Message

From: Krallman, John [krallman.john@epa.gov]
Sent: 5/2/2018 3:19:45 PM
To: Dykes, Teresa [Dykes.Teresa@epa.gov]; Jordan, Scott [Jordan.Scott@epa.gov]
CC: Chapman, Apple [Chapman.Apple@epa.gov]
Subject: RE: OAIA Memo

Terri,

Scott can correct me if I'm wrong, but the MM2A memo does not shift the focus to actual emissions – the relevant inquiry remains potential emissions. The shift is about timing. The OIAI policy said that if your potential emissions were major when the NESHAP kicks in, you're subject to it now and forever. The MM2A memo says that the relevant inquiry is what your potential emissions are now; if you're no longer major, you're no longer major and therefore not subject to major NESHAP requirements, regardless of what your potential emissions were at the time the NESHAP kicked in. In fact, this would seem to be consistent with the court case you cite – the project was major and they violated 112(g) by not getting a determination, but once they took a permit limit, it was no longer major and no longer subject to major NESHAP requirements. It is a little quirky since the issue is a 112(g) violation, rather than a MACT standard, but it seems somewhat similar. I think the case would still probably come out the same way under the MM2A interpretation (even if I think that the remedy portion of it is probably contrary to the Supreme Court's decision in *Steel Company*).

While there may be some retroactivity issues, my initial impression is that the circumstances where it would come up would be pretty convoluted under MM2A in any case where that interpretation would matter. In any event, as before, a defendant could have challenged the applicability of major source requirements if they were not major at the time of the alleged violations. Before they would have to argue that the OIAI policy violated the Act; now they would point to the MM2A memo in support of the non-applicability of major NESHAP requirements to non-major sources.

John

From: Dykes, Teresa
Sent: Tuesday, May 01, 2018 7:11 PM
To: Krallman, John <krallman.john@epa.gov>; Jordan, Scott <Jordan.Scott@epa.gov>
Cc: Chapman, Apple <Chapman.Apple@epa.gov>
Subject: RE: OAIA Memo

And here is the reconsideration of the decision- look to FN 4 where the court says the actual emissions are not relevant- but the potential emissions are.

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From: Dykes, Teresa
Sent: Tuesday, May 01, 2018 6:57 PM
To: Krallman, John <krallman.john@epa.gov>; Jordan, Scott <Jordan.Scott@epa.gov>

Cc: Chapman, Apple <Chapman.Apple@epa.gov>
Subject: OAIA Memo

Scott and John- I found the attached decision that involves a utility that the court considered a major MACT source during construction and up and until it received a permit to limit its PTE to below the 10/25 tpy threshold. There seems to be a series of cases involving the OIAI policy due to the EGU 112(g) MACT issue (case-by-case MACT), the delisting and promulgation of CAMR, and then the court vacating the delisting- thereby imposing 112(g) MACT again on utilities.

This is clearly a case of Major MACT to Area MACT. But even here, the court says that at construction and during construction the source has the legal potential to emit. If the statute was clear, then wouldn't the court have found that a source's "actual" emissions- which were zero at the time be'c in this case I do not think the source had operated yet- controlled and found no violation???

The Wehrum memo stated that it thought the statute was clear on the new interpretation- but even so, I don't see how the memo (which isn't even given deference, but can be considered) can be applied retro-actively to act a defense, as alleged in this case, that the source was not legally a major source for the period of time before its PTE was lowered below the thresholds.

As you can imagine- this is a pretty important question for enforcement- i.e., does the memo apply retroactively- and I don't see how it can (it doesn't have effect of law, and some of the law, at least in this case is counter to its determination). I realize that retro-active application is a different question than whether we would use enforcement discretion and not pursue these cases.

Have either of you something else that you have found that supports retro-activity? Thanks.

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