

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
SEP 3 1992

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT : Recent Fifth Circuit Order Dismissing Petition for Review Filed by
Golden Aluminum Company

FROM: Jeffrey B. Renton, Attorney
Air and Radiation Division (LE-132A)

TO: William G. Rosenberg
Assistant Administrator for Air and Radiation (ANR-445)

THRU: Alan W. Eckert
Associate General Counsel
Air and Radiation Division (LE-132A)

On August 27, 1992, the Fifth Circuit issued an order (copy attached) dismissing the petition for review of Golden Aluminum Company ("Golden"), a wholly-owned subsidiary of Coors, Inc. Golden Aluminum Co. v. Reilly, No. 91-4951 (5th Cir.). Golden's petition requested review of a letter from you dated September 3, 1991, which responded to Golden's February 27, 1991 letter to Hank Habicht. Your letter denied Golden's request that the Agency reconsider earlier PSD applicability determinations issued by EPA Region VI regarding Golden's proposed secondary aluminum smelting and rolling facility. The letter noted that Region VI was the proper authority on the issues raised.

Simultaneous to its petition in the Fifth Circuit, Golden filed a virtually identical petition in the D.C. Circuit. Pursuant to the joint stipulation of EPA and Golden, that petition was dismissed by court order dated December 19, 1991. Golden Aluminum Co. v. Reilly, No. 91-1528 (D.C. Cir.). The joint stipulation notes that although the earlier Region VI determinations do not constitute nationally binding guidance, policy, or precedent, EPA is not in any way limited in referencing the Region VI determinations or establishing national policy or guidance in this area.

The core legal issue presented by the petitions was whether Region VI was justified in concluding that Golden's proposed facility was for "secondary metal production" as that term is

meant by CAA section 169(1), and was thus subject to a 100 tpy PSD applicability threshold. Golden contends that due to its unique design, the facility was actually one for rolled aluminum, and, thus, the applicable PSD threshold is 250 tpy.

In the Fifth Circuit, we responded by filing a motion to dismiss Golden's petition based on threshold jurisdictional issues. We argued that because Golden had not filed its petition within 60 days of the initial determinations by Region VI, it was not timely under CAA section 307(b)(1). We also argued, as an alternative, that the matter was moot under Article III of the Constitution because of Golden's subsequent actions in constructing its facility pursuant to a minor source permit it received from Texas. The Court's order granted our jurisdictional motion absent an opinion setting forth its grounds. It did not reach the underlying legal issue targeted by Golden's petition.

Golden has the right to move the Fifth Circuit for reconsideration or rehearing en banc, or request certiorari by the Supreme Court. In our view, there is no basis for any of these potential requests. We thus anticipate that this will conclude the litigation. If you or your staff have any questions regarding these matters, please call me at 260-4148.

cc: John Calcagni, OAQPS (MD-15)
Stan Meiburg, Director, Air Div., Region VI
United States Court of Appeals

August 27, 1992

GILBERT F. GANUCHEAU
CLERK

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 91-4951 - Golden Aluminum vs. Reilly
(307 (b) 1 (1) 42 USC, 7607 (b) (1))

The following action has been taken in the above case:

AN EXTENSION OF TIME has been granted to and including

- for filing appellant's/petitioner's brief.
- for filing appellee's/respondent's brief.
- for filing reply brief.
- for filing petition for rehearing.
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- Motion to consolidate granted.
- Motion to supplement or correct the record granted.
- Motion to leave to file supplemental brief granted.
- Motion for leave to file brief amicus curiae is granted.
- Joint motion as to time for filing briefs granted.
- order enclosed has been entered.
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GILBERT F. GANUCHEAU Clerk

By: _____
Deputy Clerk

Mr. William K. Reilly
Mr. Bradley S. Bridgewater
Mr. Earl K. Madsen
Mr. Robert B. Holden
Mr. Richard H. Bartley

U.S. COURT OF APPEALS
FILED
AUG 27 1992
GILBERT F. GANUCHEAU CLERK

UNITED STATE COURT OF APPEALS
For the Fifth Circuit

No. 91-4951

GOLDEN ALUMINUM COMPANY,

Petitioner,

VERSUS

WILLIAM K. REILLY, Administrator,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ROBERT E. LAYTON, JR., ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petition for Review of an Order of the
Environmental Protection Agency

Before KING, EMILIO M. GARZA and DeMOSS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of respondents to dismiss the petition for review is GRANTED

IT IS FURTHER ORDERED that petitioner's motion for discovery is DENIED.