Message

From: Feldman, Michael [Feldman.Michael@epa.gov]
Sent: 7/9/2020 3:05:02 PM
To: Bartley, Richard [Bartley.Richard@epa.gov]; Shar, Alan [shar.alan@epa.gov]
Subject: FW: Inside EPA: EPA denies Iowa waiver supports Sierra Club's Texas SSM case

From: Casso, Ruben <Casso.Ruben@epa.gov>
Sent: Thursday, July 09, 2020 9:54 AM
To: Donaldson, Guy <Donaldson.Guy@epa.gov>; Robinson, Jeffrey <Robinson.Jeffrey@epa.gov>; Feldman, Michael <Feldman.Michael@epa.gov>
Subject: Inside EPA: EPA denies Iowa waiver supports Sierra Club's Texas SSM case

https://insideepa.com/daily-feed/epa-denies-iowa-waiver-supports-sierra-club%E2%80%99s-texas-ssm-case

EPA denies Iowa waiver supports Sierra Club's Texas SSM case

July 9, 2020

EPA is denying that its recent proposal to allow Iowa to exempt Clean Air Act permit holders from emissions standards during periods of facility startup, shutdown and malfunction (SSM) supports environmentalists' case against a similar waiver in Texas, as the two sides continue to fight over where to hear the Texas suit.

In a July 6 filing with the U.S. Court of Appeals for the District of Columbia Circuit in *Sierra Club, et al. v. EPA, et al.*, EPA say its June 22 proposal to allow Iowa to use SSM waivers has no bearing on the litigation contesting Texas' ability to allow SSM exemptions.

The Lone Star State and Iowa are among those states that the Trump administration is allowing to have SSM waivers in their state-specific air plans, despite an Obama-era "SIP Call" rule forcing the removal of such exemptions from state air plans following D.C. Circuit rulings that found the waivers unlawful at the federal level. The SIP Call required 36 states to remove SSM exemptions from their state implementation plans (SIPs) for Clean Air Act compliance.

Environmentalists are fighting to keep the suit in the D.C. Circuit, claiming that EPA's decision to exclude Texas from the Obama EPA's 2015 SIP Call rule is "nationally applicable," or has "national scope or effect," and should be heard in the court, which issues nationally-binding rulings, and not in the 5th Circuit as EPA claims. The 5th Circuit can only issue rulings binding in Louisiana, Mississippi and Texas.

Environmentalists argue that by seeking to keep the Texas case in regional court, EPA is trying to evade review in the D.C. Circuit and avoid a potentially adverse nationally binding ruling.

But EPA in its new filing says, "Independent, subsequent agency action -- let alone a proposed action (which has no legal effect) -- cannot change the facial applicability and direct legal effects of the earlier action. And EPA's Iowa Proposal does not change the fact that EPA did not find or publish a finding that the Texas Withdrawal Action was based on a determination of nationwide scope or effect. Venue over the Texas Withdrawal Action therefore remains proper only in the appropriate regional circuit."

EPA has not formally ended the 2015 SIP Call policy, but has now exempted both Texas and North Carolina from the SIP Call, and proposed to do so for Iowa, prompting accusations from environmentalists that EPA is dismantling the SIP Call piecemeal, without D.C. Circuit review of its action.

The SIP Call itself responded to D.C. Circuit rulings finding SSM exemptions unlawful in federal regulations -- but EPA now argues the court's decisions do not apply to SIPs.
"Petitioners miscast EPA's Iowa Proposal. That proposal addresses a different type of provision than is at issue in this challenge to the withdrawal of the SSM SIP call issued to Texas: the Iowa Proposal addresses an exemption provision, not an affirmative defense."
Affirmative defenses shield industry from civil liability in the event of an SSM episode deemed unavoidable by regulators. The D.C. Circuit has, however, also found these defenses unlawful in as much as they deprive courts of the ability to fashion equitable remedies in air law enforcement actions. The 5th Circuit, meanwhile, has previously upheld a Texas affirmative defense provision.