LEGAL UPDATE ON SIGNIFICANT AIR CASES

State Bar Of Michigan Environmental Law Section
Air & Waste Management Association

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Injunctive Relief Under The Clean Air Act tTo Redress Past Emission Exceedances

- *United States v. Ameren Missouri* (8th Cir., August 20, 2021, No. 19-3220).
- Rush Island power plant – two coal-fired electric generating units constructed in 1976-77
- Grandfathered from PSD. Emitting ~ 18,000 tpy SO_2
- Ameren undertook repair projects at the units in 2007 and 2010, at a cost of over $20 million per unit
- The repairs involved some new and "redesigned" components and took 3-4 months to complete on each unit

- After a trial, the Eastern District of Missouri court found that the repairs increased the operating availability of the units and did not qualify as “routine” maintenance.
- The trial court found that the reliability improvements resulted in over 400 tons per year actual emission increases.
- The trial court held that the so-called “demand growth exclusion” did not apply because Rush Island is a base load plant that operates based on availability, not market conditions.

- Consequently, the trial court held that the projects were subject to PSD and Rush Island units 1 and 2 were subject to BACT since 2007 and 2010, respectively.
- BACT was flue gas desulfurization (95% SO_2 reduction).
- The trial court found that Ameren had improperly emitted more than 162,000 tons of SO_2 (cumulative) from Rush Island “and counting”.

- In addition to installing FGD at Rush Island, the trial court ordered Ameren to install dry sorbent injection at another Ameren facility – Labadie – located approximately 35 miles from Rush Island
- Ameren appealed.

Key Rulings By 8th Circuit Court

- Regarding the Actual-to-Projected Actual test, the trial court properly placed the on the United States the burden of proving that Ameren *should have expected* the projects to result in an emission increase – EPA met burden with expert testimony.
- Trial court properly placed on Ameren the burden of showing that the "demand growth exclusion" applied – 8th Circuit upheld the trial court's determination that Ameren did not show that the post-project emission increase were not related to the maintenance projects.

Key Rulings by 8th Circuit

- Trial court could not order injunctive relief against Labadie plant, which had not received a Violation Notice and was not alleged to have been in violation.
- However, the 8th Circuit held that the CAA does authorize injunctive relief to remedy harms/impacts from past violations and remanded for further proceedings.

Startup, Shutdown and Malfunction Petition

Natural Resources Defense Council v EPA, D.C. Cir. No. 10-1371, April 18, 2014.

- Courts, not EPA, have the authority to determine when penalties are "appropriate"
- Tension between requirement for continuous compliance and inevitable fact that technology will sometimes malfunction

- Good argument to make to a court
- Does not justify EPA creating an affirmative defense
- Court vacated malfunction defense provisions and denied all other challenges to the 2013 Cement MACT

SSM SIP Call

- In response to *NRDC*, in 2015 EPA issued SIP calls to 36 states, including Michigan, that had affirmative defense provisions for startup, shutdown or malfunction.
- Michigan's revised SSM rules submitted for SIP approval in 2017.
- In September 2021, Sierra Club filed suit against EPA, alleging that EPA had failed to take action against 12 states and jurisdictions that failed to respond to the SIP call and had failed to approve or disapprove SIP revisions submitted by 29 other states and jurisdictions, including Michigan, within 18 months.

Clean Power Plan/Affordable Clean Energy Rule

- Final CPP rule published October 23, 2015
- CAA Section 111(d) standards for existing sources:
- "[E]ach State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any pollutant (i) for which air quality criteria have not been issued. . . but (ii) to which a standard of performance under this section would apply if such existing source were a new source . . ."

- 27 States and several industry groups immediately filed challenges
- D.C. Circuit refused to stay the CPP, instead ordering an expedited briefing schedule
- Petitioners appealed the decision not to stay the CPP to the Supreme Court of the United States
- In February 2016, SCOTUS issued a stay of the CPP
- Highly unusual to stay a rule even before the case was argued before the lower court

- Although the D.C. Circuit heard oral arguments in September 2016, in early 2017, before any decision, EPA asked to hold the case in abeyance while it reconsidered the CPP.
- In July 2019, EPA rescinded the CPP and replaced it with the Affordable Clean Energy (ACE) rule.

CPP vs. ACE

CPP "Building Blocks"

- Reduce carbon emission through efficiency projects at coal-fired plants
- Reduce carbon emissions by shifting production from higher-emitting plants to lower-emitting plants
- Shift production to renewable energy operations
- Consumption reduction/energy efficiency as an optional element
- Second and third "building blocks" and demand reduction were "beyond the fence" measures

CPP vs. ACE

Premises of ACE:

- The only permissible interpretation of CAA section 111(d) is that EPA can only issue standards applicable to a stationary source ("within the fence")
- In the context of coal-fired power plants, this means heat-rate improvements
- EPA provided a list of candidate technologies that could be employed to achieve reductions

D.C. Circuit Decision

- A number of states and environmental groups challenged ACE
- In January 2021, the D.C. Circuit vacated ACE and remanded to EPA to reconsider "afresh"
- Specifically, the court stated that EPA was wrong to interpret CAA Section 111(d) to authorize only "within the fence" measures.

Definition of "Standard of Performance"

- "[A] standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."

CAA Section 111(a)(1).

D.C. Circuit Decision

- "Section 7411 does not, as the EPA claims, constrain the Agency to identifying a best system of emission reduction consisting only of controls 'that can be applied at and to a stationary source.' ACE Rule, 84 Fed. Reg. at 32,534. The EPA here 'failed to rely on its own judgment and expertise, and instead based its decision on an erroneous view of the law.' We accordingly must vacate and remand to the Agency 'to interpret the statutory language anew.'" (Some internal citations omitted.)

SCOTUS Again Steps In

- On October 29, 2021, the Supreme Court accepted a petition for *certiorari*
- Action took may observes by surprise even though the Supreme Court had issued that unusual stay in 2016.
- This case is not about how we should mitigate climate change – it is about how clearly Congress must speak when it delegates authority to administrative agencies and the limits of agency authority.

Questions?

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