The New York Times
nytimes.com

March 18, 2006

Judges Overturn Bush Bid to Ease Pollution Rules

By MICHAEL JANOFSKY

WASHINGTON, March 17 — A federal appeals court on Friday overturned a clean-air regulation issued by the Bush administration that would have let many power plants, refineries and factories avoid installing costly new pollution controls to help offset any increased emissions caused by repairs and replacements of equipment.

Ruling in favor of a coalition of states and environmental advocacy groups, the United States Court of Appeals for the District of Columbia Circuit said the "plain language" of the law required a stricter approach. The court has primary jurisdiction in challenges to federal regulations.

The ruling by a three-judge panel was the court's second decision in less than a year in a pair of closely related cases involving the administration's interpretations of a complex section of the Clean Air Act. Unlike its ruling last summer, when the court largely upheld the E.P.A.'s approach against challenges from industry, state governments and environmental groups, the new ruling was a defeat for the agency and for industry, and a victory for the states and their environmentalist allies.

In the earlier case, a panel including two of the three judges who ruled on Friday decided that the agency had acted reasonably in 2002, when it issued a rule changing how pollution would be measured, effectively loosening the strictures on companies making changes to their equipment and operations.

But on Friday, the court said the agency went too far in 2003 when it issued a separate new rule that opponents said would exempt most equipment changes from environmental reviews — even changes that would result in higher emissions.

With a wry footnote to Lewis Carroll's "Through the Looking Glass," the court said that "only in a Humpty-Dumpty world" could the law be read otherwise.

"We decline such a world view," said their unanimous decision, written by Judge Judith W. Rogers, an appointee of President Bill Clinton. Judges David Tatel, another Clinton appointee, and Janice Rogers Brown, a recent Bush appointee, joined her.

The winners this time —more than a dozen states, including New York and California and a large group of environmental organizations — hailed the decision as one of their most important gains in years of litigation, regulation and legal challenges under the Clean Air Act.

The provision of the law at issue, the "new source review" section, governs the permits required at more than 1,300 coal-fueled power plants around the country and 17,000 factories, refineries and chemical plants that spew millions of tons of pollution into the air each year.

"This is an enormous victory over the concerted efforts by the Bush administration to dismantle the Clean Air Act," Eliot Spitzer, the New York attorney general, whose office led the opposition from the states, said in an interview.

Mr. Spitzer, who is running for governor, said the ruling "shows that the administration's effort to misinterpret and undermine the statute is illegal."

Howard Fox, a lawyer for Earthjustice, which represented six environmental and health groups in the case, called the ruling "a victory for public health," adding, "It makes no sense to allow huge multimillion-dollar projects that drastically increase air pollution without installing up-to-date pollution controls."

The E.P.A. issued only a brief statement, saying: "We are disappointed that the court did not find in favor of the United States. We are reviewing and analyzing the opinion."

The decision is unlikely to be the last word; several circuit courts or appeals courts have considered or decided related cases, and the issue may eventually reach the Supreme Court. Some in Congress say the uncertainty demands an overhaul of the Clean Air Act itself, but there has been no real movement in that direction in recent years.

The new ruling addressed the administration's effort in 2003 to offer relief to energy companies that faced costly settlements of litigation brought by President Clinton's E.P.A. The agency proposed exemptions for companies whenever upgrades to their equipment amounted to less than 20 percent of the replacement cost of the equipment. In effect, that made perennial repairs of old equipment a more attractive alternative in many cases than its outright replacement.

Energy companies said the two rules the administration proposed in 2002 and 2003 would help them expand energy supplies at lower cost to consumers. But environmentalists said the change would result in just the kind of increased pollution that the law was intended to control.

The Clean Air Act calls for companies to build plants with up-to-date control technologies, and the new source provision was a way to ensure that as time goes by, pollution controls must be modernized along with the plants themselves.

Industry groups, which had challenged the first E.P.A. rule last year as not being flexible enough, were aligned with the agency this time. In general, they have been close partners with the Bush administration in environmental matters, pushing for greater economic considerations in the creation of any new policy.

The 20 percent threshold in the overturned rule would have enabled plant operators to make many repairs and upgrades without spending additional tens of millions of dollars for more advanced pollution controls. In settlements under the old rules, some companies faced costs of more than $100 million.

"This is a terrible decision," said Scott Segal, director of the Electric Reliability Coordinating Council, a trade organization, arguing that the "any physical change" definition created financial instability for plant operators who spent as much as $800 million for a new boiler.

He and other industry leaders expressed hope that the court ruling might induce Congress to pass new legislation that would include New Source Review, a step that he said would make it easier for plant operators to plan for their future upgrades and investments.

John Engler, president of the National Association of Manufacturers, called the ruling "a significant setback to business efficiency" and environmental quality.

The government has 45 days to decide whether to seek a review of the ruling by the entire appeals court.