

PSD Guidance/Clean Air Act: Federal Appellate Court Addresses Whether Document Constitutes Final Agency Action



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The United States Court of Appeals for the D.C. Circuit (“Court”) addressed whether a guidance document issued by the United States Environmental Protection Agency (“EPA”) constituted final agency action for purposes of judicial review. See *Sierra Club v. EPA*, No. 18-1167, 2020 WL 1684036 (D.C. Cir. Apr.7, 2020).

The document published by EPA in 2018 was titled:

Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program (“SILs Guidance” or “Guidance”).

Sierra Club sought judicial review of the *Guidance*. EPA asserted that the *Guidance* was not a final agency action. Therefore, the agency argued it was not reviewable by the Court.

The Court agreed with EPA. It held that the *Guidance* was not final agency action subject to review under the Clean Air Act (“CAA”).

The Court first highlighted the relevant CAA statutory provisions and regulations that govern the *SILs Guidance*. The CAA amendments enacted in 1970 require EPA to promulgate National Ambient Air Quality Standards (“NAAQS”). The states were then required to develop their own state implementation plans (“SIPs”). Such SIPs would contain emission limits and other control measures to bring the state’s air in compliance with the NAAQS.

Congress in 1977 added the Prevention of Significant Deterioration (“PSD”) to the CAA. It required major emitting facilities to obtain a permit setting forth emission limitations for a facility prior to construction. PSD applicants must meet certain emission requirements. In 1987, EPA promulgated a regulation that outlined a set of values for states to use in determining what level of emissions might violate those requirements. These values are known as “significant impact levels,” or SILs.

EPA in 2010 attempted to codify the uses of SILs for certain air pollutants. However, the regulations were judicially challenged and subsequently withdrawn. The *SILs Guidance* was issued in April 2018.

The *Guidance* provides that permitting authorities are allowed to exempt sources from certain requirements when they have individually small impacts. They are judged by comparing a source’s projected maximum impact to EPA-recommended SILs. The SILs values in the *Guidance* are non-binding. Permitting authorities are allowed to use the SILs values in the *Guidance* or develop their own values.

Permitting authorities have the discretion to ignore the *Guidance*. EPA explained that it would “obtain experience with the application of these values in the permitting program before establishing a generally applicable rule.”

The Court’s analysis of whether the *Guidance* was final began with an explanation of the test for determining whether agency action is final. The applicable test is two-pronged: To be final, “first, the action must ‘mark the consummation of the agency’s decisionmaking process Second, the action must be one by which rights or obligations have been determined, or from which legal consequences flow.’”

The Sierra Club addressed the first prong of the finality test. It argued that the *Guidance* was issued after EPA received comments and undertook revisions. Thus, the *Guidance* was argued to be the consummation of the agency’s decisionmaking process.

EPA responded that the *SILs Guidance* contained a disclaimer that it was “neither a final determination nor a binding regulation.” Further, EPA noted that it would gather information based on the implementation of the *Guidance* prior to promulgating a final rule. Therefore, according to EPA, it was clear that issuance of the *Guidance* did not mark the consummation of the agency’s decisionmaking process.

As to the second prong of the finality test, Sierra Club asserted “that the *SILs Guidance* has an ‘immediate and significant’ effect on how permitting authorities interpret the PSD permitting requirements.” EPA responded that the *Guidance* “merely provides technical and legal advice and that authorities retain ‘discretion to use other values that may be justified separately,’ including values lower than those EPA recommends; or they may elect not to use SILs at all.”

The Court agreed with EPA on the second prong—issuance of the *Guidance* did not determine rights or obligations nor effect appreciable legal consequences. The Court did not address the first prong of the test.

The Court explained that determining whether agency action has direct and appreciable legal consequences—the second prong of the finality test—is a pragmatic inquiry that focuses on how the action actually affects regulated entities. It stated:

. . . the SILs Guidance imposes no obligations, prohibitions or restrictions on regulated entities, does not subject them to new penalties or enforcement risks, preserves the discretion of permitting authorities, requires any permitting decision relying on the Guidance be supported with a robust record, and does not prevent challenges to individual permitting decisions.

Further, permitting authorities were allowed to ignore the *Guidance*. Accordingly, issuance of the *Guidance* had no direct and appreciable legal consequences and was, therefore, not final agency action.

A copy of the Order can be downloaded [here](#).