Title V/Clean Air Act: D.C. Circuit Addresses Venue

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The District of Columbia United States Court of Appeals ("Court") addressed in a June 14th opinion a title V Clean Air Act judicial review issue. See *Sierra Club v. Environmental Protection Agency*, 2019 WL 2479448.

The question considered was whether venue is proper in the Court pursuant to Section 307(b)(1) of the Clean Air Act.

Sierra Club filed a petition asking the Administrator of the Environmental Protection Agency ("Administrator") to object to a renewal of an Operating Permit under Title V of the Clean Air Act. The Title V permit was issued by the state of Utah for the Hunter Power Plant.

The Administrator denied the petition. The basis for the denial was the Administrator's belief that the petition for objection did not involve a nationally applicable regulation nor have nationwide scope or effect. Therefore, the Administrator concluded venue was not proper.

Title V requires certain stationary sources of air pollution to obtain Operating Permits. The Clean Air Act requires that the states administer Title V through adopted implementation plans. These plans are submitted to and approved by EPA.

Sierra Club sought a vacatur of the Order and remand for the Administrator to respond to the merits of the argument in the petition for objection. It argued that the underlying preconstruction permit was based on an erroneous classification of modifications in the late 1990's.

The Clean Air Act in relevant part provides "a petition for review of action of the Administrator in promulgating any national primary or secondary ambient air standard… or any other nationally applicable regulations promulgated… or final action taken, by the Administrator… may be filed only in the United States Court of Appeals for the District of Columbia. It further states "a petition for review of the Administrator's action in approving or promulgating any implementation plan… or any other final action of the Administrator… which is locally or regionally applicable may be filed only in the US Court of appeals for the appropriate circuit." Also relevant is language which states an action may be filed in the Court "if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

The Court ascertained whether venue was proper by first determining if the underlying matter was *nationally applicable, based on a determination of nationwide scope or effect which the Administrator finds and publishes or locally or regionally applicable* (emphasis added).

Following a traditional analysis, it initially addressed whether Sierra Club had standing to bring the suit. The Court found Sierra Club's declarations established standing because there was an injury. The injury was the power plants contribution to haze in various National Parks. Because of this haze, members of the Sierra Club were deemed injured by health concerns and reduction in enjoyment when visiting these different parks.

Second, the Court addressed venue. There are two bases for venue in the Court provided by Section 307(b) of the Clean Air Act. One basis is a determination that EPA's action was nationally applicable. The other was the Administrator's determination that the otherwise locally or regionally applicable action has a nationwide scope or effect and published the finding.

The Court determined that neither of these bases were present. It held the Order was not nationally applicable. This was determined by looking to the face of the agency action, instead of looking at the practical effects. The Court determined on its face that the Order denied Sierra Club's petition for objection in a narrow sense. The denial was for a single permit for a single plant located in a single state. It had an immediate effect only for the singular and isolated plant and could not be considered nationally applicable. The Administrator expressly confined his interpretation to specific circumstances of the plant, purposely declining to speak broader.

Finally, the Court explained the Administrator had not published a finding that the Order was based on a determination that had nationwide scope or effect. The mere publication of the Order was not sufficient. The publication must reflect or otherwise indicate that the Administrator had determined the action or other agency action was based on determination of nationwide scope or effect. It found the Administrator made no such determination.

Finding venue was lacking and Sierra Club's petition for review was dismissed.

A copy of the decision can be found here.