HUNTON& WILLIAMS

CASE HIGHLIGHT

July 2005

Contacts

Washington, DC
1900 K Street, NW
Washington, DC 20006-1109

F. William Brownell
(202) 955-1555
bbrownell@hunton.com

Makram B. Jaber
(202) 955-1567
mjaber@hunton.com

Henry V. Nickel
(202) 955-1561
hnickel@hunton.com

David S. Harlow
(202) 955-1568
dharlow@hunton.com

Craig S. Harrison
(202) 778-2240
charrison@hunton.com

D.C. Circuit Upholds Most of EPA's New Source Review Rules

Court generally holds for Hunton & Williams client and against challenges by certain states and environmental groups

The U.S. Court of Appeals for the D.C. Circuit largely upheld EPA's 2002 new source review rules in response to challenges brought in *New York et al. v. EPA*. The court on June 24 upheld the following aspects of EPA's NSR and new source performance standards rules: (1) the use of past emissions and projected future actual emissions rather than potential emissions in measuring emissions increases; (2) the use of a ten-year lookback period in selecting the two-year baseline for measuring past actual emissions for non-utilities; (3) the use of a five-year lookback period in selecting the two-year baseline for measuring past actual emissions for utilities; (4) the exclusion of increased emissions due to demand growth from the measurement of projected future actual emissions; (5) the five-year look back provision for the "achievable emission rate" test in the NSPS portion of the 1992 WEPCo rule; (6) the Plantwide Applicability Limit program; and (7) the rule's provisions governing incorporation of the revised rules in state implementation plans. The court struck down two aspects of the NSR rules: the "Clean Unit" applicability test and the provisions of the 2002 and 1992 rules that exclude certain pollution control projects from NSR.

The court accepted industry arguments that should prove helpful in future NSR rulemakings and litigation. For example, the court deferred to EPA's assessment of the environmental effects of its choice of baseline periods and of plantwide applicability limits, even where the benefits could not be quantified with precision, and the court rejected flawed studies by environmental groups. The court also rejected the Natural Resources Defense Council's challenge to the 1992 so-called *WEPCo* modification rule.

The court declined to address on ripeness grounds UARG's argument that EPA's 2002 rule preamble unlawfully interpreted the 1980 NSR modification rule to require facilities that had begun normal operations to employ an "actual-to-potential" emissions increase test. The D.C. Circuit also declined to address the argument recently accepted by the Fourth Circuit in *Duke Energy*[1] that led that court to

adopt industry's view of the 1980 NSR modification rule. As a result, each court that addresses an NSR enforcement action in the future will have to address whether, as held in *Duke Energy*, common sense and Supreme Court precedent compel that the 1980 NSR modification regulation be interpreted consistently with the NSPS modification regulations. As the *Wall Street Journal* noted in a recent editorial, the Fourth Circuit decision undermines the theory advanced by EPA in these recent NSR enforcement actions and returns to the historical understanding of the meaning of this CAA program.

Bill Brownell, a partner from the Washington, D.C. office of Hunton & Williams argued the case on behalf of Industry Petitioners, including UARG, American Chemistry Counsil, NSR Manufacturers Roundtable and others. In addition to Brownell, the Hunton & Williams team included Henry Nickel, Makram Jaber, David Harlow and Craig Harrison from the Washington, D.C. office.

[1] Hunton & Williams represented Duke Energy in the Fourth Circuit case.