

## EPA Adopts Final BART Guidelines

On July 6, 2005, EPA issued a rule adopting final guidelines for Best Available Retrofit Technology (BART) under the regional haze program and revisions to the regional haze regulations. 70 Fed. Reg. 39,104. In part, EPA's rule is in response to *American Corn Growers Association v. EPA*, 291 F.3d 1 (2002), in which the D.C. Circuit set aside BART-related elements of the regional haze regulations. Set out below is a summary of key aspects of the final rule.

### Background

EPA published its final regional haze rule on July 1, 1999. 64 Fed. Reg. 35,714. The rule requires states to submit SIPs to address regional haze visibility in Class I areas established under the Clean Air Act. Among the provisions of the rule is a requirement for BART to be established for certain large stationary sources that were put in place between 1962 and 1977. "BART-eligible sources" are sources which (1) have the potential to emit 250 tons or more of a visibility-impairing air pollutant, (2) were put in place between August 7, 1962 and August 7, 1977, and (3) whose operations fall within one or more of 26 specifically-listed source categories. Under the Act, BART is required for any BART-eligible source which a state determines "emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area."

Under section 169A(g)(7), states must consider the following factors in making BART determinations:

- The costs of compliance;
- The energy and non-air quality environmental impacts of compliance;
- Any existing pollution control technology in use at the source;
- The remaining useful life of the source; and
- The degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

In response to challenges to the regional haze rule, the D.C. Circuit in *American Corn Growers* issued a ruling striking down the rule in part and upholding it in part. EPA had provided in the rule that, if a source potentially subject to BART is located within an upwind area from which pollutants may be transported downwind to a Class I area, that source "may reasonably be anticipated to cause or contribute" to visibility impairment in the Class I area. EPA also specifically provided that, in weighing the factors set forth in the Act for determining BART, states should consider the collective impact of BART sources on visibility.

In *American Corn Growers*, the D.C. Circuit ruled that EPA's collective contribution approach to determining BART applicability was inconsistent with the provisions in the Act "giving the states broad authority over BART

determination.” The court did not specifically rule that the approach was necessarily inconsistent with the Act. However, the court did find that EPA’s requirement that states consider the degree of improvement in visibility that would result from the cumulative impact of applying controls in determining BART was inconsistent with the language of the Act.

### **Changes in Response to *American Corn Growers***

***Determination of Which Sources are Subject to BART.*** In response to the court’s decision, EPA eliminates the requirement that states must assess visibility on a cumulative basis in determining which sources are subject to BART. However, EPA continues to provide that states have the option of concluding that all BART-eligible sources within the state are subject to BART. Other “options” are for states to make a determination that the full group of BART-eligible sources in a state cumulatively may not be reasonably anticipated to cause or contribute to any visibility impairment in Class I areas or to consider the individualized contribution of a BART-eligible source to determine whether it is subject to BART. EPA also states that States may choose to presume that all BART-eligible sources meet the applicability test, but provide sources with the ability to show on a case-by-case basis that this is not the case. This revision to the rule is likely to provide little real-world change to determining BART applicability. States are still likely to opt to review applicability on a cumulative basis.

### ***Consideration of Anticipated Visibility Improvements in BART Determinations.***

EPA also amends the regional haze rule to require that states consider the degree of visibility improvement resulting from a source’s installation and operation of retrofit technology, along with other statutory factors, when making a BART determination. The effect of this

revision is to require states to consider all five factors, including visibility impacts, on an individual source basis when making each individual source BART determination. This change should be of benefit in making reasonable BART determinations.

EPA also points out that the D.C. Circuit set aside provisions of the regional haze rule governing the establishment of alternatives to BART. *Center For Energy and Economic Development v. EPA*, 398 F.3d 653 (2005). Specifically, the court ruled that EPA could not require that visibility improvements for source-specific BART be estimated based on the application of BART controls to all sources subject to BART. In light of the court’s decision, EPA did not include the portion of the proposed BART guidelines addressing alternative programs in this rulemaking.

### **Relationship Between BART and CAIR**

In the Clean Air Interstate Rule (CAIR), EPA indicated that it was considering making a finding that CAIR may be a BART-substitute for electric generating units. In this rule, EPA issues its final determination that CAIR states may treat CAIR as a BART-substitute for these units.

The bulk of the final rule and preamble responds to comments on EPA’s proposed BART guidelines and EPA’s proposed response to the court’s decision in the *American Corn Growers* case. The final BART guidelines are contained in Appendix Y to Part 51. □

### **D.C. Circuit Issues Greenhouse Gas Decision**

On July 15, 2005, the D.C. Circuit issued its opinion in a case in which state, local

government, and environmental group petitioners sought to have the court overturn EPA's denial of a petition asking it to regulate CO<sub>2</sub> and other greenhouse gas emissions from new motor vehicles under section 202(a)(1) of the Clean Air Act. *Massachusetts v. EPA*, No. 03-1361. In a split decision, the court upheld EPA's denial of the petition to regulate greenhouse gas emissions. Three separate opinions were issued in the case: a 15-page majority ruling issued by Judge Randolph; a 5-page opinion dissenting in part and concurring in the judgment issued by Judge Sentelle; and a 38-page dissenting opinion issued by Judge Tatel. The three opinions are briefly summarized below.

### **Majority Opinion of Judge Randolph**

After first concluding that EPA's denial of the petition to regulate greenhouse gas emissions constitutes final agency action, Judge Randolph indicates that the next issue to be addressed is whether petitioners have Article III standing to bring the action. The judge reviews the numerous affidavits submitted by petitioners alleging injury from greenhouse gases, but decides not to make a final ruling on standing, noting that, as the Supreme Court explained in a prior decision, "the merits inquiry and the statutory standing inquiry often overlap." As a consequence, the judge proceeds to the question of whether EPA properly denied the petitioners' request to regulate greenhouse gas emissions.

Judge Randolph declines to make a ruling as to whether EPA has the statutory authority to regulate greenhouse gases from new motor vehicles. Instead, he assumes, for purposes of his analysis, that EPA has such authority and thus addresses whether EPA properly declined to exercise that authority. The judge then summarizes the scientific authority with regard to global warming and notes that EPA based its decision not to regulate primarily on the scientific uncertainty about the cause and effects of greenhouse gases on future climate and upon

"policy" considerations that the Administrator believed warranted "regulatory forbearance" at this time. He then pointed out that a "determination of endangerment to public health" is "necessarily a question of policy that is to be based on an assessment of risk and that should not be bound by either the procedural or the substantive rigor proper for questions of fact." He further stated that the court will uphold agency conclusions based on policy judgment when the agency must resolve issues "on the frontiers of scientific knowledge." Based on this reasoning, the judge concluded that the EPA Administrator properly exercised his discretion under section 202(a)(1) in denying the petition for rulemaking.

### **Dissent in Part and Concurrence in the Judgment of Judge Sentelle**

Judge Sentelle states that he would dismiss petitioners' challenge on the grounds that they lack standing to bring the action. He reviews various Supreme Court decisions in which the Court has indicated that:

[A] plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy. Citation omitted.

After reviewing cases making similar points, Judge Sentelle states that, "even in the light most favorable to the petitioners, in the end [their allegations and affidavits] come down to this: Emission of certain gases that the EPA is not regulating may cause an increase in the

temperature of the earth – a phenomenon known as ‘global warming.’” He then points out that this is “harmful to humanity at large,” and appears to him “to be neither more nor less than the sort of general harm eschewed as insufficient to make out an Article III controversy.”

After explaining that his disagreement with Judge Randolph’s analysis means that the three judges have different views on how the case should be disposed of, Judge Sentelle indicates that he would join in the majority ruling that denies the petitions challenging final action by EPA.

### **Dissenting Opinion of Judge Tatel**

Judge Tatel indicates at the outset of his dissent that it is his opinion that at least one petitioner, the Commonwealth of Massachusetts, has standing and that EPA has failed to offer a lawful explanation for its decision. Before proceeding to the legal issues presented, his dissent sets out a more lengthy review of the scientific evidence related to global warming than the majority opinion of Judge Randolph. In the balance of his dissent, he states the following positions:

- Massachusetts satisfies each element of Article III standing and specifically has demonstrated that it would suffer “harm particularized to” itself.
- In addressing the merits of whether EPA is required to regulate greenhouse gases under section 202(a)(1), Judge Tatel first states that greenhouse gases are “air pollutants.” He rejects EPA’s argument that Congress would have provided specific authority to regulate greenhouse gases and not simply call for study of climate

change, if Congress intended for EPA to regulate greenhouse gases under the Clean Air Act. Judge Tatel bases his reasoning on statutory language that specifically refers to carbon dioxide as an air pollutant and provides that EPA has authority to regulate welfare effects which include effects on “climate.” He also rejects a series of other EPA arguments as to why the Act should be read not to grant EPA authority to regulate greenhouse gases.

- After stating that EPA has authority to regulate greenhouse gases, Judge Tatel then rejects EPA’s reasons for declining to grant the petition for rulemaking. Judge Tatel asserts that the EPA Administrator is required to “prescribe . . . standards applicable to the emission of any air pollutant from . . . new motor vehicles . . . which, in his judgment, cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” He states that EPA’s discretion is limited to judging whether there is a reasonable anticipation of endangerment to public health or welfare and not whether EPA believes such regulation would be “bad policy.” Based upon precedents that he cites, he indicates that “EPA may withhold an endangerment finding only if it needs more information to determine whether the statutory standard has been met.” For EPA to make a finding of no endangerment, he states that EPA “must ground that conclusion in the statutory standard and may not rely on unrelated policy considerations.”

He states that EPA never suggests that scientific uncertainties prevent it from determining whether greenhouse gases may reasonably be anticipated to endanger welfare and states his doubts that “EPA could credibly conclude that it needs more research to determine whether [greenhouse gas-caused] global warming ‘may reasonably be anticipated to endanger’ welfare.”

- Judge Tatel’s ultimate conclusion is that “EPA has both misinterpreted the scope of its statutory authority and failed to provide a statutorily-based justification for refusing to make an endangerment finding” and thus he would grant the petitions for review. □

## Federal Court Dismisses Global Warming Claims

On September 15, 2005, a federal district court issued a decision in an action brought against American Electric Power, Southern Companies, TVA, Xcel, and Cinergy seeking to have the court find that the utilities’ emissions of carbon dioxide constitute a public nuisance because of their contribution to global warming. *Connecticut, et al. v. American Elec. Power, et al.*, No. 04 Civ. 5669, 5670 (LAP) (S.D.N.Y.). The court dismissed the complaint on grounds that it lacks jurisdiction because the complaint presents a non-justiciable political question.

The court first reviews the allegations in the complaint which set forth a lengthy listing of the scientific views that support the conclusion that carbon dioxide emissions are contributing to global warming. The court then reviews the various acts of Congress and EPA statements that address global warming issues. Also, the

court presents the views of the Clinton and Bush Administrations regarding the Kyoto Protocol.

The court indicates that the threshold issue is whether the claims presented are justiciable. It indicates that the absence of standing or the presence of a political question “suffices to prevent the power of the federal judiciary from being invoked by the complaining party.” The court indicates that the standing issue is inextricably intertwined with the merits and, as a consequence, the court addresses the issue of whether the claim involves a political question. The court points out that “to determine if a case is justiciable in light of the separation of powers ordained by the Constitution, a court must decide ‘whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.’” The court reviews six different indicia of what would indicate the existence of a non-justiciable political question. The court explains that the indicator of particular interest is whether the court “confronts ‘the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion.’”

The court then reviews the numerous “initial policy determinations” that the defendants indicate would have to be made by the elected branches before any court could address the issues. These relate to: who should bear the societal costs of reducing greenhouse gas emissions; whether all utilities should be responsible, rather than just the five defendants; the implications of the various choices; and the implications for the nation’s energy independence and, by extension, its national security. The court also points out that it would be required to make numerous policy judgments in determining how to fashion a remedy for plaintiffs’ claims, including the level at which to establish a cap of carbon dioxide emissions, the appropriate percentage reduction, a schedule for

reduction, and a number of other policy determinations.

The court concludes that “because resolution of the issue presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, ‘an initial policy determination of a kind clearly for non-judicial discretion’ is required.” The court further states that “the questions presented here ‘uniquely demand single-voiced statement of the Government’s views.’” The court then concludes that the actions present non-justiciable political questions that are “consigned to the political branches, not the Judiciary.” □

## Cinergy NSR Ruling Conflicts With Fourth Circuit’s Opinion In *Duke Energy*

On August 29, 2005, the federal judge hearing the NSR enforcement action brought against Cinergy by EPA issued a ruling on cross-motions for partial summary judgment regarding the applicable test for determining emissions increases. *U.S. v. Cinergy Corp.*, No. 1:99-cv-01693-LJM-VSS (S.D. Ind.). In a brief memorandum opinion, the judge granted EPA’s motion and denied Cinergy’s, ruling that emissions increases are to be determined based upon an “actual-to-projected-actual” test. Cinergy had argued that there must be an increase in the hourly emissions rate in order to trigger NSR applicability, relying on the Fourth Circuit decision in the *Duke Energy* case.

The judge’s opinion first briefly summarizes the decisions in the principal NSR cases that have been decided to date. In particular, the court summarized the recent D.C. Circuit ruling on the 2002 NSR rule, the *WEPCO* decision, and the *Duke Energy* opinion.

As noted above, the principal issue that the court addressed is how emissions increases are to be determined under EPA’s 1980 NSR regulations. The judge ruled that there is nothing in the Congressional history that indicates that Congress intended to incorporate the NSPS regulatory definition of “modification,” which requires an increase in the hourly emissions rate. He further ruled that Congress did not limit EPA’s authority to define modification “as it deemed fit to serve the purposes of the PSD program.” The judge rejects Cinergy’s argument that EPA’s current litigation position is contrary to its own earlier acknowledgements that Congress intended for EPA to conform the meaning and usage of modification in PSD to that in NSPS. The judge indicates that EPA’s references were to narrow specific issues and not to the issue of whether there must be an hourly emissions rate increase in order for the change to constitute a modification. The judge also finds that EPA’s current interpretation is not inconsistent with the *WEPCO* decision or EPA’s own earlier interpretations.

The judge summarily dismisses the holding of the Fourth Circuit in the *Duke Energy* case, which held that “a net emissions increase can result only from an increase in the hourly rate of emissions.” *Duke Energy*, 278 F. Supp. 2d at 640. The judge states that the *WEPCO* decision in rejecting the actual-to-potential test contemplated that there would be a projection of future actual emissions in determining whether there is an emissions increase and that a facility’s operations would not be held constant in projecting future annual emissions.

The judge indicates that Cinergy was concerned that EPA’s interpretation of “modification” would eliminate the “causation element.” The judge ruled, however, that the exclusion for increased hours of operation would preclude an increase in hours or production rate unrelated to a physical change. However, the court’s ruling implicitly seems to accept the fact that, if there

is a change, any subsequent increased operations can properly be deemed to result from the change.

In the *Duke Energy* decision, the district court and appellate court had relied heavily on the interpretations issued by Edward Reich shortly after the 1980 regulations were promulgated. In those interpretations, Reich indicated that a change would not trigger NSR if the increase in emissions was attributable to increased hours of operation. The judge indicated his agreement with the decision in the *Ohio Edison* case in which the court ruled that the Reich interpretations “are contrary to the plain language” of the Act and EPA’s regulations. □

## EPA And Industry File Rehearing Petitions In 2002 NSR Rule Case

On August 8, 2005, EPA, the Clean Air Implementation Project (CAIP) and the Utility Air Regulatory Group (UARG) filed petitions for rehearing or rehearing *en banc* with the D.C. Circuit in the 2002 NSR rule case. EPA and CAIP asked that the court grant rehearing on the panel’s ruling vacating the “Clean Unit” applicability test. EPA also requested that the court clarify that the panel’s vacatur of the pollution control project exclusion is a ruling that has prospective application only. UARG requested rehearing on the panel’s ruling that EPA did not violate the Clean Air Act by failing to require that there be an NSPS-type hourly emissions increase test as the first step in determining whether NSR permitting is triggered.

In the rehearing petitions of EPA and CAIP, the principal concern that they address with vacatur of the Clean Unit test is the panel’s ruling that the statutory definition of “modification” requires that the emissions increase methodology be based on a determination of whether there is an increase in

“actual emissions.” Both EPA and CAIP point out that the panel’s reading of the statutory language is contrary to its plain meaning and that EPA has discretion to base NSR applicability on other types of emissions tests, including a “potential-to-potential” comparison.

On August 26, the court issued an order directing that petitioners file responses to the rehearing petition of EPA, and that EPA file a response to the CAIP petition. The court did not request responses to the UARG rehearing petition. When the court is considering granting rehearing petitions, it first requests that parties on the opposing side file responses before making a final decision whether to grant the petitions.

On September 19, the government and environmental group petitioners filed oppositions to the court’s granting EPA’s rehearing petition, arguing that the statutory language is clear that the NSR applicability methodology must be based on whether there is an increase in actual emissions. UARG filed a response in support of EPA’s request that the court grant rehearing. EPA filed a response in support of CAIP’s rehearing petition.

It is not clear when the court will take final action on the rehearing petitions. □

## EPA To Work With States To Develop Multipollutant Strategies In SIPs

EPA has embarked on development of strategies to implement recommendations of the Committee on Air Quality Management formed by the National Research Council of the National Academies. One of the recommendations was to transform the State Implementation Plan (SIP) into a comprehensive Air Quality Management Plan

that would encompass not only criteria pollutants, but also key hazardous air pollutants. Standards, issued a memorandum to EPA regional air division directors asking for them to work with states in their regions to encourage them to start taking a multipollutant approach in developing control strategies as a part of their air quality planning.

The memorandum recognizes that SIP planning efforts are already underway in many areas, but nonetheless seeks to have states move forward in considering multipollutant control strategies. The memorandum indicates that with “a modest amount of additional attention,” a state could “test and/or implement multipollutant planning approaches during the current SIP planning process.” The memorandum forecasts that states would derive benefits through “better use of limited resources” and improvements in their “ability to develop control strategies that optimize the mix of controls for multiple pollutants.”

On August 10, 2005, Steve Page, the Director of the Office of Air Quality Planning and The Page memorandum provides regions and states with a three-page document titled “Preliminary Approach for Identifying Toxic Air Pollutants for Consideration in Multipollutant Control Strategies.” The attachment includes: (1) a working definition of “multipollutant control strategy”; (2) an initial list of key toxic air pollutants to consider, as well as a website address that provides a list of key area source categories for toxic air pollutants; and (3) a summary description of an approach that an area can use to develop its own list of toxic air pollutants with a link to a website describing a more detailed approach to identifying local toxic air pollutants.

The multipollutant approach in SIPs raises serious legal and policy questions. A threshold issue would be, what is the air quality goal to be achieved in the SIP? □