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D.C. Circuit Vacates Equipment Replacement Provision (ERP) Rulemaking

By Kyle B. Beall, Partner
Environmental Regulatory Group
Kean Miller Hawthorne D'Armond McCowan & Jarman, LLP

On March 17, 2006, the Court of Appeals for the D.C. Circuit vacated EPA's final Equipment Replacement Provision rulemaking which attempted to establish a bright-line test for routine maintenance, repair and replacement (RMRR) in ***New York v. EPA, No. 03-1380 (D.C. Cir. 2006).*** To vacate a rule is to rescind and set it aside entirely (as opposed to a remand which would have sent it back to the agency for further justification.) The final rule, which attempts to eliminate the uncertainty concerning NSR applicability for routine changes, was published by EPA in the Federal Register on October 27, 2003 (*See*, 68 Fed. Reg. 61,248). After being appealed and stayed by the federal court, EPA reconsidered the rule in June 2005, but decided to proceed with the rule as originally published. On February 8, 2006, oral arguments were held before a three-judge panel.

In a relatively brief decision, the D.C. Circuit focused its attention on the statutory definition of "modification" set forth in Clean Air Act § 111(a)(4). Under that definition, 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 …" The court focused its attention on what it considered the unambiguous meaning of "physical change" and the broadness of the modifier "any." It held that "Congress's use of the word 'any' in defining a 'modification' means that all types of 'physical changes' are covered." Opinion, p.19. Second, the court held that, as written, "the ERP would allow equipment replacements resulting in non-*de minimis* increases to avoid NSR." *Id.*

The Court reached its decision through the familiar two-part test first enunciated in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Under the *Chevron* analysis, a court first determines whether "Congress has directly spoken to the precise question at issue." If it does, then the court's analysis will proceed no further. Only if the statute is silent or ambiguous will the court defer to the agency's interpretation based on traditional tools of statutory construction, the second part of the test. In its analysis of "modification," the court did not get past the first part of the *Chevron* analysis.

In particular, the court noted that "read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,' … and that courts must give effect to each word of a statute." *Id.*, p.10. The court further noted that "although EPA is correct that the meaning of 'any' can differ upon the statutory setting,… the context of the Clean Air Act warrants no departure from the word's customary effect." *Id.*, p.11. The D.C. Circuit further relied upon its decision in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980) in its conclusion that the definition of modification should be construed broadly. The court concluded that "only physical changes that do not result in emission increases are excused from NSR. … The expansive meaning of 'any physical change' is strictly limited by the requirement that the change increase emissions." *Id.*, p.14-15.

Significantly, the court stated in a footnote that it "has no occasion to decide whether part replacements or repairs necessarily constitute a 'modification' under the definition taken as a whole." *Id.*, p.15, fnte. 4. Quoting *Alabama Power*, the court further explained that "EPA does have discretion, in administering the statute's 'modification' provision, to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity," but also noted that "[w]hile the court today expresses no opinion regarding EPA's application of the *de minimis* exception, given the limits on the scope of the *de minimis* doctrine, EPA appropriately has not attempted to justify the ERP as an exercise of *de minimis* discretion. *Id.*, p.16.

Under EPA's final (now vacated) ERP, equipment replacement activities were automatically excluded from NSR review if certain requirements were met. Under the automatic approach, an equipment replacement activity would be excluded from NSR if the activity involved the replacement of components with ones that are identical or serve the same purpose as the replaced components, and the fixed capital cost of the replaced components and associated activities (i.e., cost and labor) did not exceed 20 percent of the current replacement cost of the entire process unit. The replacement also could not alter the basic design parameters of the process unit, nor cause the unit to exceed any applicable emissions limits. Alternatively, a facility could choose to use the traditional case-by-case approach to determine whether an equipment replacement activity is excluded because it is "routine."

The LDEQ adopted EPA's first NSR Reform rule (known as the NSR I rule) in December 2005. Louisiana's NSR rule purposely did not address equipment replacement activities in detail due to the then-pending ERP litigation. The LDEQ has not officially responded to the latest judicial decision, and the impact on future agency determinations is unclear at this time. However, EPA's traditional (yet subjective) "four factors" analysis should still be available for facilities undergoing routine repair and replacement projects. Again, the court did *not* decide whether such projects would necessarily constitute a modification under the definition.

Appeal of the D.C. Circuit's decision on the ERP is expected.

About the Author:

Kyle Beall is a partner in the Baton Rouge office of Kean Miller. He joined the firm in 1997 and practices exclusively in the environmental area. His practice involves most aspects of environmental regulatory law, including permitting, compliance, enforcement, insurance, and transactional issues with a particular emphasis on air quality issues. He assists and counsels clients in permitting and enforcement actions before federal and state agencies, on release notification issues, and on environmental audits, and has participated in rulemaking efforts at both the federal and state level. He has also lectured on a variety of environmental topics.

Kyle has also engaged in complex litigation matters, primarily focusing in the areas of toxic tort and class action litigation, including the defense of lawsuits involving chemical exposure. After receiving a Bachelor of Science in Civil Engineering from Louisiana State University (LSU), Mr. Beall worked as an environmental engineer. In 1997, he graduated from the University of South Carolina, School of Law after attending his final year at LSU Law School in Baton Rouge. He can be reached at 225.382.3493 or kyle.beall@keanmiller.com