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ALERTS

Environmental Law Alert - Fine Particle Emissions Rules Remanded– Stricter Clean Air Regulations For Nonattainment Areas Will Follow

January 24, 2013 | Atlanta | Chicago | Columbus | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | South Bend

On Jan. 4, 2013 the Court of Appeals for the District of Columbia remanded two EPA final rules implementing particulate matter ("PM") standards. *Natural Resources Defense Council v. E.P.A*, No. 08-1250, 2013 U.S. App. LEXIS 214 (D.C. Cir. January 4, 2013). Specifically, the court remanded two rules implementing the 1997 National Ambient Air Quality Standards ("NAAQS") for fine particulate, also known as PM2.5. NAAQS establish acceptable levels of outdoor air quality throughout the country for several common pollutants, including PM2.5. The two rules at issue in the D.C. Circuit's decision establish how states must achieve and maintain compliance with the acceptable level of ambient PM2.5 as set forth in the 1997 NAAQS.

While the two rules have been remanded to EPA, the court did not vacate them or set a deadline for revisions. The court has tasked EPA with revising the rules to make them more stringent, consistent with Subpart 4 of Part D of Title I of the Clean Air Act ("CAA"). EPA's revisions to the rules could have a significant effect on the numerous sources of PM2.5 that are located in nonattainment areas. In the immediate future, EPA will have to consider how the court's opinion affects pending state implementation plan ("SIP") submittals for PM2.5 nonattainment areas as well as pending new source review ("NSR") actions in PM2.5 nonattainment areas. Eventually, after EPA revises the implementation rules, states with currently approved SIPs may have to submit revised plans that are consistent with Subpart 4 of Part D of Title I of the CAA.

The two remanded rules are:

1. Final Clean Air Fine Particle Implementation Rule, 72 Fed. Reg. 20,586 (Apr. 25, 2007).
2. Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM2.5), 73 Fed. Reg. 28,321 (May 16, 2008).

The court held it was improper for EPA to promulgate the two rules pursuant to Subpart 1 of Part D of Title I of the CAA. The court agreed with the environmental group petitioners in the case that the two rules should have been promulgated pursuant to Subpart 4 of Part D of Title I of the CAA. Part D contains the nonattainment new source review ("NNSR") rules, which apply to areas that are not in compliance with an applicable NAAQS. The NNSR rules include a variety of measures intended to compel a state's compliance with the NAAQS.

Subpart 1 contains general NNSR rules, while Subpart 4 contains PM specific NNSR rules. As the court noted, Subpart 1 is "less stringent" than

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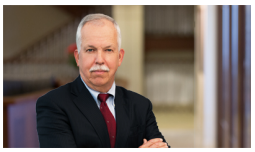

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Subpart 4. Natural Resources Defense Council, 2013 U.S. App. LEXIS 214, at *12. The court highlighted a number of examples as to why Subpart 4 is more stringent, including that:

- “Subpart 4 requires a nonattainment area to be classified as ‘moderate’ and upon failure to attain to be reclassified as ‘serious,’ while under Subpart 1, EPA ‘may’ but is not required to classify a nonattainment area.”
- “[U]nder Subpart 4, a ‘serious’ attainment date may be extended only once (for a maximum of 5 years) and only if the SIP includes the ‘most stringent measures’ included in any state’s SIP or achieved in any State and feasible for the area, while Subpart 1 allows attainment date extensions of up to 10 years with no “stringent measures” requirement therefor.”
- “Subpart 4 subjects a ‘serious’ nonattainment area that fails to timely attain to a mandatory annual 5% pollutant reduction, while Subpart 1 includes no such requirement.”
- Subpart 4 requires that ‘reasonable available control measures’ must be implemented within 4 years after designation, while Subpart 1 requires such measures be implemented “as expeditiously as practicable.”
- “Subpart 4 requires that best available control measures be implemented no later than 4 years after an area is classified or reclassified as ‘serious,’ while Subpart 1 has no best available control measures requirement.”

Id. at 12-13, ft. 6 (internal citations omitted).

EPA contended the rules were properly promulgated pursuant to Subpart 1 because Subpart 4 only established requirements for PM10 and not PM2.5. However, the court concluded that the history of Subpart 4 made it clear that it also applied PM2.5. EPA first developed the "Total Suspended Particles" NAAQS in 1971 for "particulate matter up to 25-45 micrometers in diameter." Id. at 4. Then “[i]n 1987, EPA revised the NAAQS to apply only to particles equal to or smaller than 10 micrometers (PM10) . . . ." Id. EPA revised the PM NAAQS again in 1997 and set separate standards for PM2.5but kept the PM10 NAAQS. Finally, in 2007 and 2008, EPA promulgated the PM2.5 Implementation Rules.

The court began by addressing EPA's threshold argument that the environmental petitioners' challenge was untimely and should have been raised in 1997 when EPA set the PM2.5 NAAQS. EPA argued two comments in the preamble to the 1997 NAAQS stating PM2.5 fell under Subpart 1 and PM10 fell under Subpart 4 constituted final reviewable action, which made the challenge to the two PM2.5 implementation rules untimely. The court disagreed, stating: "We conclude these two unembellished snippets, buried in the preamble to the 1997 Final PM NAAQS Rule, did not constitute final agency action so as to be reviewable in 1997." Id. at 8. The court noted, as a general matter preamble statements may constitute final agency action but "this is not the norm." Id. The court found this was not a unique case where the preamble constituted final agency action.

The court then addressed the central issue: whether EPA should have

promulgated the two implementation rules pursuant to Subpart 4. EPA argued that because Subpart 4 repeatedly refers to PM10 and not PM2.5, the statute is only applicable to PM10. The court found this inconsistent with the history of Subpart 4 and the words of the statute. The court noted:

Before the Congress enacted Subpart 4 [in the 1990 CAA amendments], EPA had promulgated a single particulate matter standards—the PM10 standard—which encompassed all particulate matter with a diameter of 10 micrometers of less—including both coarse and fine particulate matter, that is, particulate matter now governed by both the PM10 and PM2.5 standards—and the 1990 CAA amendments adopted this broad meaning in defining " PM10."

Although EPA later subdivided the PM standards into one for PM10 and another for PM2.5, the court found the regulatory change did nothing to alter the statutory language of Subpart 4. EPA made several additional arguments interpreting PM and PM10, but ultimately, the court found the statute was plain on its face and EPA's interpretation failed to pass step one of the Chevron test.

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