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Entergy Corp. v. Riverkeeper, Inc., 129 S.Ct. 1498 (2009).

Power plants that produce large amounts of heat in the course of generating electricity often utilize “cooling water intake structures” that extract water for cooling purposes from adjacent water sources. However, the operation of these structures also adversely affects the environment. Specifically, the cooling water intake structures draw in aquatic organisms – from tiny phytoplankton to large fish – that then become either impacted (“impinged”) on the intake screens, or suctioned (“entrainment”) in the cooling water system.

The deleterious environmental impacts of these structures bring them within the purview of the Clean Water Act (“CWA”), which mandates that the design and operation of cooling water intake structures “reflect the best technology available for minimizing adverse environmental impact.” After nearly three decades of distinguishing what constitutes the “best technology available” on a case-by-case basis, the Environmental Protection Agency (“EPA”) promulgated a set of regulations that set forth a universal set of standards to determine whether particular cooling water intake structures satisfy the requirements of the CWA. “Phase I” of these regulations, which apply to new cooling water intake structures, requires the installation of closed-cycle cooling systems, which recirculate water and, consequently, extract less water from adjacent waterways than conventional cooling systems. “Phase II” of these regulations, which apply to existing facilities, requires power plants to take measures to reduce aquatic organism mortality to EPA established “national performance standards,” but fails to mandate closed-cycle cooling systems, or an equivalent reduction in impingement and entrainment. EPA declined to mandate the same standards for Phase II as for Phase I because of the costs associated with retrofitting existing facilities with closed-cycle technology and because other cheaper technologies closely approach the closed-cycle performance standards.

A group of petitioners, including several environmental groups and various States, asserted that EPA’s cost-benefit analysis is impermissible under a plain language analysis of the CWA. The Second Circuit agreed with petitioners and remanded the regulations to EPA for clarification on whether EPA relied on a cost-benefit analysis in establishing national

performance standards. The Supreme Court granted certiorari and, upon review, reversed and remanded.

The Supreme Court found the CWA's "best technology" language to be ambiguous – it could either refer to technology that reasonably achieves the greatest mitigation of environmental degradation, or it could also describe technology that most efficiently minimizes environmental degradation. Furthermore, the phrase "for minimizing adverse environmental impact" indicates degree and, therefore, does not necessitate technology that achieves the greatest possible reduction in environmental impact. According to the Court, since other CWA provisions explicitly demonstrate that Congress has used plain language to mandate, for example, the greatest feasible reduction in water pollution, the language of the "minimizing adverse environmental impact" provision implies that EPA has discretion on this issue.

Ultimately, the Court concluded that whether or not it is reasonable to consider a particular cost depends on the resulting benefits. In this same vein, EPA's cost-benefit analysis was deemed a reasonable exercise of discretion with regards to the CWA because EPA's "national performance standards" provided an efficient mechanism where the approximate benefits of closed-cycle cooling systems could be achieved at a fraction of the cost.

MICHAEL C. RISBERG

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N.J. Dep't of Env'tl. Prot. v. U.S. Nuclear Regulatory Comm'n, 561 F.3d 132 (3rd Cir. 2009).

In July 2005, AmerGen Energy Corporation applied to the U.S. Nuclear Regulatory Commission (hereinafter NRC) to renew its license for operation of the Oyster Creek Nuclear Power Plant in New Jersey. Under NRC regulations, interested parties may request a hearing to air any safety or environmental concerns involving the relicensing. The New Jersey Department of Environmental Protection (hereinafter NJDEP) took this opportunity to raise concerns about the NRC's failure to prepare an environmental impact study on the effects of a possible future terrorist attack on the power plant.

Under the Atomic Energy Act of 1954, the NRC may renew licenses for nuclear power plants for up to 20 years. As part of the renewal process, the NRC must conduct a health and safety review focused on the effects of aging of the plant. Further, the National Environmental Policy Act of 1970 requires the NRC to complete an environmental review focusing on potential environmental effects of 20 years of further operation. This review is meant solely to inform the NEA's decision regarding renewal and therefore requires only that the agency consider significant acts of environmental impact. It does not require agencies to set any standards for environmental protection.

Nonetheless, the NRC does set its own standards of inquiry regarding the NEPA requirements. First, the agency keeps track of issues common to all nuclear power plants, including the risk of sabotage or attack. The NRC has concluded that the risk of sabotage in general is very small, and that, in the event that an attack occurs, the resultant damage will be no more serious than that which would occur following some kind of accident. Second, the NRC addresses certain plant-specific issues during renewal proceedings. Among these inquiries is whether the possibility of a severe accident has been adequately addressed by the particular plant in question. Specifically, plants must have a plan to mitigate damage resulting from such accidents.

So when the NJDEP brought its concerns before the licensing board, the board denied its request to prepare a separate environmental impact report regarding terrorist attacks, holding that considerations of

terrorist attacks lie outside the scope of licensing renewal proceedings. The NRC found that terrorist attacks do not relate to aging of facilities, and that the NRC had already taken extensive action independent of renewal proceedings to address security concerns in the aftermath of the events of September 11th. Finally, the NRC found that because damage resulting from a terrorist attack would likely be comparable to damage caused by an accident at the facility, and because the licensing process already took steps to ensure proper safeguards regarding accidents, additional inquiries regarding the threat of terrorist attack would be redundant. NJDEP petitioned the 3rd Circuit, which upheld the NRC's order on two main grounds.

First, the court found that NJDEP had not shown a causal relationship between the relicensing proceedings and the environmental effects of a terrorist attack. According to the Supreme Court in *Metropolitan Edison Co. v. People Against Nuclear Energy*, there must be a relationship between the environmental effect and the federal action at issue. The 4th Circuit here held that because there was no causal relationship between the relicensing proceedings and the environmental effects of a hypothetical terrorist attack, the NRC was not required to prepare an Environmental Impact Assessment regarding those effects. The NRC is not charged with regulating airspace above nuclear facilities, and has articulated its view that the Federal Aviation Administration is better equipped to judge the threat of terrorist attack and the best ways to prevent such an attack. The court held that because the NRC has no authority to regulate airborne attacks on nuclear facilities, an Environmental Impact Assessment would be of limited use. Because the relicensing proceedings are not a proximate cause of terrorist attacks and the environmental impact thereof, the 3rd Circuit held that the NRC was not required to address that threat under NEPA.

Second, the court held that the NRC had already assessed the environmental impact of a hypothetical terrorist attack, because the NRC had already prepared an assessment of the environmental effect of a hypothetical nuclear accident. NJDEP argued that the Oyster Creek facility was unique in that it was located in a populated area in which a terrorist attack was more likely and that the environmental impact of such an attack would be greater than at most other plants. The court dismissed these arguments on procedural grounds. The 3rd Circuit held that because

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the NRC had already prepared generic assessments of the risk and consequences of a nuclear accident, it had no responsibility to prepare specific assessments for each renewal proceeding. Therefore, the NRC has no responsibility to prepare environmental impact assessments on the impact of possible terrorist attacks.

ROBERT A. NOCE

Palmyra Pacific Seafoods, L.L.C. v. United States, 581 F.3d 1361
(C.A.Fed. 2009).

The United States Court of Appeals decided *Palmyra Pacific Seafoods v. United States* on April 9, 2009. This controversy involved warning labels on tuna cans. Since mercury is found in tuna and is harmful to a developing fetus, the California Attorney General argued that consumers deserved to have a warning label on the cans of tuna because of the health risks posed by the mercury content.

After a 24-day bench trial, the trial court found that the labels were not required under Proposition 65, a California law that requires companies to place warning labels on their products that contain substances known to cause cancer. Specifically, the trial court held that federal law preempts Proposition 65 because it would clash with the FDA's current method of warning consumers about the risks of eating tuna. Furthermore, the trial court found that the tuna companies sufficiently showed that they would be exempt from Proposition 65 because the exposure to mercury by the average woman fell below the required amount for a warning label. Finally, the trial court found that the mercury naturally occurs in the tuna, making it exempt from the warning requirements.

The State appealed the trial court's ruling. The appeals court specifically focused on the third ruling, holding that the State did not present enough evidence to overcome its burden of proof to overturn the trial decision. Since the State challenged findings of fact, the court was required to utilize the "substantial evidence rule", in which the evidence is reviewed in a light most favorable to the prevailing party. The moving party is required to show that there was not enough evidence to back up the prevailing party's claim; if the moving party fails to meet this burden, the court must defer to the trial court decision.

This appeals court held that there is sufficient evidence showing that the mercury found in tuna is naturally occurring. The State attacked two studies conducted by the tuna companies' expert witnesses. One of the studies purported to prove that the mercury found in tuna was naturally occurring by comparing data from 1971 and 1998 and showing that there was no rise in mercury in the atmosphere during that time, thus disproving the assertion that the increase in mercury in tuna is due to pollution from

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humans. However, the State's attacks on these studies did not rise to the level necessary to overcome the deference required by the standard of review to overturn the decision.

Furthermore, the State asserts that Dr. Morel, one of the State's experts, later rescinded his views on the natural occurrence of mercury in tuna because one of his students presented a poster at a conference that contradicted some of his views. However, Dr. Morel assured the appeals court that his views had not in fact changed but that he merely supervised the student's study. The appeals court held that the poster did not accurately reflect Dr. Morel's views and that his testimony asserting that mercury in tuna is naturally occurring is still acceptable evidence.

Because the State failed to rebut the evidence relied on by the trial court, the appeals court held that there was sufficient evidence to support the trial court's holding that tuna companies are not required to place warning labels on cans of tuna.

ABBIE E. HESSE ROTHERMICH

North Carolina v. Tennessee Valley Authority, 593 F.Supp.2d. 812
(2009).

In *North Carolina v. Tennessee Valley Authority*, North Carolina, on behalf of its citizens, sought injunctive relief against the Tennessee Valley Authority (hereinafter "TVA") for causing a public nuisance in North Carolina from coal-fired power plants operated by TVA. The plants are located in Alabama, Kentucky and Tennessee. The TVA and North Carolina estimated the cost to reduce the emission in the power plants would cost between three and five billion dollars.

North Carolina argued that the pollution caused by coal-fired power plants threatens the "health of millions of people" and irreversibly affects the natural environment of North Carolina, thus constituting a public nuisance. The injuries sustained by North Carolina range from increased health costs associated with infant mortality and respiratory, destruction of native species, and damage to other environmental assets, such as scenic lookouts, which are affected by pollution caused haze. North Carolina has also stated that the direct and indirect costs of the pollution cost billions of dollars every year to North Carolina.

The TVA is a government mandated power producer that serves many customers in the American Southeast. The TVA argues that although some pollution originating from its power plants enters the state of North Carolina, the pollution does not rise to the high level required to be considered a public nuisance. The TVA also argued that the environmental effects being experienced in North Carolina are due to North Carolina's own power plants and not power plants located outside the state. The TVA also argues that their ability to supply inexpensive energy that is not overburdened by unneeded regulation is in the interest of millions of citizens of the United States. The TVA finally argued that they have taken mitigating measures to ensure that emission from their coal-fired power plants did not enter North Carolina in "unreasonable amounts."

The District Court first addressed whether the judiciary was the appropriate forum for North Carolina to enforce their rights. The Court stated that the traditional forum for enforcing "interstate air pollution concerns" is a complaint lodged with the Environmental Protection Agency. The court held that although this forum is better suited to hearing

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these claims, it is still within the right of the judiciary to enforce a state's rights under the doctrine of public nuisance, through an equitable judgment. The court also stated that North Carolina wished to enforce the rights in a stricter way, when compared to the EPA's requirements for air quality.

North Carolina sued to stop pollution from all of the TVA plants, but the court limited their consideration to only include the four plants within one hundred miles of North Carolina. The court held that the other plants operated by TVA were too remote and that those four plants could have the potential to contribute a significant amount of pollution into the state of North Carolina.

The Court also decided which state nuisance law controls litigation when pollution crosses interstate lines and creates a public nuisance in another state. The Court held that they should apply the state law of the state where the nuisance originates when there is an interstate public nuisance. Applying this principle to the current case, the District Court decided that even though the District Court was in North Carolina, and the harm was in North Carolina, the controlling law is the state's law where the coal-fired power plants are located. Thus, the court applied Alabama nuisance law to the plants in Alabama, Tennessee nuisance law to the Tennessee plants, and Kentucky nuisance law to the Kentucky plant.

In applying the individual state laws to the different plants, the District Court found that one plant in Alabama and two plants in Tennessee caused a public nuisance in North Carolina. The District Court held that injunctive relief was appropriate because of the harm caused to the citizens of North Carolina and that there existed a causal link between the plant's pollution and the harm caused. The Court stated that Kentucky law requires a nuisance to affect the public in an unreasonable amount. In applying Kentucky nuisance law to the TVA Kentucky plants, the court held that the Kentucky plants were too remote to satisfy Kentucky nuisance law.

The District Court also held that requiring the addition of facilities to reduce the pollution was an appropriate injunction to prevent the nuisance from continuing. The District Court required that the three power plants install scrubbers and selective catalytic reduction (SCR) which removes mercury, sulfate, and nitrate from the emissions that originate in a power plant's smokestacks. The District Court put a time line on the

installation of the scrubbers and SCR. The District Court gave the TVA 21 months to install SCR and 27 months to install scrubbers on each plant, rejecting the TVA's argument that it takes over five years to install a scrubber and three years to install an SCR.

BRIAN G. SCHIERDING

Westinghouse Electric Co. v. U.S., 2009 WL 881605 (E.D. Mo. 2009)

Westinghouse Electric Company (hereinafter “plaintiff”) owns property that was previously owned or used by the defendants to process nuclear fuel. Plaintiff cleaned up the pollution incurring costs which plaintiff sought to recover under § 107(a) and § 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (hereinafter “CERCLA”) from the United States and four non-governmental defendants.

CERCLA facilitates the cleanup of polluted sites by granting the President broad power to force cleanup and requires parties responsible to contribute to the costs. A person may pursue costs from past and present owners of a site under § 107(a) of CERCLA. Further, § 113(f) allows any person to seek contribution from any other person or entity liable or potentially liable under § 107(a).

The non-governmental defendants moved for summary judgment arguing that the plaintiff cannot bring a suit under § 113(f) because no administrative or judicially approved settlement resolving CERCLA liability existed and plaintiff was not a party to a pending or resolved § 107 suit. On January 29, 2008, this Court under Judge Limbaugh, granted the non-governmental defendants summary judgment on the § 113(f) claim, leaving only the § 107(a) cost recovery claim. Judge Limbaugh concluded that Missouri has no CERCLA authority without express EPA delegation meaning that a § 104 cooperative agreement with EPA was needed to trigger contribution under § 113(f).

Plaintiff asked this Court under Judge Perry to amend the order and deny summary judgment. On appeal, the United States admitted that Missouri has CERCLA authority without express EPA delegation but that plaintiff cannot meet the standard for a motion for reconsideration. The Court explained that district courts have considerable discretion in deciding whether to reconsider a summary judgment motion which may be granted because of a significant or controlling change in the law or if justice requires.

Although the Court rejected plaintiff’s argument that a change in the law occurred that was not considered by Judge Limbaugh, the Court reconsidered the issue nonetheless because justice required. The Court reasoned that if plaintiff was precluded from recovery under § 113(f),

plaintiff might be precluded from recovering any of its costs paid to the State of Missouri.

The Court admitted that a split of opinion exists regarding whether a state settlement in the absence of express EPA delegation could be considered a judicially approved CERCLA settlement that triggered a § 113(f) contribution claim. The Court noted that recently the Western District of New York, the District of Arizona and the Northern District of New York have all held that a § 104 cooperative agreement is needed to trigger a § 113(f) claim. However, the 9th and the 2nd Circuit held that a § 104 claim is not needed.

The Court heavily relied on Congress' intent for CERCLA explaining that Congress enacted CERCLA to address the serious environmental and health risks caused by industrial pollution and was intended to encourage voluntary cleanup of hazardous waste sites. CERCLA's sections for cost recovery were intended to allow states to use the state's resources for cleanup and recovery costs. Therefore, the Court concluded, that disallowing plaintiff to recover its costs for pollution cleanup from previous owners that used the site for nuclear fuel processing would be contrary to the intentions of CERCLA.

This Court enacted a new rule holding that states have authority under §§ 107(a) and 113(f) to recover costs regardless of whether a § 104 cooperative agreement with the EPA has been entered. The Court further ruled that where a state is acting on its own and not in collaboration with the federal government, EPA authorization is not required.

The Court noted, however, that it was not deciding whether the consent decree was sufficient to trigger cost recovery under § 107(a) or contribution under § 113(f). The Court reversed the grant of summary judgment as to the recovery of costs under § 113(f) against the non-governmental defendants and remanded the case for further proceedings solely on the finding that Missouri has authority under § 107(a) and 113(f) to recover costs regardless of whether a § 104 cooperative agreement with the EPA has been made.

ERIN P. SEELE

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Albert v. Peavey Co., 2009 WL 321934 (E.D. La. 2009).

Albert v. Peavey Co. involved a class action nuisance lawsuit against a grain elevator. The grain elevator was allegedly operating in such a manner as to permit dust particles to escape and land on the plaintiff's property, constituting a nuisance. In order to resolve the dispute, the United States District Court for the Eastern District of Louisiana interpreted and applied Louisiana's Right to Farm Law, La. Rev. Stat. § 3:3603 *et seq.*

In its Memorandum in Support of Defendant's Motion for Summary Judgment, the defendant indicated that, in general, Right to Farm Acts are enacted by state legislatures to protect preexisting agricultural operations from nuisance lawsuits where the agricultural operation is operating in conformance with generally accepted agricultural practices. Louisiana's Right to Farm Law is no exception as it contains provisions granting agricultural operations immunity from nuisance lawsuits so long as the operation was acting in accordance with generally accepted agricultural practices and in existence prior to the date at which the complaining party obtained an interest in its land. Additionally, the defendant's memorandum indicated that all 50 states have some version of a Right to Farm Act.

In applying Louisiana's Right to Farm Law, the court identified four issues relevant to the disposition of the lawsuit: First, who bears the burden of establishing the "generally accepted agricultural practices" and what evidence is required to show a breach of that standard; Second, to what extent, if at all, are Louisiana environmental laws and regulations relevant to the determination of generally accepted agricultural practices; Third, to what extent may lay testimony establish generally accepted agricultural practices or a breach of generally accepted practices; and finally, if a defendant acts contrary to generally accepted agricultural practices by failing to keep records that might be evidence of generally accepted practices, may that defendant then complain that the plaintiff has failed to establish generally accepted agricultural practices.

The district court first found that a Louisiana court would likely find that the defendant had the burden of establishing a breach of generally accepted agricultural practices because of the statutory presumption that all agricultural operations were acting in conformance with generally

accepted standards. The court also noted that the standard was to be determined by examining local practices.

Furthermore, the court determined that the defendant's violation of Louisiana's environmental laws, standing alone and in the absence of any other evidence of generally accepted agricultural practices, did not establish that the defendant violated generally accepted agricultural practices.

Next, the court determined that if lay testimony established "obvious carelessness," then the lay testimony of the class members would be sufficient to establish both generally accepted agricultural practices and an existence of a breach of generally accepted agricultural practices. However, if the alleged misconduct did not constitute "obvious carelessness" then expert testimony would be required to establish the generally accepted standard of conduct and a breach of that standard.

Finally, the court held that the defendant should not be punished for failing to maintain emissions records because there were other means available to the plaintiff to use in establishing generally accepted agricultural practices. However, the court noted that if the emissions records were the only evidence available, then the defendant might be equitably estopped from asserting that the plaintiff had failed to establish a breach of generally accepted agricultural practices.

After resolving the issues it identified as relevant, the court granted the grain elevator's motion for summary judgment.

R. CALEB COLBERT

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Nat'l Cotton Council of Am. v. United States Env'tl. Prot. Agency, 553 F.3d 927 (6th Cir. 2009)

On November 27, 2007, the United States Environmental Protection Agency ("EPA") issued a Final Rule altering Clean Water Act ("CWA") and Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") regulations regarding the use of pesticides near waters protected under the CWA. Petitions for review of the Final Rule were filed in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Federal circuits by two groups of petitioners. The Environmental Petitioners represented environmental interest groups and Industry Petitioners represented industry interest groups, both of whom opposed the EPA's Final Rule. The petitions in these circuits and between these petitioners were consolidated in the Sixth Circuit by order of the Judicial Panel on Multidistrict Litigation. Environmental Petitioners filed a motion for transfer to the Ninth Circuit, citing lack of subject matter jurisdiction, but the motion was denied.

In the consolidated action, the Environmental Petitioners argued the EPA exceeded its authority under the CWA by issuing a rule that excludes pesticides from the definition of "pollutant" under the CWA and the EPA cannot exempt FIFRA-compliant applications of pesticides from the requirements of the CWA. The Industry Petitioners argued the EPA's Final Rule was arbitrary and capricious because it determined whether a pesticide was a pollutant based on its compliance with FIFRA. The EPA defended their Final Rule by arguing that the CWA is ambiguous as to the definition of pesticides. The EPA also argued that even though they deem pesticides generally not to be pollutants, but they determine pesticide residue and excess pesticides to be pollutants under the CWA definition of "pollutant" because "they are wastes of the pesticide application."

The Sixth Circuit first determined whether the EPA's Final Rule complied with the *Chevron* doctrine. The court stated when conducting a *Chevron* review, the court must examine the Final Rule against the statute that contains the EPA's charge, and under such a review, the court should determine the meaning of the words in the context they were written. If the court determines the EPA's interpretation is reasonable, they must defer to its construction of the statute. Therefore, the court considered the EPA's rationales for its Final Rule in under the scope of the *Chevron*

doctrine. The first issue the court examined was whether the CWA unambiguously includes pesticides within its definition of "pollutant." The court held while the list of substances defined as "pollutants" under the CWA was not exhaustive, the plain language or "chemical waste" and "biological materials" as used in the CWA are unambiguous as to pesticides. The court further concluded that as long as a chemical pesticide is intentionally applied to the water and leaves no excess, it is not considered "chemical waste," and therefore, a pollutant under the CWA. However, if excess chemical pesticides or pesticide residue finds its way into waters protected under the CWA, the pesticide meets the CWA's definition of "chemical waste." The court also held that "biological materials" could not be read to exclude biological pesticides or their residue and, therefore, the court held biological pesticides to be included under the definition of "biological materials" under the CWA. Next, the court determined whether chemical pesticide residuals were added to the water by "point sources." The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." Because the EPA argues that at the time of discharge, the pesticide is a nonpollutant, and the excess pesticide and pesticide residues are not created until later, presumably after they are already in the water; therefore, pesticides at the time of discharge do not require permits because they are not yet excess pesticides or residue pesticides. The court looks to the Supreme Court's previous examination of "point source" under the CWA and holds that it was clear that but for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water; therefore, the pesticide residue and excess pesticide are from a "point source." After examining the EPA's two rationales behind their Final Rule, the Court determined the Final Rule could not stand because the plain statutory language of the CWA invalidates the EPA's Final Rule and bars its application. Thus, the court vacated the EPA's Final Rule.

NICOLE L. HUTSON

American Farm Bureau Federation v. EPA, 559 F.3d 512 (D.C. Cir. 2009).

The Clean Air Act (“CAA”), 42 U.S.C. §§ 7401 -7671p (2000) tasks the EPA with identifying air pollutants that “endanger public health or welfare.” After identifying the air pollutants the EPA must then develop national ambient air quality standards (“NAAQS”) to protect the public health, through primary NAAQS, and welfare, through secondary NAAQS. In establishing these standards the EPA looks to the Clean Air Scientific Advisory Committee (“CASAC”) recommendations, among other sources. CASAC is composed of seven individuals selected by the Administrator to provide an “independent scientific review.” Every five years, if not sooner, the EPA must reevaluate the NAAQS and revise if necessary.

Particulate matter (“PM”) is comprised of two categories, fine (PM_{2.5}) and coarse (PM₁₀). The EPA generally utilizes the size of the PM to determine which classification it falls into. The EPA promulgated NAAQS for PM initially in 1971, but separate regulations for the two kinds of PM were not passed until revisions in 1997. In 2006 the EPA proposed revisions to NAAQS for PM which included maintaining the annual standard for fine PM at 15 g/m³ to protect from long-term exposure and setting the daily standard at 35 g/m³ to protect from short-term exposure. CASAC objected to this, but the EPA issued its final rule without any changes to the proposed fine PM standards. As a result of this, the petitioners filed the instant suit claiming that the promulgated rule was arbitrary and capricious.

The petitioners claimed that setting the primary annual NAAQS for PM_{2.5} at 15 g/m³ was arbitrary and capricious because the EPA only considered studies on long-term exposure and completely dismissed the reports on short-term exposure. The EPA stated that the long-term studies were the “most directly relevant” and that the short-term exposure would be more suitable to consider when setting the 24-hour standard. The Court found that this conclusion relied on the EPA establishing that it was appropriate to consider only the long-term studies to set the annual standards and that utilizing only daily standards would adequately protect against short-term exposure. The petitioners pointed out that CASAC recommended an annual standard below 15 g/m³. In determining this, CASAC cited short-term studies that had established a negative health

impact from short-term exposure in areas where the annual levels of $PM_{2.5}$ were less than 15 g/m^3 . The EPA's only explanation for not accepting CASAC's suggestions was that although it did not disagree with CASAC's statements, it asserted the short-term studies were more appropriately utilized when setting the 24-hour standards. The Court found this explanation inadequate to justify only utilizing the long-term exposure studies in determining appropriate annual standards.

The petitioners also disputed that the daily standards are adequate to protect against short-term exposure. CASAC found that some cities with high levels of $PM_{2.5}$ don't exceed the daily standard of 35 g/m^3 very often and that a level of less than 15 g/m^3 would be necessary to prevent the risks of short-term exposure. The EPA supported that the daily standard would sufficiently protect against short-term exposure by citing a study of Philadelphia and Los Angeles showing that the off-peak levels of $PM_{2.5}$ were reduced in proportion to a reduction in the peak levels. The Court notes that the exact same study states that these reductions were not a result of $PM_{2.5}$ controls, but attributed the reduction to controls implemented for PM_{10} , along with other air pollution controls. As a result of this the Court found that the EPA did not provide a reasonable explanation for its belief that daily standards would adequately protect against short-term exposure, and remanded the annual standard for further review, but did not vacate it.

KEVIN DOTHAGER