

## Air Pollution

### Air Quality Standards

#### Effect of New Source Review Decision Limited by EPA Policy, Proposed Rule

Despite a federal appeals court decision vacating an Environmental Protection Agency rule that excused most equipment replacement projects from new source review pollution control requirements, the agency is unlikely to begin new enforcement actions against power plants and other industrial facilities, attorneys have told BNA.

The impact of the March 17 decision by the U.S. Court of Appeals for the District of Columbia Circuit will be blunted by standing EPA policy not to pursue new cases under the Clean Air Act's new source review provisions and by an agency rulemaking that would narrow the circumstances when new source review applies to plant modifications, they said.

Kevin Gaynor, an attorney with Vinson & Elkins in Washington, D.C., said the D.C. Circuit decision does not mean that EPA has to begin pursuing cases against companies that complied with the equipment replacement rule, but which may now be in violation of the stricter regulation the court decision left in place.

"Under enforcement discretion, they certainly have the ability to decide not to enforce on any basis they want," said Gaynor, who represents companies on Clean Air Act issues.

New source review requires power plants and other major sources to install modern pollution controls when they make plant modifications that increase emissions.

Issued in 2003, the equipment replacement rule excluded from new source review any equipment replacement project that cost less than 20 percent of the replacement cost of the entire unit being repaired. The rule expanded an existing exclusion for routine maintenance projects.

The D.C. Circuit stayed the rule in 2003 and on March 17 vacated it in a unanimous decision, saying that it violated the plain meaning of the Clean Air Act (*New York v. EPA*, D.C. Cir., No. 03-1380, 3/17/06; 37 ER 597, 03/24/06 ).

In theory, EPA could go after power plants, refineries, and other industrial facilities that did not install pollution controls or obtain necessary permits when they replaced equipment under the old rules that were struck down by the court.

## **Attorneys Cite EPA Memo**

But Gaynor and other attorneys familiar with EPA's enforcement regime point to a memo from EPA Deputy Administrator Marcus Peacock that set out agency policy on new source review enforcement in the fall of 2005, before the D.C. Circuit decision.

Peacock told staff that instead of filing fresh new source review cases, investigators should focus on other areas "that will likely produce significant environmental benefits" (36 ER 2288, 11/11/05 .

To the extent investigators decide to initiate any new source review cases, the memo said, the agency should focus on the equipment replacement rule--although that was before the court struck it down--and a rule proposed in 2005 that would narrow the types of emissions increases that trigger new source review requirements.

The memo did say the agency should continue to pursue new source review enforcement cases already under way.

It is unclear how agency new source review enforcement policy will respond to the D.C. Circuit decision. EPA did not respond to several requests for comment on the issue.

Scott Segal, a lawyer at Bracewell and Giuliani and director of the Electric Reliability Coordinating Council, said that under the Peacock memo, additional new source review enforcement against power plants is unlikely.

Gaynor said that, in any case, many companies "were using a much more conservative approach than allowed under the [equipment replacement rule]" and probably would not be in violation of the stricter rules that are now in effect. Companies were "leery of using the rule to justify what they are doing," Gaynor said, because "there was so much controversy surrounding it."

## **Court Decision Called 'Forceful.'**

John Walke, director of clean air programs at the Natural Resources Defense Council, said that continuing to adhere to the equipment replacement rule under the Peacock memo is "not remotely tenable," because of the court decision, which he described as "just about as forceful as any I have read in the D.C. Circuit."

However, Walke said that if EPA continues to adhere to its proposed rule on emissions increases, it "would be far more extreme than the [equipment replacement] rule that was just shot down," and would effectively nullify the effect on enforcement of the D.C. Circuit ruling in the *New York* case.

The emissions test rule would change the definition of "emissions increase" that EPA uses to determine whether an increase has occurred at a power plant for purposes of new source review.

The proposed rule would define an increase based on the plant's maximum potential hourly emissions rate (70 Fed. Reg. 61,081; 36 ER 2141, 10/21/05 .

Since 1980, EPA has defined an emissions increase as an increase in a plant's actual emissions measured on an annual basis, and the agency used that test in

enforcement cases brought under the Clinton administration, some of which are pending in federal courts.

Appeals courts have been divided on which test is appropriate, but EPA has decided to follow the June 2005 decision by the U.S. Court of Appeals for the Fourth Circuit, which said EPA must use an hourly emissions rate test (*United States v. Duke Energy Corp.*, 4th Cir., No. 04-1763, 6/15/05; 36 ER 1222, 06/17/05 ).

The hourly emissions rate test would mean that in most cases new source review would not apply unless a plant expanded its production capacity.

### **Proposal 'Eviscerates' Program**

Walke said the proposed rule for the hourly emissions test would "eviscerate the [new source review] program," and that "there is not a single instance in the record of any power plant having fallen under that test." Walke said the proposal would render new source review moot because, "the test is so extreme, I am unaware of anyone ever having done anything to violate it."

However, he said the *New York* decision shows the emissions test rule may face trouble in court. "The decision shows the court believes new source review has meaning, the decision sweeps quite broadly," Walke said. The emissions test proposal "flips the law on its head," he said.

But Segal said the D.C. Circuit ruled in the *New York* decision that the word "increase" is ambiguous in the Clean Air Act, inviting interpretation by EPA. "It gives the agency latitude," Segal said.

Gaynor agreed. Determining if an emissions increase occurred is much more complicated than determining if a project is routine maintenance, he said. This would make it more difficult for a court to overturn EPA on the hourly emissions test rule than on the equipment replacement rule, he said.

It would be "much harder for a court to weigh in and say a particular emissions increase test the government is adopting is not a proper test," Gaynor said. 

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