ALERT
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COZEN O'CONNOR

Alert: DC Circuit Remands PM2.5 Implementation Rules to EPA

On January 4, 2013, the U.S. Court of Appeals for the District of Columbia Circuit held in *Natural Resources Defense Council v. EPA*, No. 08-1250, that the U.S. Environmental Protection Agency (EPA) had improperly promulgated two rules implementing standards for fine particulate matter (PM2.5) under the Clean Air Act (CAA). Because of this ruling, the EPA will have to reissue the challenged rules under different provisions of the CAA, which is likely to result in the imposition of more stringent requirements on the regulated community. In addition, the court discussed when statements made in the preamble to a rulemaking can be considered "final actions" that are subject to appeal.

Background

Section 109 of the CAA requires the EPA to establish primary national ambient air quality standards (or NAAQS) for each air pollutant for which the EPA has established air quality criteria under Section 108. These standards must be set at a level that is protective of "the public health." Once NAAQS have been established for a pollutant, the CAA requires the EPA to undertake a thorough review of these standards every five years to ensure they continue to be adequately protective. The EPA may also draft rules providing the states with direction on how to implement these standards. States are then required, in turn, to develop plans for the implementation and enforcement of the NAAQS, also known as State Implementation Plans or SIPs. Because these SIPs must be approved by the EPA, the agency's implementation rules are an important step in the regulatory process.

Challenge to PM2.5 Implementation Rules

In the present case, petitioners challenged two final rules that were issued in 2007 and 2008, which provided direction to the states on implementing the 1997 PM2.5 standards.[1] Petitioners argued that when promulgating these rules, the EPA improperly followed the general implementation provisions of Subpart 1 of Part D of Title I of the CAA.[2] Instead, petitioners asserted the EPA should have promulgated the rules pursuant to the particulate matter-specific provisions of Subpart 4, which address emissions of particulate matter in non-attainment areas (i.e., areas with levels of PM2.5 pollution that do not meet the NAAQS).[3]

The differences between Subpart 1 and Subpart 4 are important. While Subpart 1 generally is seen as providing more leeway in implementing standards, Subpart 4 contains mandatory requirements that are more stringent, resulting in less regulatory discretion. For example, under Subpart 4 precursors to particulate matter such as ammonia in a non-attainment area would be presumptively regulated. This is not the case under Subpart 1. In fact, the challenged rules established a rebuttable presumption *against* regulating ammonia as a precursor, barring technical demonstration showing that such emissions significantly contribute to PM2.5 concentrations in the area. Also, Subpart 4 requires the EPA reclassify any nonattainment area as "serious" that was previously classified as "moderate" and failed to attain compliance. Such reclassification is discretionary under

1 Final Clean Air Fine Particle Implementation Rule, 72 Fed. Reg. 20,586 (Apr. 25, 2007) (PM2.5 Implementation Rule); Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM2.5), 73 Fed. Reg. 28,321 (May 16, 2008) (PM2.5 NSR Implementation Rule).
2 42 U.S.C. §§ 7501-09a (Subpart 1).
3 Id. §§ 7513-13b (Subpart 4).

Subpart 1. The EPA's ability to extend attainment deadlines for "serious" areas is also more restricted under Subpart 4, such areas being further subject to more stringent controls such as best available control measures.

To avoid the strictures of Subpart 4, the EPA interpreted that subpart as applying only to particulate matter with an aerodynamic diameter of 10 micrometers (PM10 or "coarse" particulate matter) and reasoned it was therefore appropriate to proceed under Subpart 1 for PM2.5. Rejecting this interpretation, the DC Circuit ultimately agreed with petitioners based on a plain reading of the definition of PM10 under the Clean Air Act. The court stated that the CAA definition for PM10 — particulate matter with an aerodynamic diameter *less than or equal to* a nominal 10 micrometers — clearly included PM2.5. Accordingly, the court remanded the rules to the EPA for re-promulgation under Subpart 4.

Preamble Statements as Final Action

The DC Circuit also had the opportunity to address the rare occasion when statements made in the preamble of an agency rulemaking might be considered "final actions" and therefore subject to judicial appeal. The EPA had attempted to argue that petitioners' present appeal was untimely because the agency indicated back in 1997, when revising the NAAQS for PM, that it believed Subpart 4 would apply only to PM10 and not to PM2.5 SIP requirements for non-attainment areas.

Rejecting the EPA's assertion, the court found the appeal to be timely. According to the DC Circuit, preamble statements will not normally constitute final actions, except under rare circumstances such as when an agency's decision making process includes the adoption of and overt adherence to interpretive guidance meant to direct future agency action in response to a directive from the White House. Although no bright line rule has been drawn, the court's decision makes clear that the EPA must do more than simply broadcast a future position in a preamble statement before it becomes an appealable action. An agency must take additional steps to establish that position through the adoption of interpretive policies and clearly indicate it considers such a position to be final.

Going Forward

In light of this decision, and stripped of the discretion permitted under Subpart 1, the EPA will be forced to overhaul its PM2.5 NAAQS implementation rules with more stringent requirements for state implementation plans, resulting in additional burdens on the regulated community. For example, the EPA will have to revise the rules to require states to address ammonia in attainment plans and evaluate sources of ammonia emissions for reduction measures. Agriculture, including livestock and poultry production and manure application, are a major source of ammonia emissions.

As the EPA begins the process of re-promulgation, the DC Circuit's discussion of preamble statements provides a useful illustration of the importance of closely following regulatory developments, including regulatory preambles and associated policy documents, and taking a holistic view of agency activities when considering whether legal challenge is warranted.

To discuss any questions you may have regarding this Alert, or how it may apply to your particular circumstances, please contact a member of Cozen O'Connor's Energy, Environmental & Public Utilities Practice.