

D.C. Circuit Upholds Hourly NO2 National Ambient Air Quality Standard

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On July 17, 2012, the U.S. Court of Appeals for the District of Columbia upheld the new one-hour NO₂ National Ambient Air Quality Standard (NAAQS) of 100 part per billion. American Petroleum Institute (API) and the Utility Air Regulatory Group (UARG) challenged the new hourly standard on the ground that the rule's adoption was arbitrary and capricious because: (1) the Environmental Protection Agency (EPA) violated its own requirement to rely on published, peer reviewed studies when reviewing NAAQS, (2) EPA did not take into account a study that called into question EPA's conclusion that a more stringent standard is warranted, and (3) the new rule requires applicants for new or modified sources to demonstrate their compliance with the new NAAQS despite the lack of an adequate technique to model compliance.

The three judge panel (Rogers, Edwards, and Ginsburg) unanimously ruled that the EPA's adoption of the new rule was not arbitrary and capricious and does not violate the Clean Air Act (CAA). The Court found that there is no requirement that EPA rely on published peer reviewed studies. With respect to the claim that EPA did not consider a critical study, EPA argued that it received the study in question after it had conducted its analyses. EPA considered the study, found its methodology wanting and decided not to re-open the review process. The Court held that this did not amount to arbitrary and capricious behavior because an agency's action is only arbitrary and capricious if it "entirely failed to consider an important aspect of the problem or offered an explanation for its decision that runs counter to the evidence before the agency." Finally, the Court held that it did not have jurisdiction to consider the petitioners' challenge regarding the requirement that new or modified sources must meet the new NO₂ NAAQS because this statement is made in the preamble to the rule and does not constitute a final action by EPA.

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