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Legal News Alert is part of our ongoing commitment to providing up-to-the minute information about pressing concerns or industry issues affecting our Environmental clients and our colleagues.

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Wisconsin District Court Issues Important NSR Case

On November 7, 2007, the United States District Court for the Western District of Wisconsin issued a far-reaching New Source Review (NSR) decision that could have significant ramifications for utilities and other industries nationwide, but particularly for those in Wisconsin. In *Sierra Club v. Michal Morgan, Jay Ehrfurth, John Wiley and Kevin Reilly,* Order No. 07-C-251-S (W.D. Wis. 2007), District Judge John C. Shabaz found that three of five separate projects that occurred at the University of Wisconsin's Charter Street plant between 1996 and 2004 violated the Clean Air Act's (CAA) NSR provisions. The decision held two state employees responsible for the three projects at the plant, finding that the projects did not constitute routine maintenance, repair, or replacement (RMRR) and that they each caused a significant net emissions increase.

The Sierra Club asserted that the University of Wisconsin should have obtained NSR Prevention of Significant Deterioration (PSD) air permits for the five projects because the projects constituted significant modifications under the CAA. The CAA essentially requires an owner or operator of a plant to obtain a PSD permit prior to initiating construction if the project is not RMRR and the project will cause a significant increase in net emissions.

Prior to getting to the merits, the court had to address two issues. First, the court found that the Sierra Club had standing to bring suit based upon two affidavits from individual Sierra Club members who live within a mile of the plant. Second, and perhaps more notably, the court found that the Sierra Club could sue Michael Morgan, the Secretary of the Department of Administration, and Jay Ehrfurth, the supervisor of the plant, as individual "operators" even though they were not necessarily directly involved with any of the permitting decisions. The court dismissed the claims against the other two defendants because they had no authority to control or supervise the plant's operations.

As for RMRR, the court's decision is the clearest pronouncement to date in the Seventh Circuit on how to apply the U.S. Environmental Protection Agency's (U.S. EPA) four-factor test for determining whether a project is RMRR. The four factors are: (1) the nature and extent of the

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project; (2) the project's purpose; (3) the frequency of such projects; and (4) the project's cost. Generally speaking, meeting three of the factors was dispositive for Judge Shabaz.

The court's application of these four factors narrowed the RMRR exemption more than some of the other district courts that have addressed the issue. For example, the court found that a project that will increase a unit's availability and reliability is not for the "purpose" of routine maintenance. The court also relied heavily upon whether the project was paid for out of operation and maintenance funds in analyzing the "cost" factor. Similarly, the court found that projects occurring less than three times over the life of a unit do not meet the "frequency" factor and are not RMRR.

Finally, the court also examined whether the non-RMRR projects produced a significant increase in net emissions. The court held that three of the projects were not "like-kind replacements." Accordingly, the court applied the "actual-to-potential" test for these projects, and it was undisputed that the projects significantly increased emissions under this test.

The court's opinion can be found online at:

http://www.wiwd.uscourts.gov/bcgi-bin/opinions/district_opinions/C/07/07-C-251-S-11-07-07.PDF

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