

# 5TH CIRCUIT UPHOLDS EPA'S POSTPONEMENT OF COMPLIANCE DATE FOR ELECTRIC UTILITY WATER DISCHARGES

The U.S. Court of Appeals for the 5<sup>th</sup> Circuit upheld EPA's decision to postpone the compliance date for certain wastewater discharge effluent limitations applicable to the steam electric power generating industry. The decision illustrates the procedures EPA and other agencies must employ to change their rules and the deference courts give the agencies when the required procedures are followed.



## **Standards Issued in 2015**

In 2015, EPA issued effluent standards applicable to steam electric power generating facilities (the 2015 Rule), based on EPA's determination of what constituted best available technology economically achievable (BAT). After issuance, several electric utilities requested EPA reconsider the 2015 Rule, based on new information indicating the costs would be far higher than EPA estimated and the infeasibility of the technology EPA proposed to meet the standards. Upon reconsideration (and after a change in administration), EPA revised the 2015 Rule, extending certain key dates by two years.

## **Revision Was a Properly Issued Rule, Not a Stay**

Several environmental groups challenged EPA's revision of the 2015 Rule, asserting EPA lacked authority to issue the revision. According to these groups, EPA's action was a stay of the 2015 Rule and the Clean Water Act does not allow EPA to stay its rules.

In *Clean Water Action v. EPA*, the 5<sup>th</sup> Circuit upheld EPA's revision. The 5<sup>th</sup> Circuit acknowledged EPA must follow notice and comment procedures and provide a reasoned basis for revising a rule, just as was required for issuing the original rule. The 5<sup>th</sup> Circuit noted revision of the 2015 Rule was the result of a formal process that included notice to and thousands of comments from the public. The 5<sup>th</sup> Circuit also determined EPA's explanation for the revision contained a reasoned basis.

## **Agencies Must Follow Rulemaking Procedures to Revise Rules**

Agencies cannot revise rules simply to adhere to the wishes of a new administration. They must go through the required procedures and provide a reasoned basis for changing existing rules. At that point, courts are to uphold the revisions, even when the courts do not necessarily agree with the changes.

For a copy of the 5<sup>th</sup> Circuit's opinion <http://www.ca5.uscourts.gov/opinions/pub/18/18-60079-CV0.pdf>