Court Overturns EPA Limit for Tribal Areas

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has overturned a United States Environmental Protection Agency (EPA) regulation that gave EPA authority over air quality permits for facilities located in disputed Indian territory.

Under the Clean Air Act, EPA is responsible for establishing National Ambient Air Quality Standards (NAAQS), but the primary responsibility for ensuring that the NAAQS are achieved and maintained falls with the individual states. Under the Clean Air Act, certain federally recognized Indian tribes are entitled to the same authorities and responsibilities as states.

One of the responsibilities of the states and Indian tribes under the Clean Air Act is to develop and implement a program for issuing and enforcing operating permits for certain sources of air emissions. In Michigan, this program is known as the renewable operating permit (ROP) program. Such programs must be submitted to EPA for approval. If a state or a tribe does not submit an operating permit program, or submits one that EPA finds does not meet all the requirements of the Clean Air Act, EPA must implement and enforce its own operating permit program within that state or tribal area. Because states and tribes have a degree of flexibility in creating an operating permit program to implement the requirements of the Clean Air Act, the federal and state operating permit programs are not identical. At the time of this decision, no tribe had submitted an operating permit program to EPA for approval.

In 1999, EPA issued regulations to establish an operating permits program for all Indian territory unless a tribal or state operating program had been approved by EPA for the area. EPA recognized, however, that the precise geographic scope of tribal lands is not always clear cut. As the D.C. Circuit observed, "Indian country" is defined by federal statute as "all land within the

limits of any Indian reservation," "all dependent Indian communities," and "all Indian allotments." Thus, the court noted, the limits of tribal jurisdiction must often be determined through judicial proceedings.

In response to the uncertainty of the geographic scope of "Indian country," the EPA operating permit regulations provide that EPA will "treat areas for which EPA believes the Indian country status is in question as Indian country." Thus, EPA created a presumption that disputed territory was under tribal jurisdiction and, if the relevant tribal authority had not received approval for an operating permit program, the EPA operating permit program would apply in the disputed region rather than a state operating permit program. In addition, EPA declined to initiate a rule making process for conclusively resolving issues concerning whether specific regions were part of Indian country. Instead EPA would determine, on a case-by-case basis, whether each facility in disputed territory would be subject to the federal operating permit program or the applicable state operating permit program.

Michigan, New Mexico and several trade organizations filed suit against EPA challenging the regulations for operating permits in tribal areas. The challengers argued that EPA exceeded its authority by creating a presumption that disputed territory fell within tribal jurisdiction and by making jurisdictional decisions on a case-by-case basis, rather than through a general rulemaking.

EPA argued that it was appropriate to apply the federal operating permit program to disputed areas and that each state has the burden of proof to demonstrate that any particular area is outside of tribal jurisdiction. The court disagreed, ruling that once EPA has approved a state operating permit program, EPA's remaining authority within that state is limited to areas that are

actually within Indian country and that EPA cannot extend the scope of its authority by merely determining that the status of a particular area is "in question."

> EPA claims in its brief that it will only assert authority if there is a "bona fide" question of an area's status. However, in the Federal Register, EPA concluded that for the "purposes of this rule, there may be, but need not be, a formal dispute, such as active litigation or other form of pubic disagreement, for EPA to consider the Indian country status of the area to be in question." 64 Fed. Reg. at 8254. Thus, at least in the Federal Register, EPA has set a low, indeed virtually undefined, threshold for deciding there is a dispute. In any event, the Clean Air Act does not provide for EPA to administer a federal program even if there is a bona fide question of the area's status.
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> As petitioners point out, there either is jurisdiction or there isn't, but either way EPA must decide and not simply grab jurisdiction for itself on the ground that an area is "in question." Jurisdiction as between states and tribes is binary, it must either lie with the state or with the tribe – one or the other – and EPA does not have a third option of not deciding.
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> Petitioners correctly fear that EPA is creating a situation in which it may assume jurisdiction for itself and perpetually keep it from the states (or the tribes) because of a lack of showing of jurisdiction, without ever deciding who has jurisdiction.

Because the court found that the EPA must first determine whether a particular area is within state or tribal jurisdiction before imposing a federal operating permit program on that area, the court overturned the EPA regulation that extended the federal operating permit program to include areas where the status was merely "in question."

Regarding EPA's procedure of deciding whether facilities within disputed areas are under state or tribal jurisdiction on a case-by-case basis, the court ruled that this procedure violates the Clean Air Act. The court found that whether a state has adequate authority to enforce an operating permit program is one of the issues that must be addressed when EPA approves or

disapproves a state operating permit program. Because program approvals and disapprovals must be made after notice and an opportunity for public comment, the court ruled that EPA cannot make such jurisdictional decisions on a case-by-case basis, but instead EPA must follow the procedures for promulgating a rule, that is to provide notice and an opportunity for public comment.

Accordingly, EPA overturned the portions of the federal operating permit program regulations authorizing EPA to treat lands for which the status is "in question" as being in Indian country and sent the regulation back to EPA for further action consistent with the court's opinion.

Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. Oct. 30, 2001)

S. Lee Johnson

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