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9th Circ. Gives Growers Relief In Preserving Exemption

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Law360, New York (July 1, 2015, 12:38 PM ET) -- In what has been a trying year for agriculture in the San Joaquin Valley, the Ninth Circuit handed growers a small reprieve. A conflicting U.S. Environmental Protection Agency-approved state implementation plan and California rules on new source reviews ("NSR"), threatened a long-standing exemption for certain pre-2004 agricultural sources. The EPA realized the conflict and conformed its approval to California's statute, but a challenge to the correction questioned the agency's authority to do so. If successful, the challenge posed significant air compliance issues for long-exempt agricultural interests and potentially threw into question the stature of state law in Clean Air Act regulations more generally.

In Association of Irritated Residents v. EPA, No. 13-73398 (9th Cir. June 23, 2015), the Ninth Circuit upheld the EPA's decision to revise and correct its approval of the 2004 NSR rules to allow the San Joaquin Valley Unified Pollution Control District to exempt certain agricultural sources from obtaining emission offsets for criteria pollutants. California NSR law has always contained exemptions for agriculture. Originally, California's law included an exemption for all agricultural sources, both major and minor, from the NSR air pollution controls. See 75 Fed. Reg. 4745, 4747 (Jan. 29, 2010).

In 2004, S.B. 700 limited the exemption but essentially grandfathered in minor then-existing sources. Under S.B. 700, "[a]ny agricultural source that existed prior to Jan. 1, 2004, that becomes subject to a permit requirement pursuant to a district rule or regulation that was adopted prior to that date shall be permitted as an existing source and not as a new source." S.B. 700 likewise set permitting based on maximum emissions "as of Jan. 1, 2004," and foreclosed the requirement of "offsets for criteria pollutants for that source if emissions reductions from that source would not meet the criteria for real, permanent, quantifiable and enforceable emission reductions." See Calif. Health & Safety Code Section 42301.18.

The California state implementation plan that the EPA approved in 2004 contained no such exemptions. California and the EPA realized the mistake when a citizen group leveraged the mismatch between S.B. 700 and California's state implementation plan to win summary judgment against exempt dairy farmers in a citizen suit Clean Air Act case.

A subsequent conformed state implementation plan in 2010 fixed prospective compliance, but not

the 2004 to 2010 conflict that left S.B. 700 exempt entities subject to Clean Air Act citizen suits — that the EPA addressed by retrospectively amending its 2004 approval. In the correction, the EPA limited the NSR rules for the San Joaquin Valley Unified Air Pollution Control District (Rules 2020 and 2201), in effect from June 16, 2004, through June 10, 2010, "to the extent that the emission offset requirements apply to major agricultural sources and major modifications." Id. and 78 FR 46514, Aug. 1, 2013.

Citizen groups counterpunched by challenging the EPA's ability to modify its 2004 approval. The resulting decision is partly first impression and sets out a general framework and model for retrospective correction of regulatory mistakes under the Clean Air Act. The citizen groups challenged the EPA's determination of error and its authority to correct it.

The first challenge principally involved the citizen groups arguing with the EPA over its interpretation of S.B. 700. According to them, S.B. 700 requires minor agricultural sources "to offset when their emission reductions are *SIP creditable*, not offset creditable." (emphasis in original). The citizen groups further argued that the savings clause of S.B. 700 effectively swallowed the exemption.

The Ninth Circuit conceded ambiguity in S.B. 700 and that the groups' interpretations were possible but could not show the EPA's actions to be arbitrary. The Supreme Court focused on the process, observing that the "EPA spent several years considering the issue of the interpretation of S.B. 700, issued multiple notices and accepted and responded to several comments ..." Most influential though, and seemingly impressive to the Supreme Court were "the attorney general's and [California Air Resource Board's] letters interpreting the pertinent provision of S.B. 700 in regard to minor agricultural sources." Although the citizens' groups urged the Supreme Court not to defer to those agency interpretations, that argument would only carry weight when the EPA was "defer[ring] to a clearly wrong interpretation by the attorney general." Since that was not the case, "the EPA's reliance on the attorney general's and [California Air Resource Board] letters to interpret the ambiguous provisions of S.B. 700 was not arbitrary, capricious or unlawful."

The court next considered whether the EPA could retroactively correct a decision under Section 110(k)(6) of the Clean Air Act, which was "a question of first impression." Again, Chevron deference factored in strongly. When reviewing the EPA's interpretation of Section 110(k)(6) of the Clean Air Act, the Ninth Circuit evaluated whether the EPA employed a rational, nonarbitrary process to determine if it had made an error. The court applied the two-step analysis provided in Chevron USA Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 842-43 (1984), which looks first to whether Congress has "directly spoken to the precise question at issue," (Id. at 842), and then to the congressional intent expressed in the statute or a "permissible construction of the statute." Chevron, 467 U.S. at 843.

Section 110(k)(6) reads:

> Whenever the [EPA] determines that [its] action approving, disapproving or promulgating any plan ... was in error, the [EPA] may *in the same manner* as the approval, disapproval or promulgation *revise such action as appropriate* without requiring further submissions from the state. Such determination and the basis thereof shall be provided to the state and public. 42 U.S.C. Section 7410(k)(6) (emphasis added).

This broad provision was enacted to allow the EPA an opportunity to correct its own erroneous actions. Having determined that it erred, the EPA is required by Section 110(k)(6) to "revise such action": (1) "in the same manner as the approval, disapproval or promulgation" and (2) "as appropriate without requiring further submissions from the State." 42 U.S.C. Section 7410(k)(6).

The Ninth Circuit interpreted "in the same manner" using statutory interpretation guidelines set forth in Chevron. Chevron's step one requires the court to determine whether Congress, in Section 110(k)(6) clearly designated "in the same manner" to be a procedural or a substantive requirement. The Association of Irritated Residents contended it was substantive; the EPA contended it was procedural. The court determined that Congress had not directly spoken to the issue, and then proceeded to the second Chevron step, to determine if the EPA's interpretation was based on a permissible construction of Section 110(k)(6). This court determined that the EPA reasonably interpreted "in the same manner" as a procedural requirement.

Next the Ninth Circuit determined whether the EPA's correction was "appropriate" under the plain meaning of Section 110(k)(6). The Association of Irritated Residents argued that Section 110(k)(6) does not allow the EPA to "sua sponte promulgate a regulation that substantively amends or limits a [state implementation plan]." The EPA argued that the direction of Section 110(k)(6) allows the EPA to revise its actions when an error has been made "without requiring any further submission from the state." 42 U.S.C. Section 7410(k)(6). The Ninth Circuit found that the plain meaning of these words indicates unilateral action by the EPA and that the agency's understanding of "appropriate" was permissible.

Overall, the opinion shows a strong deference to state law. State attorney general and California Air Resource Board opinions proved the EPA's most persuasive evidence. Further, the Ninth Circuit went out of its way to find that state's rights played an important role in this case. Congress placed a duty on the states to meet the standards for air quality through state control programs, 42 U.S.C. Section 7407(a), and for that reason, the Ninth Circuit found the EPA was right to correct its own regulation to conform to California's rules. "The [Clean Air Act] grants primary authority to the states to develop emission limits. … The EPA's role under the [Clean Air Act's] scheme is secondary. ... Therefore, by trying to respect California's statutory limits on air pollution controls, the EPA is properly considering the purpose and structure of the [Clean Air Act] it is entrusted to enforce." That, combined with a generous reading of Section 110(k)(6), provided substantial latitude to conform prior EPA action to state law.

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