D.C. Circuit Decision on the Prevention of Significant Deterioration Rule for Fine Particles — Increments, Significant Impact Levels and Significant Monitoring Concentration

January 29, 2013

Summary

- The EPA is currently reviewing the January 22, 2013, decision from the D.C. Circuit Court of Appeals that, on the EPA's request, vacated and remanded to the EPA for further consideration certain portions of two Prevention of Significant Deterioration (PSD) regulations (40 CFR 51.166 and 40 CFR 52.21) that address Significant Impact Levels (SILs) for $PM_{2.5}$. The EPA requested this vacatur and remand of two of the three provisions in EPA regulations that contain SILs for $PM_{2.5,}$ because the wording of these two SIL provisions (40 CFR 51.166(k)(2) and 40 CFR 52.21(k)(2)) is inconsistent with the explanation of when and how SILs should be used by permitting authorities that we provided in the preamble to the *Federal Register* notice when we promulgated these provisions. The third SIL provision (40 CFR 51.165(b)(2)) was not vacated and remains in effect. The Court also vacated the parts of these two regulations that establish a $PM_{2.5}$ Significant Monitoring Concentration (SMC), having found that the EPA was precluded from using the SMC as a de minimis exemption from the statutory requirement to do preconstruction monitoring. The court's decision does not affect the PSD increments for $PM_{2.5}$, which are also part of the two affected PSD regulations.
- The EPA will develop a proposed rule to address the court's decision.
- The EPA is assessing the effects of the court's decision on pending PSD permits that are relying on the $PM_{2.5}$ SILs and/or SMC in fulfilling the requirements to demonstrate that the proposed source or modification would not cause or contribute to a violation of the $PM_{2.5}$ National Ambient Air Quality Standards or increments. The EPA is also assessing the impact of the court's decision on pending requests to approve state PSD rules containing the $PM_{2.5}$ SILs and SMC. Finally, given the court's broadly stated holding that SMCs are not permissible, the EPA is also assessing the decision's impact on SMCs for other pollutants.
- As the EPA reviews the decision and determines the next steps, the Agency is reaching out to state, local and tribal air agencies through existing workgroups and the EPA's Regional Offices. The EPA encourages all air agencies to submit questions and raise issues through their EPA Regional Office contacts. Other interested parties with questions are also encouraged to transmit those questions through their respective EPA

Regional Offices. The EPA will work to address those questions and concerns in the coming weeks and provide further information as soon as possible.

Background

- On October 20, 2010, the EPA issued a final rule to add to the existing PSD regulations for $PM_{2.5}$ maximum allowable increases in ambient pollutant concentrations (increments) and two screening tools, known as the $PM_{2.5}$ SILs and $PM_{2.5}$ SMC. These screening tools were developed to reduce the burden of the air quality monitoring and modeling analyses that a PSD applicant must submit to demonstrate eligibility for a PSD permit for a project with only a small air quality impact.
- The Sierra Club filed a petition challenging the EPA's 2010 PSD rule, claiming that the EPA lacked statutory authority to promulgate the $PM_{2.5}$ SILs and SMC. The Sierra Club further argued that the EPA had not provided an adequate demonstration that the $PM_{2.5}$ SILs and SMC represented de minimis impacts.
- Recognizing an inconsistency between the wording of two of the three regulation sections on SILs and statements in the preamble to the regulation, the EPA requested the court to vacate and remand to the EPA these two provisions in the 2010 rule addressing the $PM_{2.5}$ SILs.
- The Utility Air Regulatory Group intervened on behalf of the EPA, urging the court to uphold the SIL provisions, or alternatively, to remand the SIL provisions without ordering that they be vacated.
- In the January 22, 2013, decision the court granted the EPA's request to vacate and remand to the EPA the portions of the 2010 rule addressing the $PM_{2.5}$ SILs, except the parts of the rule codifying $PM_{2.5}$ significance levels in the NSR rule at 40 CFR 51.165(b)(2). The Court also vacated the parts of the 2010 rule establishing the $PM_{2.5}$ SMC, holding that the EPA was precluded from using the SMC as a de minimis exemption from the statutory requirement to do preconstruction monitoring.