

**March 22, 2006**

COURT STRIKES DOWN EPA'S NEW SOURCE REVIEW REGULATION

(New York v. EPA)

The U.S. Court of Appeals for the District of Columbia Circuit last week struck down the Environmental Protection Agency's (EPA) Equipment Replacement Provision (ERP) under the New Source Review (NSR) program. In doing so, many existing facilities may now be forced to install expensive retrofit technology or shut down, thereby jeopardizing thousands of jobs and reliable energy supplies. WLF had filed a brief in the case supporting both industry and the EPA arguing that the rule was a reasonable interpretation of the law.

The regulation in question would have required existing manufacturing and power generating facilities to comply with the time-consuming and costly NSR procedures but only if the facility decided to undertake a major physical modification to the plant as opposed to simple routine maintenance and repair. In its brief, WLF argued that EPA's rule was a reasonable definition of "physical change" under the statute that provided industry with a clear standard. On the other hand, the broad interpretation as put forth by New York and the other petitioners would require compliance with NSR for minor and routine maintenance or repair, even if no new or additional pollution were subsequently emitted.

WLF's brief further argued that the states were quite capable of enforcing their various plans that implement EPA's ambient air quality standards, and that applying NSR to existing facilities as suggested by the petitioners would violate the intent of Congress that enacted NSR amendments to the Clean Air Act.

Nevertheless, the court of appeals ruled unanimously that the modifier "any" before "physical change" in the statute evidenced the intent of Congress to encompass every physical change, regardless of the scope or nature. The opinion was written by Circuit Judge Judith Rogers, joined by Judges Tatel and Brown. The EPA has not yet indicated whether it will file a petition for rehearing or seek further review in the U.S. Supreme Court.

WLF's brief was drafted with the *pro bono* assistance of Paul M. Seby, a partner in the Denver, Colorado office of McKenna Long & Aldrige LLP.

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For further information, contact Paul Kamenar, WLF Senior Executive Counsel, at 202-588-0302. WLF's brief is posted on its website at www.wlf.org.