

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

December 29, 1992

MEMORANDUM

OFFICE OF ENFORCEMENT

SUBJECT: Opinion in U.S. v. AM General Corporation,
Civ. No. S87-377 (N.D. Ind. Dec. 14, 1992)

FROM: Karen Schapiro

TO: NSR Contacts

On December 14, 1992, the U.S. District Court for the Northern District of Indiana issued a decision in the above-captioned case granting the defendant's motion for summary judgment on the government's complaint.

The Court's decision is significant, because this is the first case testing the power of EPA to challenge a deficient New Source Review (NSR) permit pursuant to SS 113(a)(5), (b)(5)1 of the Clean Air Act. In brief, the decision holds that SS 113(a)(5) authorizes EPA to bring civil judicial enforcement action under subsection (b)(5) when a state issues a permit that fails to meet NSR requirements. Slip op. at 23. The decision restricts use of subsection (b)(5), however, to cases where EPA makes a formal Finding of Violation to the state before the source "attempts" to construct or modify. Slip. op. at 24.

As you know, EPA often does not receive state permits prior to the time a source commences to construct or modify. Thus, this Court's interpretation of SS 113(b)(5) -- requiring EPA to make a Finding of Violation before construction commences -- potentially undermines the ability of the Agency to sue holders of defective permits. To mitigate the-potentially adverse effects of the decision, however, is the fact that the Court did not decide that issuance of a formal Finding of Violation is a prerequisite to issuance of administrative orders under SS 113(a)(5).

The EPA and DOJ lawyers assigned to this case have filed a motion for reconsideration of the Court's judgment. I will alert you to new developments as the case progresses. Meanwhile,

Regions are reminded that this decision is not binding on other courts and that our policy continues to encourage challenges to deficient state permits.

1 The United States brought this case pursuant to the Clean Air Act of 1977. Under the 1990 Act, SS 113(b)(5) is now at SS 113(b)(3). See 42 U.S.C. SS 7413(b)(3) (1992 Supp.).

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Background

EPA brought enforcement against the defendant on July 27, 1987, for violating NSR requirements of the Indiana SIP and Clean Air Act. The complaint alleged that the defendant made a major modification to its Mishawaka, St. Joseph's County, Indiana plant without obtaining a proper NSR permit. The St. Joseph County Health Department (SJCHD) had issued a permit authorizing the modification, but EPA determined that the permit was deficient because it did not comport with NSR requirements. Specifically, EPA found that the permit failed to require the defendant to apply the "lowest achievable emission rate" (LAER) to limit emissions of VOC.

The defendant counterclaimed, alleging that the EPA was in violation of SS 107(d) of the Act because it had failed to consider within 60 days of submittal a request from the State of Indiana to redesignate St. Joseph's County from a non-attainment area for ozone to an attainment area. The defendant sought the Court to order EPA to rule on the redesignation request.

On October 5, 1987, the defendant moved for summary judgment on its counterclaim and on the government's complaint. The defendant argued that EPA's failure to act on the redesignation request within 60 days of submittal barred the Agency from enforcement. On September 21, 1990, the Court issued an order denying the motion. Relying on the decision of the Supreme Court in *General Motors Corp. v. U.S.*, 496 U.S. 530 (1990), the Court found that the Clean Air Act did not impose upon EPA a mandatory duty to consider Indiana's request no later than 60 days after submittal. The Court also held that

EPA was entitled to enforce the existing SIP until it approved a revision. *U.S. v. AM General Corp.*, Civ. No. S87-377M, slip op. at 9 (N.D. Ind. Sept. 21, 1990).

The defendant moved for summary judgment again in November 1990. Relying largely on the opinion in *U.S. v. Solar Turbines* 732 F. Supp. 535 (N.D. Pa. 1989), the defendant argued that EPA's action amounted to an impermissible attempt to veto a state permit under SS 113(b).² The defendant also raised two jurisdictional arguments: (1) EPA lacked power to enforce in federal court because it had not first exhausted state administrative remedies; and (2) EPA was barred from enforcement because the NOV was invalid in that it was based on insufficient evidence of a violation; was not based on a ruling by the state

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² In *Solar Turbines*, the Court held that SSSS 113(b)(1) and 167 of the Act do not authorize enforcement against a source owner that constructs in accordance with a prevention of significant deterioration (PSD) permit issued by a state pursuant to a SIP-approved program.

that the permit was invalid; and was not issued in accordance with requirements of the Administrative Procedures Act.

In response to the defendant's motion, the government argued that this case was easily distinguishable from *Solar Turbines*: EPA was suing under the 1977 Act pursuant to SS 113(a)(5), (b)(5), not SSSS 113(b)(1) and 167, as in *Solar Turbines*. The government contended that SS 113(a)(5) specifically authorizes enforcement under subsection (b)(5) whenever EPA finds that a state is violating NSR requirements. In this case, EPA had found that the SJCHD was violating NSR requirements because it issued a permit that failed to demand that the defendant apply LAER.. The government further contended that the NOV was sufficient and that, in any event, issuance of a NOV was not a jurisdictional prerequisite in an action initiated under subsections (a)(5) and (b)(5).

In addition to,responding to defendant's motion, the government moved for judgment on the pleadings with respect to the defendant's request for injunctive relief on its counterclaim. The government argued that the defendant's request that the Court compel EPA to act on the redesignation request was moot in light of the 1990 Amendments to the Clean Air Act.

The Decision

Enforcement Issues

First, the Court determined whether jurisdictional requirements had been met. Finding no authority to support the contention that EPA was required to pursue state administrative channels before proceeding in federal court, the Court rejected the defendant's argument that jurisdiction was lacking because EPA failed to exhaust state or administrative remedies. Slip op. at 15-16. Moreover, the Court held that the defendant's challenges to the NOV were not jurisdictional arguments; rather, they were defenses to the merits of the government's claim. Slip op. at 18-19. The Court noted that EPA had issued the defendant a NOV alerting it to violations of the applicable SIP more than thirty days before it filed its complaint. The Court further noted that the complaint alleged that the violation persisted more than 30 days after the NOV was issued. Thus, the Court determined that EPA had satisfied jurisdictional prerequisites of SS 113(a)(1).

The Court next considered whether SS 113 authorized enforcement against the defendant. In reaching its decision, the

³ Note that the opinion does not hold that issuance of a NOV is a prerequisite to enforcement under SS 113(a)(5), (b)(5).

Court agreed with the government that SS 113(a)(5) allows EPA to take enforcement pursuant to subsection (b)(5) when it finds that a state permit does not properly subject a source to non-attainment NSR requirements. Slip op. at 23. The Court determined, however, that EPA was barred from enforcing against the defendant in this case because it issued a Finding of Violation to the SJCHD after the defendant made the modification; the Court interpreted subsection (b)(5) to require EPA to make a formal Finding of Violation to the state before the source "attempts" to construct or modify pursuant to the permit. Slip op. at 23-29. Accordingly, the Court entered judgment in favor of the defendant on the complaint.

Defensive Issues

The Court also ruled on the government's motion for judgment on the defendant's counterclaim and the defendant's motion for reconsideration of the Court's Order of September 21, 1990. The Court determined that the counterclaim was moot in light of the 1990 Amendments to the Clean Air Act, which set forth new standards for achieving attainment status for ozone. The Court also held that the Amendments rendered moot the motion for reconsideration. Thus, the Court granted judgment in favor of the government on the defendant's counterclaim and denied the defendant's motion for reconsideration. slip op. at 29 32.

cc: Elliott Gilberg
David Rochlin

Attachment

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