Two NSR Rulings Presage Showdown

Hunton & Williams’ Bill Brownell had a pretty good June. Last winter, over an eight-day period in late January and early February, Brownell had presented oral argument in two significant Clean Air Act cases in the Fourth and D.C. Circuits on behalf of the electric utility industry concerning the scope of the act’s New Source Review program. NSR imposes significant pollution control requirements on new and modified major stationary sources of air pollution, with the stringency of the controls imposed turning on whether the source is located in an area that is in compliance with National Ambient Air Quality Standards. During the second half of June, the two federal appellate courts issued back-to-back rulings that embraced many of Brownell’s arguments.

At issue in *United States v. Duke Energy*, before the Fourth Circuit, was the merits of an NSR enforcement action brought against Duke Energy by EPA in December 2000. EPA alleged that Duke Energy had violated the act by modifying its existing power plant without complying with NSR requirements applicable to sources located in an area currently meeting NAAQS. Because the act aims to “prevent significant deterioration” in such areas, they are known as PSD areas. The Fourth Circuit agreed with Duke Energy that no such plant “modification” had occurred within the meaning of the act and EPA’s implementing regulations.

The statutory language, standing alone, would seem to provide little support for this result. The act expressly provides that “the term ‘modification’ means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source.” Duke Energy, moreover, seems to have both made “any physical change” in its facility and “increase[d] the amount of any air pollutant emitted.” By spending over seven times the original facility’s cost to extend its useful life with replacement parts, and by increasing its hours of operations, Duke’s plant was emitting more pollutants on an annual basis than in the past.

The gravamen of the Fourth Circuit’s contrary ruling, however, lies not in the CAA’s statutory language, but in EPA’s implementing regulations interpreting that language and the fact that Duke Energy’s annual, but not its hourly emissions rate, had increased. EPA has long taken the position that, for some purposes under the act, an emissions increase occurs only if the hourly emissions rate increases.

Before the Fourth Circuit, EPA acknowledged that it had embraced such an interpretation in deciding whether a facility modification had occurred for some Air Act purposes. But the agency contended that it had not done so for the purpose of determining whether NSR requirements were triggered by changes to a facility in a PSD area. In ruling against EPA in Duke Energy, the Fourth Circuit concluded that EPA’s regulation defining emissions increases based on hourly emissions rate was the currently controlling definition and the plain meaning of the statutory language precluded EPA from using a different (i.e., annual) method of measuring emission increases in determining whether a facility modification had occurred in a PSD area.

Brownell’s win just nine days later before the D.C. Circuit in *New York v. EPA* was more qualified, but also mostly welcome news to the electric utility industry. At issue in *New York* was the validity of regulatory reforms of the NSR program adopted by EPA in December 2002. The D.C. Circuit found merit in three significant environmentalist challenges to the reforms, but more broadly rejected most of the challenges. While those rejected included competing industry and environmentalist arguments, many of the reforms upheld will make it easier for stationary sources to make changes to their facilities that increase overall emissions without triggering NSR controls.

While savoring their wins, Brownell and his colleagues at Hunton & Williams are unlikely to rest for long on their laurels. Still pending before the D.C. Circuit are the far more controversial and potentially sweeping NSR reforms promulgated by the agency in December 2003. EPA then excluded regulation from the definition of “any physical change” the replacement of equipment costing less than 20 percent of the value of the process unit. Although the D.C. Circuit has not ruled on the validity of that further rulemaking, the court has already taken the extraordinary step of staying its effectiveness pending the court’s final decision. Its doing so strongly suggests a preliminary judicial view that the December 2003 regulations are problematic.

One other further complication for industry is that the reasoning of the Fourth and D.C. Circuit rulings is not entirely consistent. Supreme Court review is, accordingly, a possibility. While the Fourth Circuit’s Duke Energy forcefully rejected EPA’s attempt to define the measure of emissions increase differently in the context of a PSD area, the D.C. Circuit in *New York* acknowledged, without repudiating, that EPA had long done so. Indeed, while not reaching the question of whether the Clean Air Act itself required one uniform measure throughout the statute, the court otherwise rejected industry’s claim that EPA could not measure emissions increases in a PSD area based on annual rather than hourly emissions rates.

The conflict between the two circuits is not yet complete, but it is certainly developing.

In short, stay tuned.

Richard Lazarus is on the law faculty at Georgetown University. He can be reached at lazarusr@law.georgetown.edu.