

## ***EPA's Periodic Monitoring Guidance Struck Down***

The United States Court of Appeals for the District of Columbia Circuit has set aside the United States Environmental Protection Agency's (EPA) 1998 "Periodic Monitoring Guidance for Title V Operating Permits" (the PM Guidance) because it improperly revised prior EPA regulations without following proper rulemaking procedures.

EPA regulations require Clean Air Act Title V Operating Permits (known as "Renewable Operating Permits" in Michigan) to include provisions for monitoring and testing to verify compliance with applicable air quality regulatory requirements. EPA issued the PM Guidance to instruct states regarding what types of periodically recurring monitoring in Renewable Operating Permits will be satisfactory. According to the PM Guidance, Renewable Operating Permits that do not contain satisfactory periodic monitoring for all applicable requirements may be "vetoed" by EPA under its authority to reject Renewable Operating Permits and prevent them from taking effect.

Appalachian Power Company (Appalachian) and other industry representatives filed a petition challenging the PM Guidance. Appalachian's main argument was that the PM Guidance improperly required states to modify monitoring requirements in existing air emission permits and state and federal air quality rules in order to comply with new requirements enunciated in the PM Guidance. Appalachian argued that this amounted to altering the emission limits previously established in permits and regulations - something that cannot be done without following formal rulemaking procedures.

EPA first argued that Appalachian had no right to challenge the PM Guidance in court because it did not represent "final" agency action and it was not binding. In fact, the PM Guidance contained the following statement verifying that it was not "final" agency action:

The policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.

The court dismissed this disclaimer as "boilerplate" that EPA has included in all guidance documents since 1991 and quoted a *Duke Law Journal* article that described this sentence as "a charade, intended to keep the proceduralizing courts at bay." Accordingly, the court examined the substance of the PM Guidance to determine whether it was, in fact, "final" agency action.

The court explained that there are two criteria for an agency action to be considered "final" and subject to judicial review. "First, the action must mark the 'consummation' of the agency's decisionmaking process" and "second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"

The court found that the first requirement was satisfied because the PM Guidance was preceded by two earlier "drafts" and expressed policies that the various states were required to follow. The fact that the PM Guidance may be subject to revision from time to time did not change the fact that it was final because, the court noted, laws and even the United States

Constitution are amended from time to time, but that fact does not preclude courts from reviewing the validity of enacted laws.

Regarding the second requirement for “final” agency action - that rights or obligations are determined - the court found that the PM Guidance created binding obligations. The court found that the PM Guidance represented:

The agency’s settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to [industry], a position EPA officials in the field are bound to apply

Although the court agreed that the PM Guidance did not seem to create any rights, it was undeniable that it created obligations on states and regulated industries:

[T]he entire [PM] Guidance, from beginning to end - except the last paragraph [which contained the “boilerplate” statement quoted above] - reads like a ukase [a Russian imperial decree]. It commands, it requires, it orders, it dictates. Through the [PM] Guidance, EPA has given the States their “marching orders” and EPA expects the States to fall in line . . . .

Therefore, the court found that the PM Guidance was “final” agency action subject to judicial review because it reflected a settled agency position that had legal consequences for states and for industrial facilities required to obtain Renewable Operating Permits.

In its challenge, Appalachian contended that the PM Guidance improperly expanded the requirements contained in the underlying regulation. That regulation states that Renewable Operating Permits must include periodic monitoring requirements whenever “the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring. . . .” Appalachian argued that this regulation meant that new periodic monitoring requirements had to be created for Renewable Operating Permits only when the underlying regulation or permit did not contain a requirements for recurring testing or monitoring. For example, periodic monitoring requirements would be created when the underlying standard did not include any sort of monitoring or testing method, required only a one-time startup test, or failed to specify the frequency of monitoring. Appalachian argued that if the underlying regulation or permit required recurring monitoring or testing - whether annual, monthly, weekly, daily, or hourly - no further re-evaluation of the adequacy of the testing requirements was required by the rule.

The PM Guidance, in contrast, required states to evaluate the adequacy of all monitoring requirements, including pre-existing recurring monitoring requirements. According to the PM Guidance, additional monitoring may be required if the existing requirements did not provide the “necessary assurance of compliance.”

EPA argued that Appalachian misconstrued the regulation at issue and that the PM Guidance was consistent with EPA's intention when it promulgated that rule: that pre-existing monitoring requirements would have to be supplemented if they were found to be inadequate to ensure compliance with the underlying requirements.

EPA pointed to several statements in the preamble to the Title V rules and in its responses to comments that had been submitted on the proposed Title V rules in support of its position. The court examined these statements and found that they did not suggest that the rule was intended to require states to revise existing monitoring requirements in addition to creating periodic monitoring requirements for standards that lacked recurring monitoring requirements.

Moreover, the court concluded that EPA's current interpretation of the regulation was inconsistent with other statements EPA made at the time the Title V rules were promulgated. First, the court noted that EPA stated that if there is "any federally promulgated requirement with insufficient monitoring, EPA will issue a rulemaking to revise such requirement." The court noted that, instead of promulgating a new rule as promised, EPA issued the PM Guidance without following the proper rulemaking procedures.

Second, the court noted that EPA stated that "Title V does not impose substantive new requirements." The court found that:

Test methods and the frequency of testing for compliance with emission limitations are surely "substantive requirements; they impose duties and obligations on those who are regulated . . . . We have recognized before that changing the method of measuring compliance with an emission limitation can affect the stringency of the limitation itself.

Accordingly, the court found that because it requires states to re-evaluate existing monitoring requirements, the PM Guidance created new substantive requirements contrary to EPA's prior interpretation of the requirements of Title V.

Thus, the court ruled that the PM Guidance improperly expanded the scope of the Title V regulations for Renewable Operating Permits by requiring states to re-evaluate pre-existing periodic testing requirements without following proper rulemaking procedures. Therefore, the court struck down the PM Guidance in its entirety:

State permitting authorities therefore may not, on the basis of [the PM Guidance or EPA's Title V rules], require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test.

This ruling is significant because it clarifies the requirements for periodic monitoring set by the Title V rules and sets limits on EPA's power to modify its rules through guidance documents without following rulemaking procedures. This decision also sets a noteworthy precedent regarding when agency guidance documents may be considered "final" agency action subject to judicial review. This latter aspect of the court's decision may be a double-edged sword, however, because the Clean Air Act provides that legal challenges to "final" agency action under the Clean Air Act must be brought within 60 days after the action. It remains to be seen how the courts will apply this precedent to other cases that may involve EPA guidance documents that are more than 60 days old when challenged.

***Appalachian Power Company v. Environmental Protection Agency, 208 F.3d 1015***

This article was prepared by S. Lee Johnson, a partner in our Environmental Department, and previously appeared in the August, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.