CROWE & DUNLEVY
ATTORNEYS AND COUNSELORS AT LAW

EFO 2020 – Air Quality Regulatory Updates

Donald K. Shandy
don.shandy@crowedunlevy.com
October 14, 2020

Member LexMundi World Ready

California Communities Against Toxics v. EPA

Case Background:

- Decided August of 2019 by the U.S. Court of Appeals for the D.C. Circuit
- California and several environmental groups challenged the 2018 memorandum issued by the Assistant Administrator Bill Wehrum (Environmental Protection Agency's Office of Air and Radiation)
  - The Wehrum memo concludes that § 112 of the Clean Air Act (CAA) mandates that a source of toxic emissions classified as "major" can reclassify to an "area source," and thereby ease its regulatory burden, at any time after it limits its potential to emit to below the major source threshold
  - This is a reversal of a 1995 Seitz EPA memo – "Once In, Always In" policy
- The court dismissed the case, without addressing merits of the memo's interpretation, after holding the memo was not a final agency action

California Communities Against Toxics v. EPA

Salient Analysis:

- Analysis for finality of an agency action and whether the action is legislative is separate
  - Legislative actions are always final, but final actions are not always legislative
- Two-prong finality rule

i. Does the agency action "make the consummation of the agency's decisionmaking process"

- Memo passes: it conveys the EPA's only permissible interpretation of the law, was issued by the Assistant Administrator for the Office of Air and Radiation, and notice of its conclusion was published in the Federal Register

i. Does the agency action have "direct and appreciable legal consequences"

- Memo fails: viewed in the context of the CAA, the memo has no "practical" legal consequences
  - Memo cannot be relied on as independently authoritative in a proceeding , state permitting authorities face no liability for ignoring it, and a permitting decision adopting the memo's reasoning can be challenged under§7661 of the CAA
  - This Memo is distinguishable from previous EPA memos

U.S. v. Ameren Missouri

Case Background:

- Decided September of 2019 by the U.S. District Court for the Eastern District of Missouri
  - ❖ Most significant NSR decision in the last 10 years
- U.S. alleged the power company, Ameren, violated the CAA, the Missouri State Implementation Plan, and its Title V permit by undertaking major modifications at its Rush Island plant without obtaining the required permits.
- The court held:
  i. the power company was liable for the alleged violations
  ii. that a form of Flue Gas Desulfurization was the BACT for the emissions at issue, SO_2
  iii. the U.S. was entitled to ***injunctive relief*** requiring the Ameren to address its excess emission by reducing its SO_2 emissions at its Labadie plant – a separate, nearby facility not subject to the lawsuit

U.S. v. Ameren Missouri

Salient Analysis:

- The Five-Step BACT process is not determined by cost-effectiveness
  - Rather the focus is on "the maximum degree of reduction" available
  - Incremental cost-effectiveness is used to evaluate control options with similar control efficiencies
- ***An injunction decreasing emissions at a nearby power plant is the best remedy***
  i. Money damages are inadequate due to the public and environmental nature of the harm
  ii. The tight factual nexus between remedy and harm means the relief is narrowly tailored
    - The two plants have similar pollution-impact profiles that affect the same populations to the same extent.
    - **Labadie's reduction in emissions corresponds "ton-for-ton" with the harm cause by Rush Island's excess – 162,000 tons and counting**

Questions?

Contact

Attorney name
Attorney phone
Attorney email
crowedunlevy.com

Oklahoma City

Braniff Building
324 North Robinson Avenue
405.235.7700

Tulsa

500 Kennedy Building
321 South Boston Avenue
918.592.9800

Dallas

Spaces McKinney Avenue
1919 McKinney Avenue
214.420.2163

To sign up for Crowe & Dunlevy news, legal updates and seminars, please visit crowedunlevy.com/subscribe