emit of the "embedded" chemical process plant at the facility would not exceed 100 tpy for SO_2 because EPA had determined that emissions from the gasifier should be allocated to the waste processing portion of the facility.

The Court's Decision

The court of appeals first considered arguments of EPA and the company that the doctrine of collateral estoppel prevented the petitioners from relitigating the issues of whether chemical processing is the primary activity of the facility and whether the embedded chemical process plant would otherwise trigger PSD requirements. (Under the doctrine of collateral estoppel, a party cannot relitigate an issue that has previously been decided adversely to it in separate litigation involving the same parties or parties that are closely related.) The Second Circuit agreed that, because the petitioners had raised the same issues in a prior state court proceeding and the state court had ruled against them, the petitioners could not relitigate the issues in federal court. Accordingly, the court of appeals ruled that the petitioners case could be dismissed on collateral estoppel grounds. However, the court went on to address the merits of the petitioners' claims.

With regard to the merits, the court upheld EPA's determination that the primary activity of the facility would be waste processing rather than chemical processing as well as EPA's conclusion that emissions from the gasifier should be allocated to the primary activity rather than to the embedded chemical process plant. The court ruled that EPA could permissibly base its "primary activity" determination on the projection that 70 percent of the facility's revenues would come from waste processing rather than ethanol production even though most of the processing steps would involve ethanol production. The court also ruled that EPA's determination that the embedded chemical process plant would emit less than 100 tpy of SO_2 was not arbitrary or capricious. The court found that, because the gasifier would be used to combust lignin – an intermediate waste product – EPA could reasonably allocate those emissions to the waste processing operation despite the fact that the steam generated would be used in ethanol production. Based on these conclusions, the court denied the petition for review.

***Sierra Club v. Whitman*,** No. 01-01991 (D.D.C., January 30, 2002).

A federal district court judge addressed two significant issues related to Title V permit processing in deciding a case brought in the District of Columbia to compel EPA to respond to a petition to object to a permit issued by the Georgia Environmental Protection Division (EPD). First, the court ruled that EPA's 45-day review period cannot run concurrently with the 30-day public comment period for Title V permits. Second, the court concluded that the doctrine of "equitable tolling" can extend the period for submission of citizen petitions beyond the 60 days provided for in the Clean Air Act and EPA and State regulations.

Parallel Review of Title V Permits

In deciding whether the public comment and EPA review periods can run concurrently, the court began with an analysis of the statutory framework. The court pointed out that the public must be provided an opportunity to comment for a period of 30 days on a "draft" permit. It then noted that EPA's 45-day period for objecting to a permit begins after it receives a copy of a "proposed" permit. Even though Georgia has an approved Title V program, the court nowhere referenced the State's regulatory provisions implementing the federal Title V program.

Relying on the distinction between a "draft" and "proposed" permit, the court concluded that the State did not have authority under the Act to submit a proposed permit before the close of the 30-day public comment period. It stated that "permitting EPA review prior to the close of the public comment period would undermine the ability of the public to participate in the permitting process and thereby frustrate the purposes of the Act." It further stated that a "permit program would not be 'adequate' if it allowed the permitting authority to pass on and EPA to review a draft permit that had never been subjected to public scrutiny." Based on this analysis, the court ruled that EPA's receipt of the permit on which the public was provided an opportunity to comment was a "draft" permit, not a "proposed" permit. It further ruled that EPA's 45-day review period did not commence until sometime after the close of the public comment period.

The court's ruling only addressed the issuance of initial Title V permits. However, the ruling presumably would also apply to the issuance of renewal permits. Because significant permit modifications are to be processed in the same manner as initial permits, there is reason to be concerned about whether processing of such modifications could be affected by this ruling.

In addition, the court did not address the situation where State Title V programs specifically provide for parallel processing. The provisions of such programs providing for parallel processing should continue to be the governing law until such programs are revised.

Equitable Tolling of Objection Petitions

The issue given the most attention in the case was whether there can be "equitable tolling" of the period for citizens to file a petition requesting that EPA object to the issuance of a Title V permit. The court first reviewed case law relating to "equitable tolling" as a legal principle and concluded that such tolling is permissible. The court's reasoning emphasized that Congress had used the word "may" in providing that citizens had a period of 60 days in which to file a petition and elsewhere had used the word "shall" in specifying required actions of the permitting authority and EPA. However, the court failed to recognize that "may" was used because objection petitions are not mandatory, but are optional and expected to be filed in limited circumstances. Thus, the court's analysis on this issue appears to be unconvincing.

The specific facts that the court considered involved a situation where the Sierra Club had clearly been misinformed by the Georgia EPD regarding whether a permit would be reproposed and thus would result in the Sierra Club's having additional time to submit an objection petition. The court did not have to reach the "tolling" issue but rather could have achieved the same practical outcome by concluding that the objection period would run from the date that the Georgia EPD had indicated that the permit would be reproposed. Nonetheless, because the facts presented do not seem to provide a precedent for many other circumstances to justify "equitable tolling," it will probably be rare that the period for citizens to file petitions would be extended.

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