D.C. Circuit Dismisses Clean Air Act Challenge to New EPA Policy Memorandum, Finding No "Final Agency Action"

08.28.2019 | UPDATES

The U.S. Court of Appeals for the D.C. Circuit has issued an important decision that narrowly interprets the types of governmental decisions that may be challenged in court as "final agency action." In *California Communities Against Toxics v. Environmental Protection Agency*, the court dismissed a challenge to a 2018 EPA memorandum reversing the agency's longstanding "Once In, Always In" policy for the classification of "major sources" of hazardous air pollutants under Section 112 of the Clean Air Act. The court declined to review EPA's new guidance memorandum in the absence of any specific administrative proceeding where the guidance was being applied.

The ruling has significant implications for judicial review of governmental agency legal interpretations and guidance memoranda, although it is not clear whether other circuit courts will follow the D.C. Circuit's reasoning.

Regulation of Toxic Emissions Under Clean Air Act

Under Section 112 of the Clean Air Act, facilities that emit hazardous air pollutants are classified either as "major" sources or as "area" sources depending on the amount of emissions. Major sources are subject to more stringent emissions standards than area sources. Sources must obtain permits to operate from the appropriate state agency, subject to an administrative process for EPA review.

In a 1995 memorandum, EPA took the position that if a facility is classified as a "major source" of hazardous air pollutants as of the first date on which the facility is required to comply with a MACT (Maximum Achievable Control Technology) emissions standard, it can never be reclassified as an "area source" for that standard, even if it reduces its emissions below the major source threshold. But in January 2018, William Wehrum, EPA Assistant Administrator for Air and Radiation, issued a memorandum reversing the agency's "Once In, Always In" policy. The "Wehrum Memorandum" states that the Clean Air Act "compels" the conclusion that a major source can become area source once the source limits its potential to emit hazardous air pollutants to below the major source thresholds.

The Court's Ruling

The State of California and a group of environmental organizations sued to challenge the validity of the Wehrum Memorandum under the Clean Air Act. In declining to review the merits of the dispute, the court found that the memorandum was not "final agency action" subject to judicial review.

The court first recounted the long-standing two-part test under *Bennett v. Spear*, 520 U.S. 154 (1997), as applied and refined in subsequent U.S. Supreme Court cases, for determining whether a governmental agency decision qualifies as a "final agency action." First, the decision must "mark the consummation of the agency's decision-making process." Second, the decision "must be one by which rights or obligations have been determined, or from which legal consequences will flow." If a governmental agency decision does not meet either of these two prongs, then it cannot be challenged in court (unless such a challenge is specifically authorized by statute).

The court found that the Wehrum Memorandum met the first prong of this test, since it represents EPA's "last word" and "definitive interpretation" on the subject, and unequivocally states that the agency's new interpretation is the only permissible reading of the Clean Air Act's plain language.

But the court determined that the Wehrum Memorandum did not meet the second prong of the "final agency action" test. The court relied on a 2016 Supreme Court decision, *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), which found that the governmental action at issue in that case met the second prong of the final agency action test because it gave rise "to direct and appreciable legal consequences." Here, the D.C. Circuit decision found that the Wehrum Memorandum "does not have a single direct and appreciable legal consequence."

The court characterized the Wehrum Memorandum as "all bark and no bite," as it "merely forecasts a future objection" in Clean Air Act permit proceedings that have yet to occur. Although the court acknowledged that the Wehrum Memorandum strongly predicts future EPA action, it emphasized that the memorandum "itself does not revoke or amend a single permit." The court also emphasized that state permitting agencies were not legally obligated to follow the memorandum in their permitting decisions.

The court thus found that the Wehrum Memorandum "has no independent legal authority." According to the court, there are "clear statutory avenues" for challenging specific Clean Air Act permitting decisions, but judicial review was premature at this time.

Looking forward, the decision emphasized that courts, in assessing the final agency action question, “should resist the temptation to define the action by comparing it to superficially similar actions in the caselaw.” Instead, the decision urged that “courts should take as their NorthStar the unique constellation of statutes and regulations that govern the action at issue.”

The Dissenting Opinion

The lengthy dissenting opinion cites many of the same court decisions as the majority, but reaches a different conclusion. According to the dissent, the Wehrum Memorandum sufficiently creates legal consequences to meet the definition of “final agency action,” since the memorandum “announces a binding change in the legal regime,” has clear and identifiable effects for regulated facilities and interested stakeholders, and gives the states “marching orders” to follow EPA’s new position in their Clean Air Act permitting decisions. The dissent laments that the majority has misstated and misapplied the Supreme Court’s standard for judicial review of “final agency action.”

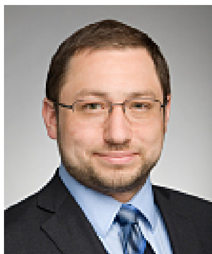
Effects of Decision

The *California Communities* decision, if it stands, represents a new chapter in how to assess what types of governmental agency legal interpretations and guidance memoranda may be challenged in court as “final agency action.” However, it remains to be seen whether other circuit courts, or the Supreme Court, will agree with the majority’s narrow interpretation.

© 2019 Perkins Coie LLP

CONTACTS

Marc R. Bruner
Partner
San Francisco
D +1.415.344.7171



Christopher G. Parker
Associate
San Francisco
D +1.415.344.7020

RELATED SERVICES

PRACTICES

- Environment & Natural Resources
- Energy Law

© 2019 Perkins Coie LLP