

## News

3/3/2009

### DC Circuit Remands USEPA's 2006 PM2.5 NAAQS

On February 24, 2009, the United States Court of Appeals for the District of Columbia issued its long-awaited ruling on the U.S. EPA's Final Rule on National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61143 (October 17, 2006), remanding the standards for fine particulates (PM<sub>2.5</sub>) and rejecting all other challenges. The Court criticized the EPA for disregarding the recommendations of its staff and its own Clean Air Scientific Advisory Committee on fine particulates and found that the EPA failed to justify its departure from those recommendations. The Court chose not to vacate the remanded rules so that some protection for fine particulates would remain in place.

In granting in part the petitions for review of *the primary PM<sub>2.5</sub> standard* brought by several states and environmental groups, the Court concluded that EPA failed to adequately explain why the annual standard of 15 µg/m<sup>3</sup> of fine particulates would be sufficient to protect the public health within an adequate margin of safety. The Court delved deeply into the scientific studies in the record to find that the EPA inappropriately rejected its internal findings and needed a better response to the technical arguments raised against the standard. Yet, the Court denied the same petitions insofar as they sought review of the Agency's analysis of the long-term mortality studies and the Agency's decision not to rely on the risk assessment. The Court specifically allowed the current annual standard to remain in place during the Agency's reconsideration so as to not "sacrifice such protection as it now provides."

The Court also remanded for further review EPA's *secondary standard for PM<sub>2.5</sub>*, finding the Agency's decision to set secondary PM standard identical to the primary NAAQS was contrary to § 7409(b)(2) of the Clean Air Act. Again, the Court thoroughly evaluated various scientific studies in the record to determine that the EPA improperly concluded that the primary NAAQS would prevent adverse effects on visibility and therefore be sufficient for a secondary NAAQS as well.

The Court denied the petitions for review of the *primary daily standards for coarse PM, (PM<sub>10</sub>)*, brought by the industry groups. The Court also denied the environmental groups' petition for review of the Agency's revocation of the primary annual standard for coarse PM because the Court determined that the EPA reasonably decided that an annual coarse PM standard was not necessary because of the controls on fine particulates.

The Court's ruling is another resounding regulatory defeat for the Bush EPA and another example of the DC Circuit's willingness to second guess EPA on highly technical issues. Although ostensibly operating under an arbitrary and capricious standard of review, the Court conducted a thorough review of the technical record and placed great weight on the fact that the EPA rejected its own internal technical reports. Environmental groups and states that support lower PM standards believe that EPA's reconsideration of the rule could result in lower standards rather than the EPA seeking to find better justifications for its earlier decision.

The PM rule reconsideration will be of great interest to all potential stakeholders. More than 120,000 comments were received by EPA from members of the public and various interested groups on the current revisions to the PM NAAQS. But, with no timeframe for Agency reconsideration set, the current rule could remain in place for months if not years to come.

Since the rule was not vacated, state SIPs adopting the PM<sub>2.5</sub> rule will remain in effect, leaving significant uncertainty for operators of facilities subject to the rule. Regardless of the timing of its reconsideration, the EPA will be required to publish another notice of proposed rulemaking or similar notice which will provide industry and other members of the public an opportunity for further input into the revisited PM standards. In the meantime, many state SIP demonstrations based on the remanded PM<sub>2.5</sub> standard are still pending approval at EPA and may be left in regulatory limbo.

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