

Court Hears Oral Arguments on EPA Effluent Guidelines Settlement

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On December 5, 2012, the District of Columbia Circuit Court of Appeals heard oral argument in an appeal of a settlement agreement between EPA, the Sierra Club, and Defenders of Wildlife, regarding the revision of power plant effluent limitations and effluent limitation guidelines under the Clean Water Act.

As background, in 2009 EPA announced its decision to review the current effluent guidelines from steam electric power generating facilities, which were last updated in 1982. EPA decided to review the effluent standards after finding that the level of pollutants discharged from coal-fired power plants has increased in recent years with the addition of sophisticated air pollution control equipment to meet stringent air regulations. EPA determined the current standards do not adequately address current pollutant discharges from power plants.

On November 8, 2010, EPA was sued by Defenders of Wildlife and the Sierra Club in the D.C. district court for failure to revise the power plant effluent standards. Even though EPA had publicly stated it planned to revise the regulations, the plaintiffs argued that EPA had failed to meet statutory deadlines in doing so, and sought an order compelling EPA to revise the effluent standards. The same day, the environmental plaintiffs filed a proposed consent decree that would require EPA to sign a notice of proposed rulemaking regarding revisions to the power plant effluent standards by July 23, 2012, and sign a final action on the revisions by January 31, 2014. The Utility Water Act Group (UWAG), which represents electric power companies affected by the effluent standards, intervened in the lawsuit on November 16. UWAG argued that the proposed rulemaking schedule would impair EPA's rulemaking process, as well as its members' rights to comment on the proposed rule and have their comments adequately considered. Industry has raised this concern in other regulatory actions as EPA has increasingly agreed to aggressive rulemaking schedules shortly after being sued by environmental organizations. In March 2012, the district court denied UWAG's motion to intervene, holding that UWAG had not demonstrated it had standing or that the consent decree would impair its legally protectable interests.

During oral argument before the three-judge panel, counsel for EPA downplayed the impact of the consent decree, arguing it merely set forth a timeline for EPA's review of the effluent standards and determination of whether to make any revisions. Counsel for UWAG stressed that its members are affected by the consent decree, since it could result in a rushed regulation that was not properly thought through, or, could require more regular reviews of the effluent standards that would be burdensome to industry. In questioning EPA's attorney, Judge Sentelle appeared to favor UWAG's standing argument, asking why members of UWAG that are directly regulated by the effluent

standards do not have standing. Judge Sentelle also questioned why the environmentalists had standing in the case but UWAG did not.

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