Clean Air Act Developments

2008-12-24

In December of 2008, three important developments occurred concerning the Clean Air Act:

CAIR Remand Without Vacatur. On December 23, 2008, the United States Court of Appeals for the District of Columbia Circuit issued a decision remanding the Clean Air Interstate Rule (CAIR) to the U.S. Environmental Protection Agency (EPA). In July of 2008 the D.C. Circuit vacated CAIR after the court identified a series of "fundamental flaws" in the regulation; it did not, however, issue the mandate that would have terminated the program. In response to a series of petitions for rehearing, the court issued the order remanding the rule, and as a result CAIR is now reinstated and will remain in place and effective while EPA seeks to replace CAIR with a rule that addresses these flaws.

The court was convinced that despite the flaws in CAIR, allowing it to remain in effect until EPA replaces it with an improved rule "would at least temporarily preserve the environmental values covered by CAIR."

The court did not establish a timetable or schedule requiring EPA to act by a certain deadline; however, it did caution the government that the court does not intend to grant an indefinite stay of the court's original decision, and that any new rule must remedy all of the "fundamental flaws" discussed in that decision. It also reminds both the government and all of the petitioners in the case that the petitioners have the ability to bring a mandamus petition back to the D.C. Circuit if EPA fails to fully remedy the flaws.

Startup/Shutdown/Malfunction Rule Vacated. On December 19, 2008 the United States Court of Appeals for the District of Columbia Circuit issued a decision vacating the EPA's Clean Air Act Startup, Shutdown and Malfunction (SSM) exemption, originally put into place in 1994 and amended in 2002, 2003 and 2006.

The court ruled that the Petitioner's challenges to the SSM exemption were timely, holding that the Agency "constructively reopened" the SSM exemption in adopting the three modifications to the original rule. These modifications together created a "different regulatory construct" for how to measure compliance with the Clean Air Act, and therefore the Petitioner's challenges were timely, despite the fact that the first challenge was filed in 2002, some 8 years after promulgation of the

original rule.

Judge Randolph filed a dissent on the issue of timeliness, claiming that the court did not have jurisdiction because the 2002, 2003 and 2006 regulatory actions did not reopen the original 1994 regulation but rather merely modified the manner in which the SSM was to be implemented. Therefore, according to the dissent, the petition would have had to have been filed within 60 days of the 1994 promulgation; it was not, and therefore Judge Randolph would have held that the challenge was time barred.

On the merits, the court granted the petitions and vacated the rule, finding that the SSM as revised did not provide the “continuous compliance”mechanism that is required for Section 112 air toxics standards.

EPA Interpretive Memorandum on CO2 as a Pollutant Subject to Regulation. On December 18, 2008, the U.S. Environmental Protection Agency (EPA) issued a Memorandum from Administrator Johnson to the EPA Regional Offices entitled “EPA’s Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program” (“PSD Pollutant Memorandum”). The PSD Pollutant Memorandum addresses the recent decision of the Environmental Appeals Board (EAB) in In re Deseret Power Electric Cooperative, and specifically the issue of whether the clause “subject to regulation under the Act” includes carbon dioxide in the context of the PSD permitting program.

This Memorandum is EPA's attempt to address this specific issue as part of a nationwide action rather than on a case by case basis, and it clarifies that as of December 18th the Agency “will interpret this definition of “regulated NSR pollutant” to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant.”

The memorandum provides that the interpretation is effective immediately, and Administrator Johnson has asked that all Regional Offices implement the interpretation immediately in pending federal PSD permitting actions, and that they take affirmative steps to notify all delegated States, as well as state and local agencies that implement PSD programs under existing EPA-approved SIPs, of the interpretation.

In response to the PSD Pollutant Memorandum, Senator Barbara Boxer (D-Calif.), chair of the Senate Environment and Public Works Committee, requested that U.S. Attorney General Michael Mukasey “intervene immediately” to force Administrator Johnson to withdraw the PSD Pollutant Memorandum. In her letter dated December 22, 2008, Senator Boxer states that the Agency issued the PSD Pollutant Memorandum “without legal authority under the Clean Air, and in spite of the clear opinion of the EPA’s Environmental Appeals Board [in Deseret Power].”

For more information on any of these developments, please contact Ken Meade.