UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

U.S.C.A. – 7th Circuit
FILED
AUG 13 2010
RMS
GINO J. AGNELLO
CLERK

WISCONSIN BUILDERS ASSOCIATION, NATIONAL ASSOCIATION OF HOME BUILDERS and UTILITY WATER ACT GROUP, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LISA P. JACKSON, in her official capacity as Administrator of the United States Environmental Protection Agency, Respondents.	No. 09-4113 (consolidated with Nos. 10-1247 and 10-1876)

EPA'S UNOPPOSED MOTION FOR PARTIAL VACATURE OF THE FINAL RULE, REMAND OF THE RECORD, TO VACATE BRIEFING SCHEDULE, AND TO HOLD CASE IN ABEYANCE

Respondents United States Environmental Protection Agency, *et al.* (EPA), respectfully move this Court for entry of an order vacating and remanding to the Agency limited portions of the final rule under review in this case, vacating all pending procedural deadlines including

due dates for remaining briefs, and holding this case in abeyance for 18 months, until February 15, 2012, to allow EPA to address a flaw in the final rule that was first brought to the Agency's attention by way of petitions for administrative reconsideration. In addition, EPA moves for a remand of the record for the same time period to allow the Agency an opportunity to reconsider portions of the final rule based on petitioners' assertions that EPA failed to consider certain comments submitted during the rulemaking process.

All parties agree that the requested relief is appropriate.[1]

BACKGROUND

This case involves multiple challenges to EPA's final rule entitled "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category," 74 Fed. Reg. 62,996 (Dec. 1, 2009). The rule, promulgated pursuant to the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387, establishes the first enforceable numeric effluent limit on the amount of pollutants in stormwater that may be

[1] On May 5, 2010, this Court entered an order denying the Natural Resources Defense Council's (NRDC) intervention motion "without prejudice to renewal if the EPA ceases to defend its regulations." *Id.* at 2. NRDC has authorized the undersigned to represent that it does not oppose the requested relief because EPA will take final action by February 15, 2012.

discharged from certain construction and development sites. In its current incarnation, the rule requires that discharges to our Nation's waters associated with construction activity at certain sites not exceed an average turbidity for any day of 280 nephelometric turbidity units ("NTU").[2] 74 Fed. Reg. 63,058. The rule also requires monitoring to ensure compliance with that numeric limit and implementation of various other controls. *Id.*

In December 2009, Wisconsin Builders Association and National Association of Home Builders (collectively, NAHB), filed petitions for review of the final rule and, in April 2010, the Utility Water Act Group (UWAG) filed its petition for review. This Court later consolidated the three petitions. NAHB and UWAG filed separate opening briefs on July 9, 2010. Among the arguments that NAHB raised, it reiterated the argument that it presented to the Agency a month earlier in its administrative reconsideration petition regarding deficiencies in the data EPA used to support its decision to adopt a 280-NTU effluent limit. NAHB also alleged that EPA had failed to consider certain site-specific characteristics, and in particular the impact of the numeric

[2] A nephelometric turbidity unit is a unit that measures clarity of water.

effluent limit on cold weather sites and small sites. For its part, UWAG alleged that, notwithstanding written comments it submitted to the Agency during the rulemaking process, EPA failed to consider certain impacts of the final rule specific to linear gas and electric utility projects.

In April 2010, the Small Business Administration (SBA)[3] filed with EPA a petition for administrative reconsideration of several technical aspects of EPA's final rule and, in that petition, identified potential deficiencies with the dataset that EPA used to support its decision to adopt the 280-NTU limit. In June 2010, less than a month before it filed its opening brief in this Court, the National Association of Home Builders also filed a petition for administrative reconsideration with EPA incorporating by reference SBA's argument regarding the deficiencies in the data underlying the 280-NTU limit.

Based on EPA's examination of the dataset underlying the 280-NTU limit it adopted, the Agency has concluded that it improperly interpreted the data and, as a result, the calculations in the existing administrative record are no longer adequate to support the 280-NTU

[3] The SBA is not a party to this case.

effluent limit. EPA therefore wishes to re-examine that number through a narrowly-tailored notice-and-comment rulemaking and, if necessary, revise that portion of the limit before proceeding with its defense of the rule. EPA also believes that a remand of the record to consider and respond to UWAG's comments would aid both the parties and the Court and would potentially narrow or eliminate the issues ultimately remaining for review by this Court. An order vacating and remanding the 280-NTU limit and remanding the record to allow EPA an opportunity to consider and respond to UWAG's comments, with the remainder of the case being held in abeyance pending EPA's completion of these actions, would be in the interests of justice, judicial economy, and the parties.

EPA's opening brief is currently due October 4, 2010.

ARGUMENT

A. Abeyance And Partial Vacature And Remand Are Appropriate So That EPA May Consider The Potential Data Error Identified In The Administrative Reconsideration Petitions.

EPA has determined that it will begin proceedings on the two pending administrative petitions so that the Agency may reconsider the 280-NTU limit in light of an error identified in those petitions. Given

this, EPA requests that the Court vacate and remand the numeric effluent limitation to the Agency and hold this case in abeyance until EPA completes the administrative reconsideration process.

The process of administrative reconsideration of a rule of this magnitude involves a number of administrative tasks, including: review of technical material in the rulemaking record, gathering and reviewing additional material and documents (as appropriate), drafting a proposed action for publication in the Federal Register, taking public comment on any proposed action, considering and responding to public comments, preparing a notice of EPA's final action for publication in the Federal Register, and taking that final action. In addition, the process will require interagency review of any proposed and final rulemaking notices pursuant to Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

Given the technical nature of the issue that EPA will reconsider and the number of steps EPA is required to take as part of this administrative determination, EPA requests that the Court hold the case in abeyance for 18 months, until February 15, 2012, to allow EPA sufficient time to complete the reconsideration process. *See, e.g., Anchor*

Line Ltd. v. Federal Maritime Comm'n, 299 F.2d 124, 125 (D.C. Cir. 1962) ("when an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency"). EPA also proposes to submit a status report to the Court every 180 days while the case is held in abeyance to keep the Court informed of EPA's progress.[4] Within 30 days after the abeyance period ends, EPA proposes that the parties submit a report advising the Court on how the parties wish to proceed with the litigation in light of the action on remand.

Good cause exists to hold the case in abeyance while EPA reconsiders the issues regarding the numeric limit identified in the administrative reconsideration petitions. First, petitioners have already represented that the administrative reconsideration process may resolve at least some of their principal concerns with the final rule, thus potentially making it unnecessary for this Court to address these highly technical issues. *See* NAHB Br. at 14 ("If EPA grants either Petition for Reconsideration by changing the current rule or promulgating a new

[4] Petitioners have indicated that they wish to reserve their right to file separate status reports in case they disagree with EPA's characterization in its reports of the status of the Agency's administrative reconsideration process.

rule, EPA could potentially moot certain issues raised in this appeal."); UWAG Br. at 6 (same). Second, the petitioners and others may elect to seek judicial review of EPA's final action on remand. Given the nature of reconsideration that EPA proposes to grant here, such challenges would likely overlap substantially with the issues presented here and, therefore, would be appropriate for consolidation with this action. Thus, granting abeyance while EPA reconsiders the numeric limit will promote judicial efficiency and conserve the Court's and the parties' resources by allowing all of the issues raised in this case and by any challenges to EPA's actions on remand (if any) to be briefed and decided in a single, consolidated lawsuit.

B. This Court Should Remand The Record To EPA To Allow The Agency To More Fully Explain Its Rationale Regarding Certain Issues Identified By Petitioners.

EPA also asks that the Court remand the record to the Agency so that, in conjunction with its review of the issues raised in the petitions for administrative reconsideration concerning the numeric limit, the Agency may address (and, if necessary, take further regulatory action on) certain impacts of the final rule specific to linear gas and electric utility projects. EPA also agrees to solicit site-specific information

regarding the applicability of a numeric effluent limit to cold weather sites, as well as on the applicability of a numeric limit to small sites that are part of a larger project subject to the numeric limit. The Agency will also address any other issues that reveal themselves to the Agency on remand.

This additional analysis will provide the Court with a more complete rationale for the Agency's decision on important regulatory issues and may ultimately resolve (or substantially narrow) the issues for judicial review. Although EPA is confident that there is sufficient information in the record such that its decisionmaking path "may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974), it nevertheless believes that the public and this Court will benefit from a full explanation by the Agency of these issues and other related issues that may arise on remand. EPA acknowledges that it could have provided a more direct response to UWAG's comments during the regulatory process, but believes that it would be a disservice to the Court, the parties to this lawsuit and to the public for that explanation to be excluded from the record on review. Accordingly, EPA seeks a remand of the record

running concurrently with the reconsideration period, to articulate more fully its rationale for these issues. *See, e.g., Public Service Comm'n of Kentucky v. FERC*, Case No. 03-1092, 2004 WL 222900 (D.C. Cir. Jan. 21, 2004) (granting motion to remand the record and to hold case in abeyance so that FERC could provide further explanation of the basis for its decision).

Courts of appeals "commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). Here, the Court must weigh the value of proceeding now (when EPA concedes that its administrative record would benefit from further development) and possibly remanding the rule back to the Agency for further explanation after full merits briefing and oral argument, against the value of providing EPA with an opportunity to fully articulate its position so that the Court can make an informed decision on the merits in the first instance.

Finally, as noted above, all parties agree that the requested relief is appropriate.

CONCLUSION

WHEREFORE, EPA respectfully requests that the Court: (1) vacate the deadlines set in its June 22, 2010 order (Doc. 22) for EPA to file its opening brief and for petitioners to file their reply briefs; (2) vacate and remand the 280-NTU numeric limit to EPA for further proceedings as outlined in this motion; (3) remand the administrative record to EPA for further explanation; (4) order the case held in abeyance for 18 months (*i.e.*, until February 15, 2012), by which date EPA will take final action to address the issues identified in this motion; (5) order EPA to file a report on the status of the administrative proceedings every 180 days during the abeyance period; and (6) order the parties to file a report advising the Court of their views on how the litigation should proceed, including proposed briefing deadlines, within 30 days after the abeyance period expires.

August 12, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2010, a copy of **EPA'S UNOPPOSED MOTION FOR PARTIAL VACATURE OF THE FINAL RULE, REMAND OF THE RECORD, TO VACATE BRIEFING SCHEDULE, AND TO HOLD CASE IN ABEYANCE,** was sent, via first class U.S. mail, to the following parties and proposed intervenors:

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