Message

From: Casso, Ruben [Casso.Ruben@epa.gov]
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To: Feldman, Michael [Feldman.Michael@epa.gov]
Subject: EPA grants reconsideration of Texas 'SIP Call' claims- Inside EPA

EPA grants reconsideration of Texas 'SIP Call' claims

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EPA has granted a partial reconsideration of Texas' petition for the agency to reconsider its Obama-era "SIP Call" that banned states from using "affirmative defenses" and other regulatory exemptions for air pollution increases from industrial facilities during periods of startup, shutdown and malfunction (SSM).

In an Oct. 16 filing in the U.S. Court of Appeals for the District of Columbia Circuit case *Environmental Committee of the Florida Electric Power Coordinating Group, et al., v. EPA*, the agency notifies the court that on the same day, the agency informed Texas that it will reconsider the state's participation in the 2015 SIP Call.

Texas objects to the agency's rule stripping SSM exemptions from the state implementation plans (SIPs) of 36 states, including the Lone Star State. EPA issued the rule to bring the SIPs, which are blueprints for attaining federal air standards, into line with EPA's policy of removing SSM waivers from its own regulations. EPA adopted the policy to comply with D.C. Circuit rulings finding the exemptions unlawful.

In addition to bringing suit, Texas in 2017 filed a petition for administrative reconsideration with EPA. A key issue in both the litigation and reconsideration will be EPA's determination in the SIP Call that affirmative defenses are unlawful in both federal rules and SIPs. Affirmative defenses allow polluters to obtain waivers from Clean Air Act compliance for malfunctions if they can prove they took reasonable steps to avoid breakdowns and the malfunction is therefore unavoidable.

"EPA will conduct notice-and-comment proceedings as part of that reconsideration process if the Agency proposes to change the Texas SIP call," EPA says in its status update in the lawsuit, which is currently stayed pending EPA's decision on whether to reconsider the entire rule.

The agency has not yet decided how to proceed with the SIP Call as it applies to other states, EPA says in the filing. However, agency air policy chief Bill Wehrum recently told reporters that he doubts the premise of the SIP Call rule, in which he thinks EPA wrongly applied to SIPs D.C. Circuit holdings that are applicable to federal rules only.

In its letter to the Texas Commission on Environmental Quality (TCEQ), the state's air regulator, EPA's Region 6 office that has responsibility for the state says that even though the state's petition does not meet air law criteria to merit reconsideration, the agency will reconsider the rule with regard to Texas anyway, under its own initiative. Region 6 covers Arkansas, Louisiana, New Mexico and Texas.

The 5th Circuit has found affirmative defenses acceptable in some circumstances, placing it as odds with the D.C. Circuit. Under EPA's "regional consistency" policy, EPA regions may diverge from national policy where a state falls within the jurisdiction of a regional appeals court that has adopted a position at odds with the national policy. The 5th Circuit states are Louisiana, Mississippi and Texas.

Anne Idsal, administrator of EPA Region 6, in her letter to TCEQ appears to suggest EPA may invoke this policy to grant Texas an exemption from the national SSM policy.

"Region 6 has received concurrence from the relevant office in EPA's Office of Air and Radiation to convene a proceeding for reconsideration of the Texas SIP call, the outcome of which may potentially entail Region 6 proposing an action inconsistent with EPA's interpretation in the 2015 SSM SIP Action when acting pursuant to the reconsideration of the Texas SIP call," Idsal writes.