A Controversial Practice Finally Catches Up With the EPA

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With increasing frequency, the U.S. Environmental Protection Agency (EPA) has been declining to apply unfavorable judicial decisions outside of the circuits in which they were issued. In an earlier column, for example, we discussed *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013). After the U.S. Court of Appeals for the Eighth Circuit found in that case that two letters from the EPA to U.S. Sen. Charles Grassley, R-Iowa, regarding water treatment processes at municipal sewage treatment plants amounted to thinly disguised regulations that the court then proceeded to vacate, the EPA informally announced that the ruling only applied in the Eighth Circuit and that the agency would apply the decision in other judicial circuits only "on a case-by-case basis."

Because the jurisdiction of the EPA regions does not perfectly correspond with the jurisdiction of the federal circuits, this practice of limiting the application of unfavorable judicial decisions to the circuits in which they were issued has led to some absurd outcomes, like a single EPA regional office applying one standard to the entities that it regulates in some states and another standard to the entities that it regulates in other states. Although the controversial practice has been roundly criticized, few believed that a legal challenge, which would confront significant jurisdictional obstacles, could ever prove successful. For that reason, a recent decision by the D.C. Circuit caught many by surprise.

In *National Environmental Development Association's Clean Air Project v. EPA*, No. 13-1035 (D.C. Cir. May 30, 2014) (hereinafter, *NEDACAP*), the D.C. Circuit vacated a memorandum in which the EPA brazenly stated that it did not intend to apply an unfavorable judicial decision in *Summit Petroleum v. EPA*, 690 F.3d 733 (6th Cir. 2012), outside of the Sixth Circuit. In this column, we will discuss the background leading up to this decision, explain how an association of companies successfully challenged the EPA's controversial policy, and explore whether and how this ruling is likely to alter the EPA's conduct in the future.

The Summit Petroleum Decision

Under the Clean Air Act, a stationary source that emits a certain amount of pollution is subject to more stringent permitting processes and obligations. Pursuant to its regulations, for purposes of determining whether a stationary source emits that amount of pollution, the EPA considers multiple activities as a single stationary source and aggregates their emissions when they: (1) "are located on one or more contiguous or adjacent properties"; (2) are under common control; and (3) belong to the same major industrial grouping. In determining whether or not multiple activities are "adjacent" under the first criterion, the EPA historically considered not only the physical distance between them but also their "functional interrelationship."

In *Summit Petroleum*, the owner and operator of a natural gas sweetening plant and the numerous gas production wells that delivered sour gas via subsurface pipelines to that plant (where the sour gas was sweetened by removing hydrogen sulfide) challenged an EPA determination that the plant and the wells, notwithstanding the significant distances between them, constituted a single stationary source. In deciding that the plant and the wells were "adjacent," the EPA had considered the functional interrelationship between them, noting that they worked together as a single unit that produced a single product.

In its challenge, the company argued, among other things, that the EPA's determination that the physical requirement of adjacency can be established through mere functional relatedness is unreasonable and contrary to the plain meaning of the term "adjacent." The Sixth Circuit agreed, vacating the EPA's determination and remanding the case to the EPA to determine whether the plant and wells "are sufficiently physically proximate to be considered 'adjacent' within the ordinary, i.e., physical and geographical, meaning of that requirement."

EPA Response

Shortly after the Sixth Circuit denied its petition for rehearing, the EPA issued a memorandum explaining how the agency intended to apply the *Summit Petroleum* decision. The memo appropriately advised that the agency "may no longer consider interrelatedness in determining adjacency when making source determination decisions ... in areas under the jurisdiction of the [Sixth] Circuit." The memo also provided, however, that "at this time, the EPA does not intend to change its longstanding practice of considering interrelatedness in the EPA permitting actions in other jurisdictions." In those jurisdictions, the memo advised, the "EPA will continue to make source determinations on a case-by-case basis."

The NEDACAP Case

In *NEDACAP*, an association of resource extraction and manufacturing companies challenged the EPA memo. Predictably, the EPA first sought to dismiss the association's petition for review by raising a number of threshold issues. The EPA argued that the association lacked Article III standing, that the EPA memo was not a final agency action, and that the association's claims were not ripe for judicial review. While some courts may have welcomed the opportunity to avoid having to reach the merits of the association's case, the D.C. Circuit rejected all three of the EPA's asserted grounds for dismissal.

First, the court concluded that the association had Article III standing to assert its claims. The court found that the EPA memo, which it referred to as the "*Summit* directive," caused injury to the association's members who operated facilities outside of the jurisdiction of the Sixth Circuit. According to the court, by forcing these companies to undergo a case-specific assessment of whether their activities are functionally interrelated, the *Summit* directive "increase[d] the relative regulatory obligations and costs for [them]," thereby putting the companies "at a competitive disadvantage vis-à-vis companies operating facilities located within the Sixth Circuit."

Next, the court concluded that the *Summit* directive represented final agency action subject to judicial review. The court found that the EPA memo "sets forth EPA's binding and enforceable policy regarding permit determinations," observing that the EPA had already in fact relied on the memo in declining to apply the *Summit Petroleum* decision to facilities located outside of the jurisdiction of the Sixth Circuit.

Finally, the court concluded that the claims were ripe for review. The court found that the case presented a purely legal question: "whether EPA's final action adopting a non-uniform enforcement regime violates the strictures of the [Clean Air Act] or EPA regulations." Because the court determined that it was not necessary to wait for the EPA to apply its memo to decide this question, the court turned to the merits.

In its petition for review, the association argued, among other things, that the *Summit* directive violated the EPA's Clean Air Act "regional consistency" regulations. Those regulations set forth the EPA's policies of "assur[ing] fair and uniform application by all regional offices of the criteria, procedures, and policies employed in implementing and enforcing the act" and of "provid[ing] mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by regional office employees in implementing and enforcing the act."

For its own part, in defense of the *Summit* directive, the EPA invoked the "doctrine of intercircuit nonacquiescence." Under that doctrine, "an agency is entitled to maintain its independent assessment of the dictates of the statutes and regulations it is charged with administering [after one circuit has disagreed with its position], in the hope that other circuits, the Supreme Court, or Congress will ultimately uphold the agency's position."

In the end, the D.C. Circuit sided with the association, finding that the doctrine of intercircuit nonacquiescence did not permit the EPA to ignore the plain language of its own regulations, which in this case "strongly articulate EPA's firm commitment to national uniformity in the application of its permitting rules." The court determined that the EPA's regulations obligated the EPA "to respond to the *Summit Petroleum* decision in a manner that eliminated regional inconsistency, not preserved it." Concluding that the EPA memo was contrary to law, the court granted the association's petition for review and vacated the *Summit* directive.

Application of Decisions

The D.C. Circuit vacated the *Summit* directive because it was contrary to the EPA's Clean Air Act "regional consistency" regulations. Because there are no other regulations implementing EPA-administered statutes that so clearly articulate the policies set forth in the "regional consistency" regulations, those hoping that the *NEDACAP* decision will deter the EPA from limiting the application of unfavorable judicial decisions interpreting other EPA-administered statutes may be setting themselves up for disappointment. In response to *NEDACAP*, the EPA will likely only apply unfavorable judicial decisions interpreting the Clean Air Act consistently across judicial circuits.

And even that may change. Because the D.C. Circuit based its decision in *NEDACAP* on the EPA's regulations, it expressly declined to decide whether the Clean Air Act itself allows the EPA to adopt different standards in different circuits. As such, the court left the door open for the EPA to propose a rule to amend its Clean Air Act "regional consistency" regulations to account for regional variances created by a judicial decision. Because the EPA appears to value the ability to limit the application of unfavorable judicial decisions to the circuits in which they were issued, the agency may well propose such a rule in the future.

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