Promoting regional "consistency"? EPA's proposed Clean Air Act rulemaking in the wake of *Summit Petroleum v. EPA*

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The U.S. Environmental Protection Agency (EPA) has proposed revised Clean Air Act (CAA) rules intended to ensure "regional consistency" in how it implements the CAA. The proposed rule, however, raises more questions than it answers on whether *such "consistency" will be achieved.*

New consistency regulations proposed

In August 2015, EPA proposed revisions to longstanding CAA regional consistency regulations in 40 C.F.R. Part 56. 80 Fed. Reg. 50,250 (Aug. 19, 2015). EPA adopted those regulations in 1980 under CAA section 301(a)(2), which directs EPA to issue regulations establishing general procedures and policies designed, among other things, "to assure fairness and uniformity in the criteria, procedures, and policies applied by the various [EPA] regions in implementing and enforcing" the CAA. EPA is organized into ten regions and a headquarters office, with nationally applicable policy emanating from headquarters and the regions driving region-specific policies where applicable.

Content of the new regulations

EPA's original regulations seek to ensure "fair and consistent application of rules, regulations and policy throughout the country by assuring that the action of each individual EPA Regional Office is consistent with one another and national policy." 45 Fed. Reg. 85,400 (1980). The regulations provide mechanisms for such fair and uniform application by headquarters and Regional Office employees, and Regional Offices must ensure that actions taken under their authority are "carried out fairly" and are "as consistent as reasonably possible with the activities of other Regional Offices." 40 C.F.R. § 56.5. They must also seek concurrence from the appropriate EPA Headquarters Office on any interpretation of the statute, rule, regulation, or program directive if that interpretation might result in inconsistent application among Regional Offices.

Purpose of the regulations

EPA's proposed revisions to the regional consistency regulations would clarify that only decisions of the U.S. Supreme Court or the D.C. Circuit that arise from challenges to nationally

applicable regulations or EPA actions will apply uniformly. Thus, a decision of a federal court arising from a challenge to a "locally or regionally applicable" action would not apply uniformly nationwide. EPA also proposed to add a provision clarifying that EPA Headquarters offices' employees need not revise existing mechanisms for fairness and uniformity (or issue new mechanisms) to address decisions arising from challenges to locally or regionally applicable actions. Finally, EPA proposed to add language to 40 C.F.R. § 56.5(b) clarifying that EPA Regional Offices' employees need not seek concurrence from Headquarters to act inconsistently with national policy if inconsistent action is required to comply with a federal court decision.

Cases that triggered the regulations

EPA's rulemaking springs from the D.C. Circuit's decision last year in *National Environmental Development Association's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014) (*NEDA*), and the Sixth Circuit's 2012 decision in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012). In *Summit*, the Sixth Circuit disagreed with EPA's approach to determining when certain sources could be "aggregated" for purposes of triggering new source review and prevention-of-significant-deterioration requirements. In response, EPA issued a memorandum (*Summit* Directive) announcing that it would follow the Sixth Circuit's decision in states within that court's jurisdiction, but it would continue to apply its preferred approach to aggregation elsewhere.

The D.C. Circuit invalidated the *Summit* Directive shortly thereafter in *NEDA*. The *NEDA* court held that EPA's regional consistency regulations express a "firm commitment to national uniformity in the applications of its permitting rules," without any exception for judicial decisions that the agency disagrees with. The court then offered EPA three options for addressing an adverse judicial decision: (1) revise its underlying regulations, (2) revise its regional consistency regulations, or (3) appeal to the Supreme Court. EPA is currently pursuing both options (1) and (3) in response to *NEDA* and *Summit*.

Questions raised

EPA's regional consistency rulemaking raises several interesting questions. First, like the *Summit* Directive, the proposed rule espouses the doctrine of inter-circuit non-acquiescence–a practice whereby EPA only considers a federal court decision binding in those geographical areas subject to the jurisdiction of the ruling court. That doctrine, however, may conflict with CAA section 301(a)(2)'s call for national uniformity. The *NEDA* court sidestepped that issue, but the D.C. Circuit may be asked to resolve it should EPA finalize the rule as proposed.

Second, EPA's proposal could lead to inconsistent application of CAA regulations and policies by Regional Offices. That inconsistency impacts regulatory certainty and could create competitive advantages or disadvantages.

Third, the proposal leaves EPA wide discretion over whether to follow an adverse judicial decision addressing locally—or regionally—applicable actions only in the particular geographic areas within that particular circuit court's jurisdiction or whether to follow that decision nationwide. EPA's preamble does not shed any light on how EPA would exercise that discretion, and stakeholders are perhaps rightfully concerned that such decision making would be opaque.

The comment period for the proposed regional consistency regulations closed in October 2015. A final rule is expected before the end of the Obama administration.