



THE ADMINISTRATIVE WATCH

ADMINISTRATIVE WATCH ADDRESSES ENVIRONMENTAL, HEALTH & SAFETY ISSUES

BCCZ

BABST | CALLAND | CLEMENTS | ZOMNIR
A PROFESSIONAL CORPORATION

Volume 9

Issue 1

March 2006

D.C. Circuit Strikes Down U.S. EPA's Equipment Replacement Provision to New Source Review

On March 17, 2006, a federal appeals court struck down an effort by the USEPA to provide a level of certainty and clarity to the regulatory morass known as new source review ("NSR"). The U.S. Court of Appeals for the District of Columbia issued a much-anticipated opinion in *State of New York, et al. v. EPA* in which the court vacated the EPA's October 27, 2003 Equipment Replacement Provision ("ERP") rulemaking. The ERP rulemaking was an effort by the USEPA to establish a bright line rule for determining whether equipment replacements were exempt from federal NSR requirements as routine maintenance, repair or replacement activities ("RMRR"). Because the ERP has been vacated by the D.C. Circuit, industrial facilities will not be afforded the certainty that the USEPA was attempting to provide regarding the scope of the RMRR exclusion.

This decision leaves in place USEPA's traditional analysis for determining whether a project is exempt from RMRR, which involves the Agency conducting a case-by-case determination of a project by weighing the nature, extent, purpose, frequency, and cost of the work as well as other factors to arrive at a "common sense" finding. *See* 67 Fed. Reg. 80,290, 80,292-93 (December 31, 2002). Therefore, projects conducted at industrial facilities may still qualify as RMRR. However, it was not as clear which projects are exempt and which are not. The court's decision did not otherwise impact the NSR reform changes that were promulgated by USEPA on December 31, 2002.

If you would like more information regarding this case or to discuss an air issue, please contact Babst, Calland, Clements and Zomnir, P.C.'s Michael Winek at (412) 394-6538 or mwinek@bccz.com or Seth Rice at (412) 394-5490 or srice@bccz.com.

Two gateway center
Pittsburgh, pa 15222
412.394.5400
WWW.BCCZ.COM

Copyright 2006 * Babst, Calland, Clements and Zomnir, P.C. * Two Gateway Center * Pittsburgh, PA 15222 * 412-394-5400
The Administrative Watch is privately distributed by Babst, Calland, Clements and Zomnir, P.C., for the general information of its clients, friends and readers. It is not designed to be, nor should it be considered or used as, the sole source of analyzing and resolving legal problems. If you have, or think you may have, a legal problem or issue relating to any of the matters discussed in the Administrative Watch, consult legal counsel. Also, if you have any questions regarding these or any other matters, contact Michael H. Winek at 412-394-6538 or mwinek@bccz.com.