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LITIGATION UPDATE

NEW JERSEY V. EPA

by Nathan Borgford-Parnell*

INTRODUCTION

On February 8, 2008 the U.S. Court of Appeals for the District of Columbia vacated two Environmental Protection Agency (“EPA”) actions, the first to delist mercury emitting coal and oil-fired electric utility steam generation units (“EGUs”) from section 112 of the Clean Air Act (“CAA”), and the second to limit mercury emissions, under the much less restrictive, CCA section 111 with the new Clean Air Mercury Rule (“CAMR”).¹ The suit was filed by the state of New Jersey, along with thirteen other states, environmental organizations, and industrial groups.²

LEGAL BACKGROUND AND ARGUMENTS

In 1970, Congress amended the Clean Air Act, adding section 112, requiring EPA to list and regulate hazardous air pollutants (“HAPs”) that “cause, or contribute to, an increase in mortality or an increase in serious irreversible or incapacitating reversible illness.”³ In response to the EPA’s extremely slow application of section 112, Congress returned to the issue of HAPs in 1990 by strengthening section 112 to require EPA to list and regulate over one hundred specific HAPs. The amended section 112 required that EPA regulate all new and existing sources of HAPs to reflect the “maximum reduction in emissions which can be achieved by application of the best available control technology.”⁴ Additionally, section 112(c)(9) restricted EPA’s ability to delist a HAP source without first determining that “emissions from no source is the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.”⁵

In 2000, in response to an EPA study linking anthropogenic releases of mercury with methylmercury levels in fish, EPA Administrator announced as “appropriate and necessary”⁶ the listing of coal- and oil-fired EGUs as source categories for HAPs under section 112.⁷ Coal and oil EGUs are the largest anthropogenic source emitters of mercury in the United States. In 2004 EPA revisited its decision of listing coal- and oil-fired EGUs. After reviewing a number of alternatives EPA decided to delist coal- and oil-fired EGUs as HAP sources under section 112 and institute the less restrictive Clean Air Mercury Rule. Under the CAMR, EPA proposed to limit mercury emissions from new and existing coal and oil EGUs, and develop a voluntary cap-and-trade program to reduce mercury emissions.⁸

The petitioners in the case contended that EPA, in delisting coal and oil EGUs, violated the plain text and structure of section 112(c)(9) delisting requirements. During the trial the EPA admitted that it had not, and could not make the findings required under CCA Section 112(c)(9) for delisting a HAP source. However, EPA offered three arguments for the legitimacy of its decision, regardless of the section 112(c)(9).

First, EPA contended that its decision was justified through its interpretation of section 112(n)(1)(A) which requires EPA Administrator to conduct a study of each HAP listed in section 112. Following the study, EPA determines whether it is “necessary and appropriate,” to regulate EGU as HAP sources. EPA contended that section 112(n)(1)(A) does not restrict the agency from reviewing previous decisions of “necessary and appropri-

The court found no ambiguity in section 112 and held that the EPA’s argument “deploys the logic of the Queen of Hearts, substituting EPA’s desires for the plain text...”

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ate” listings of EGUs. If EPA finds that a listing of source EGUs had not in fact been “necessary and appropriate,” it contended that it could delist those sources without meeting the delisting requirements of section 112(c)(9). Secondly, EPA argued that the court should defer to the agency’s interpretation of section 112, stating that it is ambiguous and calls into question whether EGUs should be regulated at all. Finally, EPA pointed out that it has previously delisted HAP sources without satisfying the requirements of section 112(c)(9).

HOLDINGS

As for EPA’s first argument, the court agreed that typically agencies may reverse a previous “administrative determination or ruling where the agency has a principled basis for doing so.”⁹ However, Congress has the power to restrict an agency’s ability to reverse its self. The Court found that the delisting restriction in section 112(c)(9) represented an expressed limit on EPA’s discretion to delist HAP sources. Furthermore, the Court found that EPA’s position would nullify section 112(c)(9) and allow the agency to delist any source without regard for the statutory delisting process.¹⁰

In analyzing EPA’s request for judicial deference the court utilized the two-pronged test laid out in *Chevron*. Under the first prong of the test the court looked to determine if “Congress has directly spoken to the . . . issue.”¹¹ Looking at the plain language of the statute, the court pointed to section 112(c)(6) where Congress expressly discusses regulation of EGUs.¹² The court found no ambiguity in section 112 and held that the EPA’s argument “deploys the logic of the Queen of Hearts, substituting EPA’s desires for the plain text . . .”¹³ Finally, the court found EPA’s third argument unconvincing, pointing out that previous examples of statutory violations are not an excuse for current violations.¹⁴

Finding all three of EPAs arguments without merit, the court vacated the delisting of coal- and oil-fired EGUs. Under EPAs own interpretations, the mercury regulation under CAMR created within CCA section 111 cannot be used to regulate sources listed in section 112. With this in consideration, the Court also vacated CAMR and remanded it to EPA for reconsideration.

CONCLUSION

Environmental groups have hailed the Court’s ruling as a victory for the health of all Americans by invalidating an attempt by EPA to get around the much stricter standards required by CCA section 112 with a weak cap-and-trade program under CAMR.¹⁵ The petitioners contended that the cap-and-trade program would have done little to cap mercury in the short term and would have delayed any actual reductions by a decade or more.¹⁶ After the decision, one petitioner’s attorney stated, “We hope the administration will gain some new respect for the law in its last year and start working to protect Americans from pollution and stop working to shield polluters from their lawful cleanup obligations.”¹⁷



¹ See *New Jersey v. EPA*, 517 F.3d 574, 577 (D.C. Cir. 2008).

² Press Release, New Jersey Office of the Attorney General, Federal Appeals Court Rules in Favor of NJ and Vacates EPA Mercury Rules (Feb. 8, 2008), available at www.nj.gov/oag/newsrelease08/pr20080208b.html (last visited Apr. 25, 2008).

³ *New Jersey*, 517 F.3d at 578.

⁴ *New Jersey*, 517 F.3d at 578.

⁵ *New Jersey*, 517 F.3d at 579.

⁶ *New Jersey*, 517 F.3d at 579.

⁷ *New Jersey*, 517 F.3d at 579.

⁸ *New Jersey*, 517 F.3d at 579.

New Jersey, 517 F.3d at 582.

¹⁰ *New Jersey*, 517 F.3d at 583.

¹¹ *New Jersey*, 517 F.3d at 580.

¹² *New Jersey*, 517 F.3d at 580.

¹³ *New Jersey*, 517 F.3d at 582.

¹⁴ *New Jersey*, 517 F.3d at 583.

¹⁵ Press Release, Environmental Defense Fund, Court Rules EPA Violated the Law by Evding Required Power Plant Mercury Reductions (Feb. 8, 2008), available at <http://www.edf.org/pressrelease.cfm?ContentID=7630> (last visited Apr. 25, 2008).

¹⁶ New Jersey Office of the Attorney General, *supra* note 2.

¹⁷ Environmental Defense Fund, *supra* note 15.