Inside EPA

NEW LAWSUIT MAY BE TEST CASE FOR CONTROVERSIAL TITLE V PERMIT RULING

Date: August 10, 2006 -

Environmentalists have filed a lawsuit that could become a test case over how EPA responds to a controversial appeals court decision last year, which held the agency and states must issue Title V permits that reflect pending new source review (NSR) and other Clean Air Act enforcement actions.

The new lawsuit is also the latest salvo in a long-standing battle over alleged NSR violations at a Tennessee Valley Authority (TVA) power plant, after a court struck down EPA enforcement actions against the facility on constitutional grounds.

The Center for Biological Diversity filed a July 31 complaint in the U.S. District Court for the District of Columbia seeking to force EPA to object to the air permit Kentucky issued to a TVA plant under Title V of the Clean Air Act, which requires that all federal requirements be included under one umbrella permit. The group has raised several objections to the permit, including its failure to reflect pending agency enforcement action against the facility for alleged NSR violations. *Relevant documents are available on InsideEPA.com.*

Were saying, Well, if you are already concluding that NSR is applicable, then you have to include it in the permit, one environmentalist says.

The source says that EPAs response to the new lawsuit will be one indication of how the agency will comprehensively address last years U.S. Court of Appeals for the 2nd Circuit decision in *New York Public Interest Research Group [NYPIRG] v. Johnson*, where the court held that Title V permits must include pollution limits that reflect pending state or EPA enforcement allegations, even if they have not been substantiated in court.

Industry groups and the Bush administration unsuccessfully sought to appeal the ruling, arguing it was unreasonable for air permits to reflect limits that were still a matter of legal dispute. They also believed the decision would create lengthy fights over the permitting process that would parallel ongoing enforcement efforts.

The new lawsuit, *Center for Biological Diversity et. al. v. Stephen Johnson et. al.,* stems from activists objections to Kentuckys Title V permit for a facility known as TVA Paradise. The permit does not include limits under the prevention of significant deterioration (PSD) program, which is the equivalent to NSR for areas that meet federal air standards.

The NSR and PSD programs require facilities to upgrade their pollution control equipment when they make major modifications. EPA is named in the suit because the agency allows Kentucky to administer the federal Title V program.

An environmentalist argues that EPAs response to the lawsuit will test how the broadly the agency views the 2nd Circuit decision in terms of setting a precedent. The source argues that while the 2nd Circuit decision involved state enforcement actions, the new lawsuit is even stronger because it is asking EPA to codify federal enforcement action as part of the air permit.

Here, EPA cant say, We disagree with ourselves, the source says.

Agency officials could not be reached for comment, and a TVA spokeswoman also did not return calls.

EPA had pursued the plants alleged violations as part of its broad NSR enforcement initiative that began in the Clinton administration. But the U.S. Court of Appeals for the 11th Circuit ruled in 2003 that the agency was pursuing its enforcement case in a way that violated the Constitution, without addressing the substance of the allegations.

Environmentalists filed comments with the state last year objecting to the

proposed Title V permit for failing to include PSD limits that reflected the enforcement action, which is still pending. PSD is an applicable requirement for the three main boilers [at the power plant] which needs to be included in the permit, activists said, according to a March 9, 2005, summary of public comments prepared by the Kentucky Division for Air Quality (DAQ).

However, the state indicated it was premature to include these limits before the enforcement allegations were resolved. The U.S. EPA considers this an active enforcement case and is proceeding. Upon settlement or judicial ruling, Kentucky DAQ will incorporate these terms and conditions into the permit, the state responded in the same document.

Activists filed an April 21, 2005 petition with EPA calling for the agency to reject the permit after Kentucky finalized it and sent it to EPA for approval. In the new lawsuit, environmentalists are raising the procedural issue of EPAs failure to respond to their petition.

The environmentalist says that similar lawsuits in the past have produced settlements where EPA agreed to respond to petitions by specific dates. If the agency then takes action to approve the permit, that would likely prompt another lawsuit over the final permit, the environmentalist says. The activists are also have a host of other objections to the permit unrelated to the 2nd Circuit decision.

The new case is one of at least two pending lawsuits that will test the impact of the 2nd Circuit ruling. Environmentalists earlier this year filed a lawsuit in the 11th Circuit objecting to EPAs approval of a Title V permit issued to a Georgia facility, known as the Wansley plant, owned by Oglethorpe Power Company. The case could test whether a second appeals court affirms the 2nd Circuits decision (*Clean Air Report,* Feb. 9, p28).

In a brief filed June 13 in *Sierra Club v. Stephen Johnson et. al.,* environmentalists objected to the Title V permit for the plant because Oglethorpe is co-owner of a separate facility with Southern Company subsidiary Georgia Power, known as plant Scherer, which is subject to pending federal NSR enforcement. Oglethorpe, Georgia Power Company and the Georgia Environmental Protection Division have intervened in the case.

The environmentalists argued the 2nd Circuit precedent dictated that EPA must include NSR violations in the Title V permit to reflect enforcement actions against the Scherer plant.

[T]he existence of a violation is even more clear cut than in *NYPIRG*, because here EPA itself has brought the enforcement action against Plant Scherer. Thus, while it may not be unreasonable for EPA to disagree with a state agency as to the existence of a [Clean Air Act] violation at a source, it clearly would be arbitrary for EPA to deny the existence of a violation at Plant Scherer in this case, while at the same time arguing that the very same violations do in fact exist for the

purposes of the agencys ongoing enforcement action, the brief says.

Source: Clean Air Report via InsideEPA.com

Date: August 10, 2006

Issue: Vol. 17, No. 16

Inside Washington Publishers