Skadden

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

D.C. Circuit Decision May Significantly Impact the Process for Obtaining Clean Air Act Permits

In *Sierra Club v. Environmental Protection Agency*, 2013 U.S. App. LEXIS 1408 (D.C. Cir. Jan. 22, 2013), the District of Columbia Circuit Court of Appeals issued a decision that is likely to have a significant impact on parties seeking Prevention of Significant Deterioration (PSD) permits.[1] The court held that the United States Environmental Protection Agency (EPA) did not have the legal authority to adopt exemptions that would allow permit applicants to avoid mandatory preapplication ambient air quality monitoring in connection with emissions of the pollutant $PM_{2.5}$[2] if the impact of the source on ambient air quality is below the Significant Monitoring Concentration (SMC) adopted by EPA. The court also vacated and remanded to EPA regulations that deemed permit applicants in compliance with a modeling exercise known as a "source impact analysis" for $PM_{2.5}$ emissions if the applicant could demonstrate that the impact of the proposed emissions from the facility itself are less than the Significant Impact Levels (SILs) for $PM_{2.5}$.

Although the decision only directly affects certain regulations relating to $PM_{2.5}$ emissions from proposed new or modified sources, the ruling could impact the requirements related to the permitting of other air pollutants, such as SO_2, NO_2 and PM_{10}.

1. PSD Source Impact Analysis and Preapplication Monitoring Requirement

Section 165(a) of the Clean Air Act requires a person seeking a PSD permit to demonstrate that "emissions from construction or operation of such facility will not cause or contribute to … air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year [and] (B) national ambient quality standard in any air quality control region …" 40 U.S.C. §7475(a)(3).

Section 165(e)(1) requires as part of the demonstration "an analysis of the ambient air quality at the proposed site and in areas which may be affected by emissions for each pollutant subject to regulations under this chapter which will be emitted from such facility." 42 U.S.C. §7475(e)(1). To put this into effect, EPA requires an applicant to demonstrate, for each pollutant emitted from the proposed source that is subject to the PSD requirement, that the allowable emissions from the proposed source, combined with other applicable emissions increases and reductions in the relevant geographic area, will not cause or contribute to air pollution that will exceed the "maximum allowable increase" of each pollutant (known as "increments") or result in a violation of the NAAQS for such pollutants. This is known as the "source impact analysis." 40 CFR 51.166(k) and 52.21(k).[3]

---

1 PSD permits are major source air construction permits required for sources locating or located in an area that is classified as "attainment" or "unclassifiable" with the National Ambient Air Quality Standard (NAAQS) for a subject pollutant. Assuming other conditions are met, a pollutant is subject to the PSD requirements if the net emissions increase of the pollutant from the proposed new or modified source exceeds significance thresholds established in EPA or state regulations.

2 Particles less than 2.5 micrometers in diameter.

3 EPA's regulations set forth at 51.166 establish the minimum requirements that must be included by states in State Implementation Plans (SIPs). The parallel regulations at 52.21 apply where EPA is the permitting authority.

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Don J. Frost, Jr.
Washington, D.C.
202.371.7422
don.frost@skadden.com

Henry C. Eisenberg
Washington, D.C.
202.371.7155
henry.eisenberg@skadden.com

* * *

1440 New York Avenue, NW,
Washington, D.C. 20005
Telephone: 202.371.7000

Four Times Square, New York, NY 10036
Telephone: 212.735.3000

WWW.SKADDEN.COM

As part of the air quality analysis required for PSD permit applications, Section 165(e)(2) requires that a permit applicant gather continuous air quality monitoring data for a period of one year prior to the submittal of a PSD permit application. 42 U.S.C. §7475(e)(2).[4] EPA's regulations implementing the preapplication monitoring requirement are set forth at 40 CFR 51.166(m) and 52.21(m).

2. SILs and SMCs

EPA developed SILs and SMCs as screening mechanisms to identify those circumstances where it was reasonable to allow sources (and regulators) to avoid the time and expense associated with conducting source impact analyses and/or monitoring in connection with preparing and reviewing PSD permit applications.

A. SILs

SILs were originally promulgated to evaluate whether the emissions from a source locating in an attainment or unclassifiable area would be deemed to be causing or contributing to a NAAQS violation in an adjacent downwind area. A source exceeding a SIL would be required to reduce or offset emissions in order to obtain a permit. 40 CFR 51.165(b)(2) and (3). EPA adopted SILs for NO_2, SO_2, PM_{10} and CO for this purpose.

EPA had not, prior to the adoption of SILs for $PM_{2.5}$, issued a *regulation* that would allow a source to forego a cumulative source impact analysis if the source demonstrated that its emissions would not result in an ambient air quality impact above a SIL, but EPA's long-standing guidance authorized this approach. *See* 72 Fed. Reg. 54112, 54139 (Sept. 21, 2007) (proposed rule); New Source Review Workshop Manual, at C.24-C.25 (draft 1990).[5]

EPA adopted SILs for $PM_{2.5}$ on October 20, 2010. 75 Fed. Reg. 64864. Separate standards were adopted for the annual and 24-hour $PM_{2.5}$ NAAQS. The standards were further broken down to address modeled impacts on Class I, II or III areas. 40 CFR 51.166(k)(2) and 52.21(k)(2). EPA expressly stated that if a permit applicant demonstrated that the air quality impact from the new source or modification alone was below the SILs set forth in the regulation, the applicant will have been deemed to have satisfied its obligation to demonstrate that emissions from the new source or modification, in combination with other applicable emissions increases or reductions, would not cause or contribute to a violation of the $PM_{2.5}$ NAAQS or exceed the $PM_{2.5}$ increment. *Id.*

EPA's rationale for this exemption was that it had legal authority to be flexible in applying Clean Air Act obligations to circumstances that were inconsequential or insignificant, pursuant to *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). EPA considered "a source whose individual impact falls below a SIL to have a *de minimi*s impact on air quality concentrations." 72 Fed. Reg at 54139. As a result, it "considers the conduct of a cumulative air quality analysis and modeling by such a source to yield information of trivial or no value with respect to the impact of the proposed source or modification." *Id.*

---

4 Section 165(e)(2) allows a regulating authority to reduce the preapplication monitoring period if the regulator determines that this is sufficient for an adequate analysis. *Id.* EPA has established the minimum period for preapplication monitoring at four months. 40 CFR 51.166 (m)(1)(iv) and 52.21(m)(1)(iv).

5 *See also In Re: Prairie State Generating Company*, PSD Appeal No. 05-05 (EAB, Aug. 24, 2006) (discussing application and use of SILs in permitting decisions).

B. SMCs

EPA's PSD regulations provide that a regulatory authority may exempt a proposed stationary source or modification from the preapplication monitoring requirement for a particular pollutant if the emissions increase from the new source or net emissions increase from the modification would cause an ambient air quality impact less than *de minimis* amounts established in the regulations. 40 CFR 51.166 (i)(5)(i) and 52.21(i)(5)(i). A monitoring exemption for *de minimis* impacts from particular pollutants has been part of the regulatory scheme since 1980. 72 Fed. Reg. at 54141. The 2010 rule added a SMC for $PM_{2.5.}$

EPA's rationale for adopting SMCs was the same as its rationale for adopting SILs. EPA stated that "[i]f a source can show through modeling of its emissions alone that its impacts are less than the corresponding SMC, there is little to be gained by requiring that source to collect additional monitoring data on $PM_{2.5}$ emissions to establish background concentrations for further analysis." *Id.*

3. The Sierra Club Decision

A. The $PM_{2.5}$ SILs Are Partially Vacated

The Sierra Club challenged the adoption of the SILs for $PM_{2.5}$ on the ground that Section 165 of the Clean Air Act does not allow EPA to establish a *de minimis* exemption from the requirement that an applicant demonstrate that its proposed emissions would not cause or contribute to a violation of the $PM_{2.5}$ NAAQS or an exceedance of the $PM_{2.5}$ increments. The Sierra Club further argued that even if Section 165 "were not so extraordinarily rigid as to bar any *de minimis* exemption … pollution increases below the SILs are not so trivial as to be *de minimis*." *Sierra Club*. 2-1 U.S. App. LEXIS 1408, at *12. Among other examples, the Sierra Club argued that in areas in which the ambient air concentration of $PM_{2.5}$ is just meeting the NAAQS, the construction of a source of $PM_{2.5}$ emissions whose modeled impact is below the SIL will still cause a violation of the NAAQS. *Id.* Similarly, a source with modeled impacts below the SIL that is constructed in an upwind state could contribute to worsening conditions in a downwind nonattainment area. *Id* at *13. EPA's regulations would allow such sources to avoid demonstrating that their emissions would not cause or contribute to a violation of the NAAQSs or an increment. *Id.*

EPA did not concede that it lacked authority to promulgate SILs. However, EPA acknowledged in its brief that the codified SILs provisions were flawed because the text of the regulations was inconsistent with EPA's intent, as explained in the preamble to the final rule, that "permitting authorities should determine when it may be appropriate to conclude that even a *de minimis* impact will 'cause or contribute' to an air quality problem and to seek remedial action from the proposed new source or modification." *Id.* at *13-14 (quoting the preamble to the final regulations at 75 Fed. Reg. 64892). EPA recognized that the regulations did not provide permitting authorities with such discretion. *Id.* at *14. Accordingly, the court granted EPA's request to vacate and remand the $PM_{2.5}$ SILs regulations codified at 40 CFR 51.166(k)(2) and 52.21(k)(2).[6] The court found that it was not necessary to reach the question of whether EPA had statutory authority to promulgate SILs because such a question was not ripe for adjudication. *Id.* at *15.

---

6 The court did not vacate the SILs provision in 40 CFR 51.165(b)(2) and (3) because the text of this regulation does not exempt a source from ambient air quality analysis; instead, this regulation affirmatively states that a source that exceeds a SIL in a downwind nonattainment area is deemed to have caused or contributed to a violation of the NAAQS (and must make changes to avoid this impact). *Id.* at *20. Moreover, EPA's legal authority to promulgate this specific regulation was not challenged by the Sierra Club. *Id.* at *19.

B. The SMC Is Vacated

The Sierra Club also argued that EPA did not have *de minimis* authority to promulgate a SMC for $PM_{2.5}$. In finding in favor of the Sierra Club, the court declared that Section 165(e)(2) of the Clean Air Act was an "extraordinarily rigid mandate that a PSD permit applicant undertake preconstruction monitoring." *Id.* at *25. The court stated that

> Congress's use of the word "shall" in each sentence [of Section 165(e)(2)] … evidences a clear legislative mandate that the preconstruction monitoring requirement applies to PSD permit applicants. That Congress provided only one exception to this monitoring requirement — a shorter monitoring period — suggests that the Congress did not intend any other exceptions.

Id. (underline added). The court noted that its interpretation was supported by the fact that Section 165(e)(2) requires that the results of the air quality analysis "be made available to the public at the time of the hearing for a PSD permit" and that this is consistent with one of the stated purposes of the PSD program, to allow for "adequate procedural opportunities for *informed* public participation in the decision making process." *Id.* at *28-29 (quoting 42 USC § 7470(5)). Although EPA asserted a number of policy arguments in support of the monitoring exemption, the court stated that "the statute leaves no room for such exemptions …" *Id.* at *30.

EPA argued that as a threshold matter the Sierra Club's challenge was time-barred "because the EPA has used SMCs as a screening tool since 1980." *Id.* at *21. The court rejected this argument, holding that "by establishing a new monitoring exemption for a new pollutant, the EPA exposes its $PM_{2.5}$ regulations, including whether it has authority to adopt the SMC exemption for $PM_{2.5}$ and whether it used an appropriate method to determine the level of the SMC, to challenge by a timely filed petition." *Id.* at *23.

4. What Happens Next

EPA has not said whether it will seek a rehearing *en banc* of the court's decision vacating the SMC exemption or file a petition for certiorari to the Supreme Court, although neither course of action seems probable. EPA has already announced that it intends to issue new rules to address the court's decision. This will at a minimum include a rule to address the voluntary remand of the rules that exempted applicants whose modeled emissions were below the SILs for $PM_{2.5}$ from a cumulative source impacts analysis.

Where EPA is the permitting authority, PSD applicants will be required to include an analysis of ambient air quality based on preapplication monitoring data for $PM_{2.5}$. This will add to the time, burden and expense of preparing such applications and will be a particular problem for applicants in areas that do not have existing ambient air quality monitors for this pollutant. EPA has announced, in a document posted to its website on February 6, 2013,[7] that it is assessing the impact of the court's decision on pending PSD permits that rely on the $PM_{2.5}$ SILs and/or SMC. We are aware of at least one instance in which EPA is holding up for further review a permit that was on the verge of issuance.

EPA has not stated whether it also is reviewing pending permits that relied on SILs or SMCs for other pollutants. However, EPA's use of SILs as a tool to exempt sources from conducting cumulative impact analyses for other pollutants was based on guidance and historic agency practice, not regulation. Therefore, pending permits that rely on modeled emissions showing that ambient air quality impacts

---

7 http://www.epa.gov/airquality/nsr/documents/summ_court_020613.pdf (last checked on February 26, 2013).

from the source itself are below SILs for other pollutants also may be delayed pending EPA assessment of the effect of the court's decision on such applications.

The regulations promulgated over 30 years ago that allow permit applicants to avoid collecting preapplication ambient air quality monitoring data for pollutants other than $PM_{2.5,}$ by demonstrating that their emissions are below a SMC, are still in effect following *Sierra Club*. However, EPA has stated that "given the court's broadly stated holding that SMCs are not permissible, [it] is also assessing the decision's impact on SMCs for other pollutants."[8] EPA may conclude that in order to ensure that its regulatory program is fully consistent with the Clean Air Act, it should amend its PSD regulations to eliminate the SMC exemption for other pollutants.

Under the "cooperative federalism" structure of the Clean Air Act, most permits to construct or operate air emissions sources, including PSD permits, are issued by state (or local) environmental regulators pursuant to state laws and regulations that have been approved by EPA and are incorporated into a state SIP. EPA has stated that "it is assessing the impact of the court's decision on *pending* requests to approve state PSD rules containing the $PM_{2.5}$ SILs and SMC" (emphasis added).[9] EPA has not indicated what it intends to do about the use of SILs and/or SMCs that are *already included* in state SIPs for other pollutants subject to PSD permitting. For the time being, a permit applicant that demonstrates that its projected emissions will not exceed an applicable SMC (or SIL) should be able to rely on existing state or local regulations exempting it from preapplication ambient air quality monitoring (or cumulative impacts analysis).[10] However, depending on the outcome of EPA's review of SMCs and SILs for other pollutants, EPA could issue a "SIP call" requiring states to amend their SIPs to eliminate exemptions from monitoring and ambient air quality analyses based on SILs and SMCs.

---

8 *Id.*

9 *Id.*

10 Similar to EPA, states that relied on EPA's guidance in using SILs as a screening tool to allow permit applicants to avoid cumulative impacts analysis (as opposed to implementing this mechanism through a regulation approved by EPA as part of its SIP) may be forced to consider the impact of *Sierra Club* on PSD permits that are currently pending.