A Win for Texas: Fifth Circuit Finds EPA's Disapproval of State Implementation Plan Arbitrary and Capricious

Toxic Tort and Environmental Law Update

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The Fifth Circuit Court of Appeals vacated the U.S. Environmental Protection Agency's (EPA) disapproval of Texas' State Implementation Plan (SIP), finding that the EPA's action was arbitrary and capricious. In *Luminant Generation Co., et al. v U.S. Environmental Protection Agency*, No. 10-60891, slip op. (5th Cir. March 26, 2012), the court remanded the decision to the EPA for reconsideration and granted the states greater flexibility in creating SIPs for their needs.

The Clean Air Act (CAA) Grants States the Power to Create SIPs

Under the CAA, the states must adopt SIPs that meet certain criteria. Among other requirements, SIPs must include permitting programs, new source review (NSR), for the construction or modification of stationary sources. The CAA allows for major and minor NSR programs, with major NSR applying to sources that meet certain threshold emissions levels and minor NSR governing sources that do not meet those levels. While the CAA established detailed rules for major NSR, the Act prescribes only the barest of requirements for minor NSR.

States generally have wide discretion in formulating SIPs and must periodically revise them to ensure compliance with current air-quality standards. The EPA must approve or disapprove a SIP revision within 18 months of a state's submission.

The EPA Disapproves of Texas' SIP

In *Luminant Generation*, the contested regulation governed a permit that applied to minor NSR and pollution control projects that reduced or maintained current air emissions rates. Texas amended the regulation in February 2006. Under the CAA's 18-month deadline, the EPA was required to take action on the amended regulation by August 2007. However, the EPA did not issue its final disapproval rule until September 2010, more than three years later. The EPA stated that it disapproved of Texas' SIP because it did not meet the requirements of the CAA for a minor NSR program. According to the EPA, the SIP (1) did not meet the requirements of Texas' minor NSR regulation, (2) did not apply to "similar sources," and (3) lacked "replicable" limits.

Fifth Circuit Rules That EPA's Disapproval of SIP Was Arbitrary and Capricious

The Fifth Circuit, however, disagreed with the EPA's decision. While chastising the EPA for its failure to timely respond to Texas' SIP amendment, the court opined that the EPA did not identify a single violation of the CAA.

First, the court disagreed with the EPA's attempt to evaluate the SIP for compliance with state law. The court held that Section 7410(*l*) of the CAA required the EPA to evaluate proposed SIP provisions in relation to CAA, not state rules. As a result, the EPA impermissibly relied on state law.

The court also rejected the EPA's assertion that the SIP's availability was too broad and not limited to "similar sources," such as oil and gas facilities. The court agreed with the petitioner's argument that no such "similar sources" requirement existed with this provision of the CAA.

Finally, the court challenged the EPA's contention that the SIP gave Texas' environmental director too much discretion and did not include "replicable" limits on how that discretion was to be exercised. The court agreed with the petitioner's argument that the CAA did not require a state's SIP to include replicable limits. Thus, the EPA's disapproval based on some replicable-limits standard, like the EPA's earlier reliance on Texas law and insistence on a "similar source" requirement, was arbitrary and capricious.

Conclusion

The court concluded that our system of cooperative federalism afforded sweeping discretion to the states to develop SIPs, and it assigned the EPA with the narrow task of ensuring that a SIP meets the CAA's minimum requirements. Unless the EPA can show that a particular provision of CAA prohibits a SIP, it will be difficult for the EPA to disapprove of SIPs in the future.

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