

FEDERALISM AND THE CLEAN AIR ACT

A Legal Perspective

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The CAA – “Cooperative Federalism?”

- > Title I Programs
 - PSD/NSR Permitting
 - SIP-approved states, delegated states
 - NSR Reform
 - SIP control programs
- > Title II Mobile Sources
- > Title III Air Toxics Program
- > Enforcement
- > Climate Change

Title I Programs – Legal Framework

- > SIP Process – inherent federalism conflicts
- > Pre-construction permitting (PSD/NSR)
 - “Delegated” states – follow federal regs
 - SIP-approved states – follow state regs
- > Who is permitting authority?
 - *State of Alaska* case
 - NSR utility enforcement cases
- > NSR Reform

NSR Reform – When Does it Kick In?

- > Delegated States: Upon effective date of federal regs (D.C. Circuit 12/2003 indefinite stay)
 - Approx. 10 states
 - NY and Mass: Relinquished delegation – two permits required (state and federal)
- > SIP Approved States: Upon completion of state rulemaking
 - Unless “incorporate by reference” – stayed
 - EPA Approval?
- > Until then – play by the existing rules

Permitting Pitfalls

- > Delegated vs. SIP-approved states – role of EPA vs. state agency
- > *State of Alaska case*
 - SIP-approved state; permit issued by state agency over EPA objection; EPA issues administrative order prohibiting construction
 - State and permittee challenged order
 - Supreme Court: EPA has authority to question emissions technology determinations by state agencies

State of Alaska Case

- > Dissent: EPA should follow state permitting regulations approved by EPA (i.e. appeal the permit, follow procedures in EPA-approved process)
- > Bad facts lead to bad decisions
- > Emboldened EPA?
 - Kentucky case: State agency issued permit; environmental groups petitioned EPA to review
 - Issue is whether state agency should have required evaluation of alternative control technologies as part of BACT

NSR Enforcement Cases

- > Many “bad cases” where companies should have secured PSD permits
- > Most egregious: EPA *ex post facto* second guessing permit authority’s decision – bad policy
 - Company gets state permitting authority’s approval to construct/modify without a PSD permit
 - Permittee undertakes the project
 - Later EPA seeks penalties for failure to get the PSD permit

SIP Control Programs

- > State regulations will always apply; issue is whether they supplant federal regulations
- > Caught in the middle – when EPA and states disagree
 - Example: Massachusetts opacity requirements
 - Work with state to address deficiencies but until EPA and the state resolve their differences, potentially subject to two sets of requirements
- > Watch for differences in federal-state programs that look alike (acid rain and state NOx programs)
 - Different monitoring, RK or reporting requirements

Title II Mobile Sources

- > Favorite target for reductions to meet NAAQS, but watch for federal preemption
- > *Engine Manufacturers Association* case
 - Fleet vehicles rules: must purchase “clean vehicles”
 - Supreme Court: CAA prohibits states from adopting regulations that control emissions from motor vehicles (so-called California Car provisions)
 - Broad reading of preemption under Title II
- > Ramifications: Mobile source programs will have to be tailored carefully to meet S.Ct. objection

Title III Air Toxics Program

- > Federal Section 112 MACT/NESHAPs vs. state regulation of air toxics
 - Federal program: control technology based
 - State programs: Most are ambient impact based
- > What happens when you have to install control technology to meet MACT but that interferes with ability to meet state ambient-based standard
- > Next round of federal standards: residual risk
 - Begins to look more like state programs

Enforcement

- > Division of responsibility but EPA and states have independent enforcement authority
- > Degree of coordination varies among regions and states
 - States do majority of inspections and administrative enforcement actions; EPA does most “major impact” enforcement cases involving litigation
- > Increasingly seeing joint investigations with one agency taking enforcement lead
 - Other agency still involved

Overfiling/Underfiling

- > Both EPA and state agency have “enforcement interest” in a case
- > Defendant is caught in the middle
 - Negotiate/settle with one, both, neither?
 - Protection from “double enforcement”?
- > Historical Perspective: Under CAA, courts generally uphold EPA’s authority to overfile

CAA Overfiling Cases

- > *U.S. v. Murphy Oil USA* (142 F.Supp.2d 1054 (W.D.Wis. 2001))
 - Murphy Oil sued by WDNR for CAA violations; resolved and settled state case with Consent Decree entered in state court; settlement included “release of liability”
 - EPA lawsuit alleging same CAA violations; seeking penalties and injunctive relief
 - Murphy Oil argued *res judicata* barred EPA case for same violations
 - District Court: Language of CAA authorizes overfiling to prevent “ineffectual or inadequate” state enforcement

CAA Overfiling Cases

- > *U.S. v. Solutia* (Dist. Wyoming)
 - Self-disclosure of CAA violations to WDEQ → consent order with compliance schedule and no penalty → failure to meet schedule → new CO, schedule, no penalty → EPA objects, issues NOV → defendant meets with EPA and WDEQ to negotiate, offers \$200,000 penalty → EPA rejects offer (seeking \$3.7 mm) → WDEQ files suit and settles for \$200,000 → settlement seeks to resolve EPA's claims → EPA indicates it will file own complaint → defendant seeks declaratory judgment precluding EPA action

Solutia Case

- > Defendant argues *res judicata*
- > U.S. -- CAA provides authority to overfile at any time
- > District Court: EPA has unconditional authority to bring an enforcement action under CAA, subject **only** to satisfying the statutory requirement that it give written notice to the state
- > Raises enforcement policy issue: here state recognized EPA's objection to \$0 penalty and extracted \$200K penalty, yet EPA still not satisfied
 - *\$200K figure bad fact or coincidence?*

Legal Issues and Implications

- > Statutory Language is so broad that most challenges to EPA authority to overfile under CAA will not succeed
 - Contrast to RCRA language (*Harmon Industries* case)
- > New EPA initiative
 - IG Report alleging inadequate oversight of state enforcement programs
 - EPA “strengthen oversight” of state programs
 - Audits of state programs (eventually all states)
 - Ensure timely prosecution and appropriate penalties and injunctive relief
 - If not – overfiling on individual cases is “an option”

Strategy in Overfiling Situation

- > Take a close look at the facts before choosing strategy for resolving noncompliance
 - Natural tension between achieving best resolution and avoiding appearance of a sweetheart deal
 - *Solutia*: Closer federal scrutiny (\$\$, injunctive relief, timetable for compliance)
- > Involve EPA early?
 - Again, fact specific and region/state specific
 - History of overfiling by EPA regional office?
 - Delegated authority?
 - “Intuitive fairness”

Climate Change

- > Tensions are multiplied: International, federal, regional, state, local
- > CAA: Authority to regulate CO₂?
- > Regional, state and local initiatives are taking the lead in the U.S.
 - Consistency is key, yet very little attention paid to consistency issue
 - Dilemma for regulated community
 - Early reduction project – qualify for emission reduction credits?

Climate Change – Prospects

- > International: Not under current administration
- > National: Legislation likely; cap and trade system?
- > Regional and/or State: Most likely source of first “legally binding” climate change regulations
 - Opposite of CAA approach: Federal program sets “minimum requirements” and states develop programs to meet
 - Climate Change: On the ground programs developed first; with federal authority coming later, potential for exacerbating tensions

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