EPN "All Hands" Call, Friday, October 18, 2019

This month's all-hands call provided an overview of two recent D.C. Circuit Court decisions, one on the Cross-State Air Pollution Rule Update and another on air quality standards for ozone, and their effects on the future of environmental regulations.

Presenters

Janet McCabe, former Acting Assistant Administrator at the EPA Office of Air and Radiation, who worked for years on air quality standards and the Clean Power Plan.
Steve Silverman, former attorney at EPA's Office of General Counsel, where he served as counsel during the original ozone standards lawsuit.

Cross-State Air Pollution Rule (CSAPR) Update

Janet McCabe **presented** on the DC Circuit's decision in **Wisconsin v. EPA** that EPA's October 2016 Cross-State Air Pollution Update Rule for the most part fulfilled requirements under the Clean Air Act to limit pollution from upwind states to downwind states, avoiding interference in meeting national ambient air quality standards. The rule was challenged in court by industry, environmental/health groups, and states as either too stringent or too lenient.

Janet's view was this was a positive decision that upheld the basic principles of the Clean Air Act. The court found that EPA's rule was well-documented and explained, and upheld EPA's process as an appropriate framework. The decision also resolved a number of specific technical or policy issues, which will be helpful as EPA utilizes this framework in the future.

At the same time, the court did remand one section of the rule to the agency for review, which Janet said was expected. The rule was clear that it provided only a partial remedy for downwind states; its requirements would not eliminate all contributions of air pollution from upwind states, because EPA reasoned there was not enough time to implement all the necessary reductions and it did not have enough information about certain sources. However, the court found that partial remedies do not meet the requirements of the Clean Air Act; it doesn't matter if installation of control technology would be difficult or there isn't enough information. The statute has obligations and deadlines that must be met, and the court remanded the section of the law that allows partial remedies back to EPA.

National Ambient Air Quality Standards (NAAQS) for Ozone Concentrations

Steve Silverman explained that NAAQS are some of the most important environmental regulations since they apply everywhere, have to be attained everywhere, and affect every American. Cost is impermissible and standards are entirely science-based. The most common air pollutant from particulate matter is ozone, which makes up a significant component of smog. Every time ozone is regulated, there are lawsuits from both aisles challenging the law as too stringent or too lenient. This time, what is different in the court case **Murray Energy Corp v. EPA** is how the court treated human activity patterns and background concentrations of ozone.

Environmentalists argued that 70 parts per billion for ozone allows a number of levels to remain that studies have shown can be harmful to human health. Industry, on the other hand, argued that 70 parts per billion would be unattainable. In this decision, the court sided with EPA and concluded

that the standard should remain. What the environmentalists missed is the crucial role that human activity and physical exertion plays in human health responses to particulate matter. According to Steve, extensive research has shown that ozone poses little risk unless dealing with people under exertion, but is orders of magnitude more risky for people who are exercising. EPA has dealt with this in copious detail, and the courts agreed that activity patterns matter for ozone pollution—this form of the standard eliminates exposures at the target level—and prevents exposure to levels higher than acceptable for human health.

Finally, the court dealt with background concentrations directly instead of avoiding the issue altogether. Particularly in the West, these non-anthropogenic sources of ozone (e.g. wildfires, lightning, etc.) make up for around 40-50 parts per billion—possibly the majority of ambient ozone levels. The court decided that since these background concentrations would make 70 parts per billion unattainable, considerations of these concentrations are impermissible when establishing NAAQS.

Steve also noted that while the courts sided with EPA in these instances, it does not necessarily signal that other regulations will fare well in court. Even though they may also be well thought-out and supported by evidence, it might be too optimistic to believe that the courts will not simply grant deference to EPA as they have done on cases with even weaker evidence.