United States Environmental Protection Agency

Environmental Appeals Board

In the Matter of Nelson Industrial Steam Company,
Petitioner

Petition for Administrative Review

1. Nelson Industrial Steam Company ("NISCO") is a Texas partnership which owns a power production facility in Westlake, Louisiana, consisting of two petroleum coke-fired cogeneration units and associated operational equipment. NISCO provides steam and electricity to its partners, CITGO Petroleum Corp., ConocoPhillips Company, and Sasol North America Inc.

2. NISCO hereby requests administrative review by the Environmental Appeals Board of a decision by the EPA Director of the Clean Air Markets Division which refused to exempt NISCO from the Clean Air Interstate Rule ("CAIR") requirements under 40 C.F.R. Parts 96 and 97. A copy of that applicability determination is attached as Exhibit 1. This review is being filed per 40 C.F.R., and 40 C.F.R. 78.3.

3. On March 13, 2006, Nelson Industrial Steam Company ("NISCO") submitted a request to EPA for a determination that the two cogeneration units at its Westlake facility were exempt from CAIR. This request was made on the basis that these two units meet the definition of cogeneration units under the Public Utilities Regulatory Policies Act ("PURPA") and the cogeneration unit exemption under the Clean Air Act's Acid Rain rules (40 C.F.R. Part 72 et seq.) because neither of the units provides more than one-third of its potential electrical output capacity or more than 219,000 MWe to a utility power distribution system for sale. NISCO requested a determination as to whether the two units meet the definition of cogeneration unit under CAIR found at 40 C.F.R. 51.123(cc). The CAIR imposes an additional efficiency test to demonstrate that a unit is a cogeneration unit. Thus, although a unit may be classified as a cogeneration unit under PURPA and the Acid Rain rules, it may not be a cogeneration unit under CAIR. A copy of the initial request for an applicability determination under CAIR is attached as Exhibit 2.

4. Subsequently, on November 15, 2006, NISCO supplemented the pending request for an applicability determination to also request that EPA exempt the two NISCO units from CAIR applicability for the reason that the NISCO units do not meet the definition of electric generating unit ("EGU") contained in 40 C.F.R. 51.123(cc) and in the Federal Implementation Plan ("FIP") because the units have never sold ***sufficient*** electricity to a utility power distribution system to fall within the meaning of "producing electricity for sale." A copy of the supplemental request is attached as Exhibit 3.

5. Under CAIR and the FIP an EGU is defined as follows:

Electric generating unit or EGU means:

(1) Except as provided in paragraph (2) of this definition, a stationary, fossil-fuel-fired boiler or stationary, fossil-fuel-fired combustion turbine serving at any time, since the start-up of the unit's combustion chamber, a generator with nameplate capacity of more than 25 MWe ***producing electricity for sale***...."

In the final CAIR Preamble, EPA emphasized that it proposed to regulate only EGUs under CAIR because its cost-effectiveness analysis reviewed only the ability of EGUs to reduce NOx and SO2 in a cost-effective manner. In responding to a comment about why non-EGU power sources were not included in EPA's CAIR model rule (which was the basis for the FIP), EPA stated:

> [For non-EGUs], EPA has less reliable SO2 emissions data and very little information on the integration of NOx and SO2 controls. Although EPA has more information on NOx emissions from [sources subject to the NOx SIP call] (and other programs in the northeastern U.S.), the geographic coverage of the CAIR includes some States that were not included in the NOx SIP Call, some of which states contain significant amounts of industry. The EPA has even less emissions data from non-EGUs in these non-SIP call states affected by the CAIR. While EPA has incorporated State-submitted emissions inventory data for 1999 into its analysis for the CAIR, even this data is generally lacking information on fuel, sulfur content, and existing controls. Without this data, it is very difficult to assess the emission reduction opportunities available for non-EGU boilers and turbines. Furthermore, with regards to NOx, many non-EGU boilers and turbines are making reductions using low NOx burners (the control technology EPA assumed in making the cost-effectiveness determinations in the NOx SIP Call). Since these controls are operated year-round, annual emissions reductions are already being obtained for many of these units. Additional reductions would likely be less cost effective.

70 Fed. Reg. at 25214, May 12, 2005.

6. The two petroleum-coke-fired NISCO units were not evaluated by EPA with respect to emissions or pollution control equipment in the background documents supporting the CAIR. To the best of our knowledge, EPA did not evaluate any pet-coke fired units in its cost-effectiveness analysis which was central to the basis for the rule.[1] Louisiana was not in the NOx SIP call, so data concerning the NOx control technology for the two units was not available to EPA, as indicated in the above Preamble to the Federal Register. The two NISCO units are subject to a PSD permit issued prior to construction of the units. PSD Permit No. PSD-LA-557. Both units are considered to have best available control technology ("BACT") for the control of SO2 and NOx and this fact was not challenged by EPA in its determination. BACT for NOx was determined to be good operating techniques and the use of staged combustion. The facility already achieves control of NOx emissions at level of approximately 0.1 lb. NOx/MMBtu.

[1] See Regulatory Impact Analysis at http://www.epa.gov/CAIR/pdfs/finaltech08.pdf. See also http://www.epa.gov/CAIR/pdfs/finaltech07.pdf, and http://www.epa.gov/CAIR/pdfs/tm0012.pdf.

BACT for SOx was determined as the use of limestone in the fluidized beds (which achieves 90% SO2 control). Additional controls would not be cost-effective.

7. Because EPA did not consider NISCO's facility in the development of the rule and because NISCO's facility was not regulated under the Acid Rain program due to its exempt status as a cogeneration unit, EPA did not provide any SO2 allocations to NISCO under the CAIR program, even though it provided SO2 allocations to virtually all other units it considered to be EGUs. To the best of NISCO's knowledge, it is the only CAIR regulated unit in the entire country that has not been provided with SO2 allocations. (Originally, there were biomass fired units that were not provided with allocations, however, EPA exempted such units from the CAIR in a subsequent rulemaking published at 72 Fed.Reg. 59190, October 19, 2007). Thus, the only way for NISCO to comply with the CAIR provisions would be to buy SO2 and NOx credits. Essentially, NISCO would be subsidizing reductions at other CAIR regulated facilities, which are primarily regulated public utilities, even though the only reason that NISCO is subject to CAIR at all is that it sells a tiny amount of electricity to a small Louisiana municipality in some years simply to avoid wasting such electricity.

8. Neither of the NISCO units has ever sold more than 1% of its electrical output to a utility power distribution system, except during the aftermath of Hurricane Rita in 2005. Even then, the annual sale of electrical output was only 2.58%. In five of the fifteen years since 1990, NISCO has not sold **any** electricity to the grid. In six more of those years, sales were below 0.2 % of total generation. Only in 2005 did sales to the grid exceed 0.82%. Because 2005 was the year of Hurricanes Katrina and Rita, the special *force majeure* circumstances of those storms account for these extra sales. EPA did not dispute any of these facts in its applicability determination.

9. The NISCO units were constructed and are operated to produce power only for three of the companies which together own 100% interest in NISCO: Sasol, CITGO and ConocoPhillips. Each of these three entities uses the power for manufacturing purposes. Any sales of electricity to the grid are the result of only incidental or accidental swings in electrical production due to a manufacturing unit being temporarily off-line. The NISCO units are operated in order to tailor output to the demands of these three entities, not to produce power for sale. The miniscule amount of power sold is not done so on an intentional basis, but rather to avoid waste. The only exception to this mode of operation was due to back-to-back natural disasters of unprecedented magnitude.

10. NISCO provided some power to Southwest Louisiana after Hurricane Rita. Before Hurricane Rita, NISCO hadn't sold *any* power in 2005. The NISCO units were the first two units back on line in the entire Southwest Louisiana/Southeast Texas area and were intentionally run at maximum rates for a relatively short period of time to supply badly needed power. As noted above, even during 2005 with these sales, the percentage of the electricity produced by the units that was sold was only 2.58%

11. The annual sales of electricity from the NISCO units since they first fired the Circulating Fluidized Bed Boilers have been as follows:

Year	MWHN PBS Total Generation	MWHN Avoided Cost (sold)	Percentage MWHN Avoided (sold)*
1992	883,541	494	**0.06%**
1993	1,404,540	11,462	**0.82%**
1994	1,416,159	2,229	**0.16%**
1995	1,469,516	10,902	**0.74%**
1996	1,441,529	522	**0.04%**
1997	1,561,879	48	**0.00%**
1998	1,468,807	50	**0.00%**
1999	1,342,403	-	**0.00%**
2000	1,289,062	8,611	**0.67%**
2001	1,620,472	-	**0.00%**
2002	1,621,741	1,016	**0.06%**
2003	1,552,336	88	**0.01%**
2004	1,559,327	-	**0.00%**
2005	1,613,791	41,636	**2.58%**

12. NISCO requested that EPA exercise its inherent authority to interpret the phrase "producing electricity for sale" within the definition of EGU so as to exclude: a) incidental production of electricity for sale when it amounts to less than 1% of the unit's annual output and b) production of a small amount of electricity for sale only for limited periods during or in response to natural disasters. NISCO stated in its request that EPA has the authority to determine that the NISCO units are not EGUs within the meaning of CAIR; to amend the FIP to create such *de minimis* exemptions from the definition of EGU; and/or to allow the State of Louisiana to include such a *de minimis* exemption in its SIP. Thus, NISCO requested that EPA exclude the two units from CAIR applicability based on such determination through one of these mechanisms.

13. EPA's final determination was that it refused to exempt the NISCO units based on the *de minimis* sales of electricity from the units. EPA's determination was arbitrary and capricious and an abuse of discretion in failing to exclude the two NISCO units from the definition of EGU under CAIR.

14. NISCO does not request an evidentiary hearing as there are no factual issues alleged to be in dispute. EPA did not contest the classification of NISCO's two units as cogeneration units under PURPA or the Acid Rain program. EPA did not contest the fact that the emissions of sulfur dioxides and nitrogen oxides from the two units are already controlled to Best Available Control Technology through the PSD permit. EPA did not contest the data concerning NISCO's sales of electricity.

15. NISCO is the owner of the two units in question and thus has a direct interest in the determination as to whether CAIR is applicable.

16. It is clear that EPA has inherent authority to make *de minimis* exceptions to its rules. In *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) the court considered whether EPA had the authority to create *de minimis* exceptions to the Clean Air Act statutory requirement that all modifications to major stationary sources should be subject to PSD review. The Court found

that EPA did have such authority and noted that the principle of recognizing the agency's inherent authority to make exemptions "is a cousin of the doctrine that, notwithstanding the "plain meaning" of a statute, ***a court must look beyond the words to the purpose of the act where its literal terms lead to "absurd or futile results."*** (citing *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1939); *District of Columbia v. Orleans*, 132 U.S.App.D.C. 139, 141, 406 F.2d 957, 959 (1968)). 636 F.2d at 360, note 89, emphasis added. EPA has exercised just such inherent authority to craft exemptions in the following cases and should have done so here as well: *Ober v. Whitman*, 243 F.3d 1190 (9th Cir. 2001) and *Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451 (D.C. Cir. 1996). Each of these cases is discussed in more detail below:

17. In 2001, the U.S. Court of Appeals for the Ninth Circuit upheld EPA's authority to exempt *de minimis* sources from the application of reasonably available control technology under a federal implementation plan for particulate matter. *Ober v. Whitman*, 243 F.3d 1190 (9th Cir. 2001). The petitioners contended that the CAA does not contain any explicit provision for such *de minimis* exceptions. They argued that the statute says that the implementation plan must include reasonably available control measures ("RACM") to bring particulate emissions within the standards or a demonstration that attainment by the statutory date is impracticable. The court quoted from the EPA General Preamble for Implementation of Title I:

> If it can be shown that one or more measures are unreasonable because emissions from the sources affected are insignificant (i.e. *de minimis*, those measures may be excluded from further consideration as they would not represent RACM for that area....Where the sources affected by a particular measure contribute only negligibly to ambient concentrations that exceed the NAAQS, EPA's policy is that it would be unreasonable and therefore would not constitute RACM to require controls on the source.

243 F.3d at 1194. In another passage, the court quoted from the same General Preamble justifying EPA's exemption by noting "because of the small contribution of the source category's emissions to the nonattainment problem, the imposition of additional controls ...on a particular source category in the area would not contribute significantly to the Act's purpose of achieving attainment of the NAAQS 'as expeditiously as practicable.'" (Citing 59 Fed.Reg.41998, 42011.) The court, applying the *Alabama Power* doctrine, found that EPA had the authority to make *de minimis* exceptions to the statutory requirement for RACM.

18. In *Environmental Defense Fund, Inc. ("EDF") v. EPA*, 82 F.3d 451 (D.C. Cir. 1996, EDF challenged a presumption created by EPA in the federal action conformity rules (requiring federal actions to conform to state SIP requirements) that sources below the "major source" thresholds are presumed to conform without a specific analysis of their conformity. The applied the principles set forth in *Alabama Power* to find that EPA's exemption was reasonable, even in the light of a statute that did not appear to allow for an exemption. The court's decision states as follows:

VIII. EXEMPTION FOR NON-MAJOR FEDERAL ACTIONS

The EPA's general conformity regulations apply only to "major" sources of emissions. 58 Fed.Reg. 63,229/1. This limitation appears in the regulations in the form of tonnage thresholds of emissions, below which the conformity of the federal action is presumed. 40 C.F.R. SS 51.853(b)(1), (c)(1), (g)(2). **The regulations also identify certain categories of government action that are exempt from the conformity rule because the emissions increases they produce, if any, are *de minimis*.** These exempt actions include judicial and legislative proceedings, recurring activities such as permit renewals where the activities to be conducted will be similar in scope and operation to activities already being conducted, rulemaking and policy development and issuance, routine maintenance and repair activities, civil and criminal law enforcement activities, actions related to foreign affairs, and so on. See 40 C.F.R. SS 51.853(c)(2), (c)(3) (listing exempt actions).

EDF maintains that these exemptions and thresholds are in conflict with the statute. **According to EDF, the broad prohibition in section 176(c)(1)-- "[n]o department, agency, or instrumentality of the Federal Government shall engage in ... any activity"--shows that the Congress intended the general conformity requirement to apply to every activity of the federal government, however minor a source of emissions it may be.** Moreover, the threshold levels adopted by the EPA are taken from the major stationary source definitions promulgated by the EPA for the use of states, in doing their SIPs, to determine which sources will be subject to review for compliance with air quality standards. Those levels were originally derived after a detailed analysis of the impact that a source over the threshold would have upon the attainment of the national standard for that particular pollutant. See 40 C.F.R. SS 51.165, 51.166; 45 Fed.Reg. 52,705-10 (1980). In the present proceeding, argues EDF, the EPA has not and could not prove that these exemptions are truly *de minimis*: the cumulative effect of the exempted federal actions would produce at least some negative impact upon a state's prospects of attaining the national air quality standards.

As we explained in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C.Cir.1979), categorical exemptions from the requirements of a statute may be permissible "as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis*." *Id.* at 360. This principle derives from the commonplace notion that "the law does not concern itself with trifling matters." Id. The ability to create a *de minimis* exemption "is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design." Id.

* * *

Moreover, we noted in that case, as we had in *Public Citizen v. Young*, that "the literal meaning of a statute need not be followed where the precise terms

lead to absurd or futile results, or where failure to allow a *de minimis* exemption is contrary to the primary legislative goal." *Id.* at 1535. Because the EPA's regulation avoided a "mammoth monitoring burden" and yet "square[d] with the health- protective purpose of the statute," we concluded that to require a different result would be "to adjudge Congress incompetent to fashion a rational legislative design." Id. at 1534-35.

In this case, as in *Ohio v. EPA*, [citation omitted] we do not think that the Congress has taken a position so rigid that it will not admit of a *de minimis* exemption. Although the terms of the statute do prohibit the federal government from engaging in "any activity" that is not in conformity, it seems eminently reasonable for the EPA to interpret this provision to refer to "any activity" that is likely to interfere with the attainment goals in a SIP--that is, to major federal actions and to lesser actions that could still produce a regionally significant level of emissions. See 40 C.F.R. SS 51.853(b), (i); 58 Fed.Reg. 63,229/1 (applying conformity requirements to *de minimis* actions would generate "vast numbers of useless conformity statements"). The purpose of section 176(c)(1), after all, is not to minimize emissions but to ensure that federal actions conform with state implementation plans. 58 Fed.Reg. 63,215/2. Moreover, we find nothing in the statute to preclude the EPA's identification of categories of federal action that would produce either no or a trivial level of emissions; these activities by definition could not threaten a state's attainment of the goals in its SIP. Although a series of *de minimis* federal actions, taken together, could conceivably effect a significant environmental harm, the EPA appropriately did not consider the cumulative effect of the exempted federal actions; the statute requires each individual federal activity to be in conformity with the SIP and does not demand a mechanism that would evaluate the emissions of various federal activities in the aggregate.

82 F. 3d at 466, 467, emphasis added.

19. In addition, in *Chemical Manufactures Ass'n v. Natural Resources Defense Council*, 470 U.S. 116 (1985), a Clean Water Act case, the Court held that the EPA has authority to issue "fundamentally different factors" variances to its National Effluent Limitations Guidelines despite statutory language stating that EPA "may not modify" any such standard. The Court indicated that EPA could allow such exemptions where pollutant removal costs would be "wholly out of proportion" to those considered by EPA in developing the effluent limitations. Such case provides support for EPA use of discretion to exempt NISCO where further control beyond BACT (as required by NISCO's PSD permit) is not reasonable under CAIR and the two units should not therefore be considered as EGUs given the de minimis amount of electricity sold.

20. Likewise in *E.I. du Pont de Nemours v. Train*, 430 U.S. 112, 128 (1977), the Court found that the EPA's categorical effluent limitations under the National Effluent Limitations Guidelines **must** include variances other than those expressly created by statute in order to assure the regulated parties of due process. (Similarly, in the case of NISCO, not allowing an exemption

from the definition of EGU may violate the due process and/or equal protection given the de minimis nature of the electrical sales and the fact that the units were already exempt from the Acid Rain program and are well-regulated under the PSD permit.

21. In *United States v. Storer Broad. Co.*, 351 U.S. 192, 201-06 (1956), the Court upheld an agency exemption from a stringent legal requirement fashioned to apply to a broad category of regulated entities on grounds that agency has implied authority to waive the standard in individual cases. It is clear that EPA had the authority to exempt NISCO's units from classification as an EGU under CAIR and should have done so.

22. In *Portland Cement Ass'n v. Ruckleshaus*, 486 F.2d 375, 399 (D.C. Cir. 1973), the court found that EPA may create waivers or exemptions that "impart . . . a construction of 'reasonableness' to the standards as a whole and adopt . . . a more flexible system of regulation than can be had by a system devoid of 'give'"). It was arbitrary and capricious and an abuse of discretion for EPA to fail to do so in NISCO's case.

23. Regulation of NISCO's two units under CAIR as EGUs when such units generally sell less than one half of one percent of their electrical output to a utility power distribution system is an absurd result in light of the fact that the units are already controlled to BACT levels under their PSD permits and are exempt under the Acid Rain program. As noted by NISCO, and not challenged by EPA in its final determination, additional controls for reductions of SO2 and NOx beyond BACT are infeasible. Further, as noted by NISCO, reductions from NISCO would make no material difference to the ozone contributions in the Texas counties[2] at issue or in the SO2 contributions to Alabama.[3] Because that was the underlying basis for regulation of any EGUs in Louisiana, such rationale is not supported in the case of NISCO, certainly.

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[2] NISCO submitted data along with its request for an applicability determination to EPA that the modeling analysis performed by EPA to support the CAIR rule ozone impacts is technically suspect in its conclusion that Louisiana is an upwind source of ozone contaminants for Harris and Tarrant counties in Texas. This conclusion is directly contrary to a number of more specific modeling runs performed by Louisiana DEQ and approved by EPA Region 6 in connection with Louisiana SIP approvals. In each of those modeling exercises, it was concluded that Texas emissions contribute to Louisiana ozone nonattainment – not the other way around. The basic meteorological data does not support that prevailing winds are from Louisiana – quite the reverse is true. See the EPA Region 6 press release dated July 26, 2002 stating "that air pollution is transported to the area [5 parish area around Baton Rouge] **from southeast Texas.**" http://yosemite1.epa.gov/r6/press.nsf/346f458dede7637d8625693d004ec51d/fd2043e8013ddb7786256c02006fa331!OpenDocument The SIP approval supporting this action was published in 67 Fed. Reg. 61786 on October 2, 2002. The SIP approval was later rescinded only because the U.S. Fifth Circuit found that EPA lacked authority for its Transport Extension policy, not because of any underlying finding that there was not transport of ozone forming constituents from Texas to Louisiana. NISCO requested that all such modeling data supporting the October 2, 2002 SIP approval and transport extension, already within EPA's and LDEQ's records, was considered to be incorporated into NISCO's request to EPA for nonapplicability under CAIR. NISCO requests that EPA include this modeling data in the administrative record of this appeal.

[3] NISCO also stated in its request to EPA that SO2 modeling was performed for NISCO in conjunction with its application for a Title V permit. The modeled maximum SO2 emissions were less than 15% of

24. EPA's failure to exempt NISCO from CAIR on the basis that it is not an EGU was arbitrary and capricious and an abuse of discretion under the facts set forth above. For this reason, NISCO requests that the Environmental Appeals Board overturn the EPA applicability determination and find that the NISCO units should not be considered to be EGUs when their sales of electricity are de minimis, as stated herein.

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the short term and long term ambient standards. This certainly is indicative that the NISCO contributions of SO2 are not likely to affect ambient air quality in Alabama. As noted, NISCO employs BACT control for SO2 already. Further reductions are neither feasible nor cost-effective. EPA did not contest or question these positions in making its determination.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Administrative Review has been mailed, postage prepaid and/or electronic mailed to the following:

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Baton Rouge, Louisiana, this 26th day of November,2007.

Maureen N. Harbourt