Sixth Circuit Court of Appeals vacates EPA's PM2.5 attainment redesignation for the Cincinnati-Hamilton metropolitan area

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On March 18, 2015, a federal circuit court of appeals vacated EPA's conclusion that the Cincinnati-Hamilton metropolitan area had attained the National Ambient Air Quality Standards (NAAQS) for fine particle pollution, or $PM_{2.5}$ (*Sierra Club v. EPA*, Case Nos. 12-3169, 12-3182, 12-3420). The potential result is that regulators will either have to develop new controls limiting $PM_{2.5}$ in the area or advance a different legal argument that such controls continue to be unnecessary.

In 2011, EPA determined that the Cincinnati-Hamilton metropolitan area had achieved the NAAQS for $PM_{2.5}$. However, the Sierra Club challenged EPA's determination because, among other reasons, Ohio and Indiana had declined to develop rules imposing "Reasonably Available Control Measures" (RACM) and "Reasonably Available Control Technology" (RACT) for $PM_{2.5}$ on sources within the area. The court agreed with this argument and held that Ohio and Indiana's failure to impose RACM/RACT invalidated EPA's conclusion that the metropolitan area was in attainment. (Kentucky was spared – the court's decision did not implicate the Cincinnati metropolitan area within Kentucky for procedural reasons.)

The court's decision could have several different consequences. First, Ohio and Indiana may have to go through the time-consuming process of developing additional controls for $PM_{2.5}$ on sources in the Cincinnati-Hamilton metropolitan area. For instance, $PM_{2.5}$ RACM/RACT in other jurisdictions has included fugitive dust controls. Second, the court's decision expressly left open the possibility that the agencies could still conclude that $PM_{2.5}$ RACM/RACT may be unnecessary, albeit on a different legal basis than what the agencies had previously argued. This approach carries some risk, but the agencies may nonetheless prepare another attainment redesignation without specific $PM_{2.5}$

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RACM/RACT on a slightly different legal ground. Third, EPA may seek an appeal of the Sixth Circuit's decision to the Supreme Court, although this is unlikely given the small number of cases that the Supreme Court accepts for review every year. Thus, this decision leaves federal and state regulators with some difficult strategic decisions ahead, with potential economic consequences for businesses in the Cincinnati-Hamilton metropolitan area.

For more information, please contact Thad Driscoll, Bill Hayes, Chris Kahn, Steve Wesloh or any other attorney in Frost Brown Todd's Environmental Practice Group.

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