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Editor's Note: In this issue, Karen L. Reed discusses a recent D.C. Circuit Court of Appeals' decision to strike down federal Clean Air Act rules regulating emissions of mercury as a hazardous air pollutant from electric utility steam generating units and the impacts on future federal and state regulation. Ms. Reed is currently of counsel with the Portland, Oregon, law firm of Bateman Seidel Miner Blomgren Chellis & Gram PC, practicing real estate, environmental and natural resources law. She represented the State of New Mexico in the case discussed in this article. The views expressed in this article are solely those of the author and not of any other person or entity, including but not limited to Bateman Seidel, the State of New Mexico or New Mexico Attorney General Gary King.

THE DEMISE OF EPA'S CLEAN AIR ACT MERCURY DELISTING AND CAP-AND- TRADE RULES

In *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), eighteen states and local governmental authorities¹ challenged two final rules issued by the U.S. Environmental Protection Agency (EPA) with respect to the regulation under the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.*, of emissions of mercury, a hazardous air pollutant (HAP), by electric utility steam generating units (EGUs), composed primarily of coal-fired power plants.

¹ These challengers were California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Wisconsin, the Michigan Department of Environmental Quality, the Pennsylvania Department of Environmental Protection and the City of Baltimore, Maryland. Seven other states (Alabama, Indiana, Nebraska, North Dakota, South Dakota, West Virginia and Wyoming) joined EPA in defending the rules. *New Jersey v. EPA*, 517 F.3d at 576-77.

On February 8, 2008, the U.S. Court of Appeals for the District of Columbia Circuit upheld this challenge and struck down EPA's rules. The court denied various petitions for rehearing and for rehearing en banc on May 20, 2008,² and now EPA and many states, including Oregon, are faced with the task of revisiting their air quality regulations to bring them into compliance with the court's decision. This article discusses this case and its aftermath, particularly with respect to Oregon.

Scientists have known for some time that mercury is a potent neurotoxin which bioaccumulates and is particularly harmful to children.³ Nationwide, "more fish advisories are issued for methylmercury⁴ than for any other toxicant."⁵ "Oregon is one of 35 states with fish consumption advisories for mercury. Currently, mercury advisories are in effect for seven Oregon waterbodies."⁶

² The deadline to petition the U.S. Supreme Court for a writ of certiorari is August 18, 2008. Rule 13 of the Rules of the Supreme Court of the United States.

³ See, Oregon Department of Human Services, Environmental Toxicology Section, *Fact Sheet: Methylmercury in Sport-Caught Fish*, <http://oregon.gov/DHS/ph/envtox/fishfact.shtml> (Feb. 3, 1997).

⁴ "Most of the mercury in water, soil, sediments, or plants and animals is in the form of inorganic mercury salts and organic forms of mercury (e.g., methylmercury)." 1 EPA, *Mercury Study Report to Congress* O-1 (Dec. 1997), available at <http://www.epa.gov/mercury/report.htm>.

⁵ Oregon Department of Human Services, Environmental Toxicology Section, *Oregon's Fish Advisories for Methylmercury*, <http://oregon.gov/DHS/ph/envtox/mercpapr.shtml> (Sept. 22, 2007) (citation omitted).

⁶ *Id.*

Regulatory Background

In 1970, Congress charged EPA with regulating HAPs under the CAA. However, over the next two decades, EPA listed only eight HAPs and established standards for only seven. *New Jersey v. EPA*, 517 F.3d at 578. Frustrated by the lack of progress, Congress enacted amendments to the CAA in 1990 that eliminated much of EPA's discretion and required EPA to regulate more than 100 specified HAPs, including mercury and mercury compounds. CAA § 112(b)(1), 42 U.S.C. § 7412(b)(1). In addition, Congress required EPA to regulate mercury emissions from EGUs if, after performing a required study, EPA found such regulation "appropriate and necessary." *Id.* § 112(n)(1).

After performing this study, EPA found that, as of 1995-1996, roughly 87 percent of annual anthropogenic emissions of mercury in the United States were from combustion sources, including waste and fossil fuel combustion.⁷ The study further found a plausible link between (1) mercury emissions from anthropogenic combustion and industrial sources, and (2) mercury concentrations in air, soil, water and sediments and methylmercury concentrations in freshwater fish.⁸ The study concluded that "coal combustion and waste disposal most likely bear the greatest responsibility for direct anthropogenic mercury deposition to the continental U.S."⁹

Based on these results, EPA issued a determination in the waning days of the Clinton Administration that it was appropriate and necessary to regulate mercury emissions from EGUs.¹⁰ However, during the Bush Administration, EPA reversed this decision, choosing to remove or "delist" EGUs from Section 112 of the CAA. 70 Fed. Reg. 15,994, 16,032 (Mar. 29, 2005) (commonly referred to as the Mercury Delisting Rule). In the Mercury Delisting Rule, EPA found that its decision in 2000 was in error and that it had "authority to remove [EGUs] from

the section 112(c) list at any time that it makes a negative appropriate and necessary finding." *Id.*

Instead, EPA decided to regulate EGUs' mercury emissions under Section 111 of the CAA.¹¹ This rule established: "a mechanism by which mercury emissions from new and existing EGUs are capped at specified, nation-wide levels. . . . [EGUs] must demonstrate compliance with the standard by holding one 'allowance' for each ounce of mercury emitted in any given year. Allowances are readily transferrable among all [EGUs]."¹² The transferability of emission allowances raised serious concerns among the state challengers and many others that mercury "hot spots," or localized areas of elevated deposition, could arise, causing significant negative impacts to public health.

In response to EPA's actions, the Oregon Department of Environmental Quality (DEQ) issued the Utility Mercury Rule in December 2006, adopting a more stringent modified cap-and-trade program for Oregon.¹³ Oregon's only existing coal-fired power plant is the Boardman Power Plant, which is a 585-megawatt coal-fired generating facility in northeastern Oregon owned and operated by Portland General Electric (PGE).¹⁴ Among other things, the Utility Mercury Rule requires installation of mercury control technology at Boardman that would reduce the plant's mercury emissions by 90% by July 1, 2012.¹⁵

The Court's Decision

Although the parties in *New Jersey v. EPA* briefed and argued a number of issues, the court analyzed and ruled on only one - whether EPA

⁷ 1 EPA, *Mercury Study Report to Congress* O-1 (Dec. 1997), available at

<http://www.epa.gov/mercury/report.htm>.

⁸ 3 *id.* at 7-1.

⁹ 3 *id.* at 7.4.

¹⁰ 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000).

¹¹ 70 Fed. Reg. 28,606, 28,624-32 (commonly referred to as the Clean Air Mercury or Cap-and-Trade Rule), revised on reconsideration, 71 Fed. Reg. 33,388 (June 9, 2006).

¹² 70 Fed. Reg. at 28,606.

¹³ OAR 340-228-0600 to 340-228-0678.

¹⁴ PGE, Current Issues: Boardman Plant Air Emissions, http://www.portlandgeneral.com/about_pge/current_issues/boardman_air_emissions.asp (last visited June 18, 2008).

¹⁵ DEQ, *Fact Sheet: Oregon's Utility Mercury Rule*, http://www.deq.state.or.us/aq/factsheets/06-AQ-019_mercury.pdf (Dec. 15, 2006).

properly determined that it was not “appropriate and necessary” to regulate EGUs’ mercury emissions under Section 112 of the CAA. EPA argued to the court that it has inherent authority to reverse itself whenever it has a principled basis for doing so. *New Jersey v. EPA*, 517 F.3d at 582. The challengers argued that EPA had not followed the proper procedure or made the requisite findings necessary to support the delisting and that consequently the delisting was illegal.

Section 112(c)(9) of the CAA, 42 U.S.C. § 7412(c)(9), establishes specific standards for delisting, and EPA admitted it did not comply with these standards. *New Jersey v. EPA*, 517 F.3d at 582. Section 112(c)(9)(B)(ii) provides in pertinent part that delisting requires “a determination that emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.” This high standard is difficult to meet in practice, particularly in light of the conclusions of EPA’s Mercury Study Report.

The court agreed with EPA that, as a general proposition, administrative agencies retain discretion to correct their prior errors. *New Jersey v. EPA*, 517 F.3d at 582-83. “Congress, however, undoubtedly can limit any agency’s discretion to reverse itself, and in section 112(c)(9) Congress did just that.” *Id.* at 583. The court refused to defer to EPA’s interpretation of its authority under Section 112 of the CAA because there was no ambiguity in the statute. *Id.* at 582. Rather, the court found that Congress prescribed in plain text the mechanism by which EPA could correct any errors, and EPA did not follow that mechanism. *Id.* at 582-83. Consequently, the court vacated both the Mercury Delisting Rule and the Cap-and-Trade Rule, because, as EPA had conceded, the two rules were interdependent. *Id.* at 583-84.

What’s Next?

Unless EPA is able to delist mercury emissions from EGUs under Section 112(c)(9), which as discussed above would be quite difficult, or the court’s decision in *New Jersey v. EPA* is

reversed, which appears unlikely,¹⁶ EPA will have to establish maximum achievable control technology (MACT) standards. Many parties have expressed concern that EPA will drag its feet in setting these standards,¹⁷ and Congress currently is considering legislation that would establish a deadline for EPA action.¹⁸

In the meantime, applicants for permits to construct new EGUs or to modify existing EGUs must apply to EPA or the delegated state agencies, such as DEQ, for a case-by-case determination that the proposed units will meet standards equivalent to MACT standards. CAA § 112(g)(2), 42 U.S.C. § 7412(g)(2). In addition, to bring the Utility Mercury Rule into compliance with the court’s decision, DEQ intends to amend the rule to remove the invalidated trading provisions, while retaining the mandatory control and post-2018 emissions caps. E-mail from Gerald Ebersole, DEQ Air Quality Division, to author (May 8, 2008) (on file with author). Thus, the court’s action will cause increased federal and state regulatory activity related to air quality.

The results of these case-by-case and rulemaking determinations will have an important effect on environmental quality in Oregon. It is a misperception that coal combustion emissions are insignificant in Oregon because the Boardman

¹⁶ There are several reasons why, in this author’s opinion, it is unlikely the U.S. Supreme Court would grant review of this decision. The three-judge panel was unanimous in its decision, even though one of the judges, The Hon. Janice Rogers Brown, who was appointed by George W. Bush, is widely regarded as very conservative. In addition, the court denied rehearing en banc, and the panel’s opinion narrowly addresses only the legal issue upon which the court based its ruling. Finally, under 42 U.S.C. § 7607(b)(1), the U.S. Court of Appeals for the District of Columbia had exclusive jurisdiction to hear the case, thus precluding any potential for a split in the circuits.

¹⁷ In response to the court’s ruling, EPA spokesperson Jonathan Shradar stated: “We have now no control over existing power plants, which should be of concern to the American people.” David A. Fahrenthold & Steven Mufson, *Court Rejects Emission ‘Trades’*, Wash. Post, Feb. 9, 2008, at A3.

¹⁸ See, e.g., S. 2643, 110th Cong. (2d Sess. 2008); H.R. 1087, 110th Cong. (2d Sess. 2008).

Power Plant is the state's only existing coal-fired power plant. In fact, as of 2006, approximately 42 percent of Oregon's energy supplies came from coal combustion.¹⁹ This was roughly equivalent to the share of the state's energy supplies from hydroelectric power, which was 44 percent, and is far larger than all other sources of energy combined.²⁰ Consequently, mercury emissions will be an important component of the ongoing debate in Oregon regarding the impact of energy resources on the environment.

If you would like to contribute, please contact the E-OutLook Editor, Hong Huynh at hong.huynh@millernash.com or (503) 205-2485.

¹⁹ Justin Klure, Pacific Energy Ventures, Oregon Wave Energy & Global Climate Change, Presentation to Oregon State Bar Env'tl. & Natural Res. Section (June 23, 2008) (presentation materials on file with author).

²⁰ *Id.*