NEW SOURCE REVIEW: THE D.C. CIRCUIT SPEAKS

During its first term in office, the Bush Administration adopted two different rules that loosen Clean Air Act restrictions on emissions growth from power plants and other large polluters. On June 24th, the D.C. Circuit Court of Appeals issued a decision on the first rule, in response to a challenge by a coalition of environmental groups and states attorneys general. State of New York et. al, v. U.S. Environmental Protection Agency, No. 02-1387 (D.C. Circuit, decided June 24, 2005). While industry spokesmen have spun the court’s ruling as a victory for the Bush Administration’s rewrite of the regulations, the verdict was mixed, as some aspects of the new rule were struck down while others were upheld.

EFFECT ON ENFORCEMENT ACTIONS

One of the most important aspects is the DC Circuit’s apparent rejection of a recent Fourth Circuit decision holding that New Source Review applied only to projects that resulted in increases in hourly emission rates. United States v. Duke Energy Corp., No. 04-1763 (Fourth Circuit, decided June 15, 2005). The DC Circuit accepted EPA’s longstanding position that NSR is triggered by actual increases in annual emissions, even if hourly emission rates are unchanged. The U.S.EPA and a coalition of states attorneys general have taken power companies to court for NSR violations that added thousands of tons of illegal emissions to the atmosphere every year, without necessarily increasing hourly emission rates. The D.C. Circuit’s recent ruling makes it easier for these cases to go forward by rejecting the industry defendants’ narrow reading of the law.

BACKGROUND

At issue were “New Source Review” (NSR) rules that require manufacturers to obtain permits and install up to date pollution controls whenever a plant modification results in a significant increase in emissions. EPA finalized a set of rule changes in December of 2002 that made it easier to avoid these requirements by more narrowly defining what constitutes an “emissions increase.” The DC Circuit’s opinion addresses the December, 2002 revisions.

EPA also adopted new rules in 2003 that allow companies to escape NSR restrictions by classifying large equipment replacements or upgrades as exempt “routine repairs,” instead of modifications that require permits and pollution controls. The DC Circuit has prohibited the 2003 rule from taking effect until it decides whether the expanded exemption for “routine repairs” is legal under the Clean Air Act (that decision is expected next year).

SUMMARY

The D.C. Circuit’s opinion in New York v. U.S. Environmental Protection Agency:
• **Upheld** provisions that exempting major modifications from New Source Review so long as emissions were not expected to increase above their highest level in the past ten years, and which authorize plant-wide emission limits for air pollutants. These changes had been supported by industry, but opposed by most states and environmental groups, who argued the new provisions would increase pollution and be more difficult to enforce.

• **Upheld** EPA’s longstanding position that NSR is triggered by any significant annual increase of a major pollutant above actual emission levels. The court rejected industry’s argument that NSR could only be triggered by increases in hourly emission rates above the maximum level allowed in permits.

• **Remanded** and sharply criticized weak record-keeping provisions that allowed industry to decide whether to keep the data needed to enforce the law. EPA will now have to strengthen record-keeping requirements unless it can better explain how the law can be enforced without the data needed to determine compliance.

• **Struck down** a 1992 provision granting an NSR exemption to “pollution control projects” that increase emissions of one pollutant while decreasing another. The court also rejected a proposal that exempted so-called “clean units” from NSR if they had installed the “equivalent” of best available pollution controls.

• **Deferred** deciding on whether states would have to adopt the new NSR rules, while making clear that states would not have to do so if they could show their own regulations were at least as stringent as EPA’s new proposal.

**DISCUSSION**

**Upheld:**

**Ten Year Baseline:** Calculating an emissions increase requires a starting point, or “baseline.” In the past, EPA and states generally used the most recent two years of emissions data to define the baseline against which future increases would be measured. Power plants (and in some states, manufacturers) were allowed to choose the highest two years within the past five against which to measure increases. EPA’s December, 2002 rule allows companies to choose the highest two years within the past ten as the baseline (power plants remain limited to a five-year look-back). In other words, an increase will not trigger New Source Review unless it would increase a source’s emissions above their highest level within the previous decade. As before, past actual emissions would be adjusted downward to reflect current permit limits. The DC Circuit upheld this requirement, based on its finding that the Agency’s actions were not arbitrary or capricious.

The Court cited EIP’s study, “Reform or Rollback,” which predicted that the change would substantially increase air pollution because emissions a decade ago were typically higher than in more recent years. EPA disputed our conclusions, and the DC
Circuit ultimately gave the benefit of the doubt to the government, under the deferential standard of review used in such cases. The court did seem to admonish the EPA to closely track the effect of its changes on air emissions and public health. Because the new ten-year baseline does not apply to power plants, it will have no effect on the pending NSR enforcement actions against that industry.

**Plant-wide Applicability Limits:** EPA’s new rules allow facilities to increase pollution from individual units, so long as it does not exceed a plant-wide cap on emissions. The DC Circuit upheld this rule. States and environmental groups have supported the concept of flexible plant-wide limits, but argued that EPA’s final rule would set those limits too high and be too difficult to enforce.

**Actual and Annual Emission Increases:** Industry has long argued that EPA has no authority to restrict an emissions increase that results from plant modifications unless these exceed the amounts allowed in permits. The court flatly rejected this argument, holding that the Clean Air Act plainly requires the regulation of increases above actual emissions when these result from plant changes. The decision is important, because many permit limits have not changed in thirty years, and are so generous that actual pollution levels are several times below the theoretical ceiling allowed in permits.

Equally significant, the DC Circuit called into question a recent fourth Circuit decision which held that only increases in *hourly* emission rates were subject to New Source Review. *United States v. Duke Energy Corp.*, No. 04-1763 (Fourth Circuit, June 15, 2005). EPA has always calculated emission increases on an annual basis (and reiterated that position in the December, 2002 rules) for practical reasons. Power plants and manufacturers often make substantial capital investments to restore deteriorating capacity, which can substantially increase total emissions by increasing plant operating time. Under the Duke decision, these projects would escape New Source Review unless they increased hourly emission rates, which rarely happens.

The DC Circuit was “not convinced” by industry claims that Congress intended this narrow interpretation, and found the statutory references ambiguous at best. Because the issue was not presented in argument, the court could not squarely address whether the statute limited NSR to hourly emission rate increases, and held only that EPA’s longstanding interpretation that the law applied to annual increases was reasonable. But its opinion strongly suggests that the DC Circuit rejects the Duke decision. The D.C. Circuit’s opinion is especially helpful to the NSR enforcement actions, because most of these target power plant projects that illegally increased emissions on an annual rather than an hourly basis.

**Rejected:**

**Clean Units:** The December 2002 rule would have allowed facilities to escape permit review and avoid upgrading pollution controls if they qualified as “clean units”. While clean units would have to show that they had installed the “equivalent” of the best available pollution controls, states and environmental groups objected that this standard
was too vague and would shield potentially serious sources of pollution from scrutiny. The DC Circuit rejected this rule change, holding that the law did not allow EPA to create exemptions for sources that significantly increased emissions by redefining them as “clean units.”

Pollution Control Exemption: The DC Circuit also rejected a rule adopted in 1992 that allowed EPA to approve pollution control technologies that substantially increase one regulated pollutant while decreasing another. Sometimes, this exemption has led to absurd results. For example, the Texas Commission on Environmental Quality increased carbon monoxide permit limits nearly thirty-fold – to almost 100,000 tons – when permitting a “pollution control” project at one power plant that was designed to reduce nitrogen oxide emissions. Again, the DC Circuit found that the plain meaning of the statute did not make room for this exemption for projects that would increase one air pollutant while decreasing another.

Remanded

Enforcement Provisions: Under the old rules, utilities claiming that modifications would not result in emission increases had to supply permitting authorities with at least five years of data to verify their claims. Under the December 2002 rules, facilities would not have to keep data or notify authorities unless there was a “reasonable possibility” that changes would result in emission increases. The DC Circuit found that this self-selection process by industry would undermine enforcement, and ridiculed EPA’s claims to the contrary, after finding, “the rule allows sources that take advantage of the ‘reasonable possibility’ standard to avoid recordkeeping altogether, thus thwarting EPA’s ability to enforce the NSR provisions.”

Furthermore, the court found that the new rules were likely to make enforcement more complicated, rather than less, making the availability and accuracy of records especially important. The enforcement provisions were returned to EPA, with instructions to develop an alternative unless the Agency could better defend allowing industry to decide which records to keep.

Deferred

New York and other states argued that EPA’s NSR rule would violate the Clean Air Act by forcing states to adopt weaker emission rules for new construction projects and plant modifications. The D.C. Circuit ultimately decided these arguments were not ripe for review, and would be better addressed when reviewing state plans for implementing the new provisions.