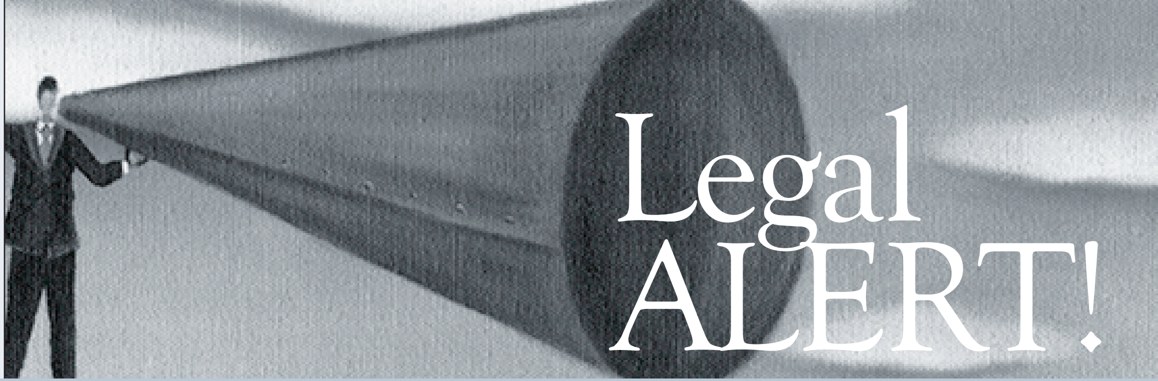
HISCOCK & BARCLAY LLP

May 2010



WWW.HBLAW.COM

Environmental

Frank V. Bifera, Chair
518.429.4224
fbifera@hblaw.com

Karim A. Abdulla

Frank V. Bifera

Richard R. Capozza

Thomas A. Carnrike

Jeffrey W. Davis

Thais M. Dombrowski

Joseph M. Finnerty

Carlos A. Gavilondo

David M. Hehr

Amy K. Kendall

Matthew T. Kerwin

Andrew J. Leja

Charles C. Martorana

Danielle E. Mettler

Gabriel M. Nugent

Michael A. Oropallo

Thomas F. Walsh

Thomas J. Warth

Federal Court Finds That Projects Were "Routine Maintenance" Under The Clean Air Act

On March 31, 2010, the United States District Court for the Eastern District of Tennessee issued a memorandum opinion on the issue of whether two projects at a coal-fired electric generating facility owned by the Tennessee Valley Authority ("TVA") constituted "routine maintenance, repair and replacement" RMRR") under the Clean Air Act ("CAA") and, therefore, were exempted from the requirements of New Source Review ("NSR"). In the case, Plaintiffs asserted that two 1988 projects constituted "major modifications" of TVA's Bull Run facility and, therefore, TVA was required to get a Prevention of Significant Deterioration ("PSD") preconstruction permit under the NSR program. TVA contended that no physical change occurred at Bull Run because the projects constituted RMRR and, therefore, were not subject to NSR. Importantly, as discussed below, the court found that because the projects are routine *in the industry* the requirements of NSR were not triggered.

In 1977, Congress amended the CAA to add the NSR program. NSR is a preconstruction permitting program that requires, among other things, that a PSD permit be obtained for a "modification . . of any source or facility" as defined in CAA § 7411(a). "Modification" is defined as "any physical change in, or change in the method of operation of a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." CAA § 7411(a)(4). The RMRR exemption is not contained in the CAA, but was created by the United States Environmental Protection Agency as an exception to the definition of "modification." *See* 40 C.F.R. § 52.21(b)(2). Projects that fall under the RMRR exemption are not subject to NSR requirements.

TVA owns and operates 11 coal-fired electric generating facilities, including Bull Run in Clinton, Tennessee. Bull Run is a single unit that began operation in 1967 and is a "major stationary source," as that term is defined by the CAA. During the 1988 outage, TVA conducted a full-scale replacement of the economizer. TVA also replaced approximately three-quarters of the tubing in the finishing superheater at Bull Run.

(Continued on back)

When combined, these two projects represented the removal and replacement of more than a quarter of all the tubing in the Bull Run boiler.

TVA had the burden of proof to demonstrate that the 1988 projects did not constitute a "major modification" because they fell within the RMRR exemption. In determining whether the RMRR exemption applied, the court considered the following four factors: (1) the nature and extent of the projects; (2) the purpose of the projects; (3) the frequency of the projects; and (4) the cost of the projects. With respect to the nature and extent of the economizer superheater replacement projects, the court found that this factor weighed in favor of TVA because replacing an economizer and superheater were not "extraordinary tasks." The court also found that the purpose of the replacements were to reduce the number of forced outages, and not to generate more electricity. Importantly, the court found economizer and superheater replacements to be common *in the industry* and that the costs were not uncommonly high.

This decision stands for the proposition that, in order to determine what is routine, the experience of similar plants in the industry should be reviewed and not just the experience of the individual facility. Examining what is routine in the industry, instead of what is routine for a particular facility, provides regulatory flexibility by reducing the amount of projects that are subject to NSR requirements. Other courts have looked at this issue in the past and came to a different result. For example, in *United States v. Ohio Edison*, 276 F. Supp. 2d 829 (S.D. Ohio 2003) and *Sierra Club v. Morgan*, 2007 WL 3287850 (W.D. Wis. Nov. 7, 2007), the courts concluded that many of the projects at issue did not fall under the RMRR exemption because, among other reasons, the types of projects would only occur once or twice in a units lifetime and, therefore, NSR was applicable.

In addition to the federal RMRR exemption, New York State's NSR regulations also provide an NSR exemption for RMRR projects. 6 N.Y.C.R.R. §§ 231-4.1(b)(28), 200.1(c)(l). New York State, however, has warned that the RMRR exemption should not be interpreted too broadly. Instead, the State believes that the RMRR exemption must be viewed in the nature of a narrow, *de minimis* exclusion from NSR requirements and not as a broad exemption or measure to provide regulatory flexibility. This approach is based on the fact that the RMRR exemption is a product of regulatory action that is not found in the CAA, as well as the District Court's decision in *New York v. EPA II*, 443 F.3d 880 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007).

If you have any questions or require our assistance in reviewing your policies or conducting management training, please contact the Hiscock & Barclay lawyer with whom you normally work or any attorney in our Environmental practice area.