Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 9
Issue 3 *2001-2002*

Article 7

2002

Case Summary

CASE SUMMARY

Sierra Club v. Whitman,
2002 WL506859 (D.C. Cir. April 5, 2002)

Over ten years ago, the Environmental Protection Agency ("EPA") designated St. Louis, Missouri, a "nonattainment" area of "moderate" classification for ozone. As an area's nonattainment classification increases, the EPA places more numerous and strict requirements upon the states to take measures to improve the air quality standards. As a result of the EPA's classification for St. Louis, Missouri and Illinois had to revise their state implementation plans to attain the primary standard for ozone. The primary standard deadline became November 16, 1996, and the EPA had to determine within six months of that date whether or not the area had reached that primary standard. If the standard is not reached, under the Clean Air Act ("CAA"), the EPA would be required to reclassify the area as a "serious" or higher level and to publish a notice of nonattainment in the Federal Register within the same six month period as the standard determination is made.

In November, 1998, the Sierra Club filed a complaint against the EPA under the CAA's citizen-suit provisions found in 42 U.S.C. § 7604(a)(2). The complaint alleged that the EPA had not performed its duty to timely publish a notice of nonattainment in the Federal Register and a reclassification of St. Louis' status for ozone. The Sierra Club argued that either the EPA had not made a determination in violation of the CAA's mandate that it do so, or that it had made a determination and had not published it in the Federal Register as required under the Act. The EPA then admitted that it had not made the determination. The District Court for the District of Columbia allowed the states of Missouri and Illinois to intervene as defendants, and then ordered the EPA to make a determination of St. Louis' status by March 12, 2001. The Sierra Club argued that the EPA had already made its determination and that they should be ordered to make their determination retroactive. The court rejected the EPA's argument that the determination had already been made and declined to order the EPA to make its determination retroactive.

On March 19, 2001, the EPA published notice that St. Louis had failed to attain the primary ozone standard by November 15, 1996 and that it would be classified as "serious" for ozone on May 18, 2001, the date the rule became effective. That same day, the EPA proposed another rule delaying the effective date of the March 19 determination until June 29, 2001. It thereafter posted a notice of proposed rulemaking to extend this attainment date until November 15, 2001, and to withdraw the March 19 reclassification and nonattainment determinations. The Sierra Club filed for a writ of prohibition against the rules in the United States Court of Appeals for the District of Columbia, which was denied. After the EPA finalized these rules, the Sierra Club appealed the two rulemakings to the Seventh Circuit Court of Appeals, and also filed a motion in the District Court for the District of Columbia to enforce the court's judgment, claiming that the rulemakings violated the court's order. The District Court denied the motion and appeal was taken to the United States Court of Appeals for the District of Columbia.

The Sierra Club's first argument was that the EPA had originally made the determination that St. Louis had failed to reach attainment status prior to the lawsuit and that this constituted final agency action. The Sierra Club offered a letter from the EPA administrator to the Governor of Missouri in March of 1998 as evidence that the EPA had made this decision. The letter indicated that the EPA was considering changing St. Louis' status. The court held that this was sufficient evidence that a decision had been made, and thus, no final agency action had resulted. The court reasoned that rulemaking is the EPA's established practice for making final determinations, and not through letters or other informal documents.

The Sierra Club's second argument is that the EPA had made a determination by rulemaking in 1998, pointing to a rule listing areas that had attained ozone standards and that the rule did not include St. Louis. The court found that the focus of this rule was not a determination of nonattainment; rather it was to give a foundation for an EPA plan to switch from one-hour to eight-hour attainment standards. Further, the court found that the status quo for air quality in St. Louis after 1991 was "nonattainment." Thus, the fact that it did not appear on a list of regions reaching attainment did not indicate that the EPA had made any statutory determination.

The Sierra Club next argued for *nunc pro tunc* relief, asserting that the EPA should be ordered to date its attainment determination May 17, 1997, although it actually made the determination on March 19, 2001, pursuant to the court's order. The court held that this relief is not proper in this situation because the Administrative Procedure Act

("APA") generally does not allow for retroactive rulemaking. The court then turned to the Sierra Club's motion to enforce the judgment of the District Court through an injunction preventing the EPA from taking any further action on its proposed rules postponing St Louis' attainment date and preventing the EPA from withdrawing the March 19, 2001, reclassification and nonattainment determination. The court held that the District Court's order did not restrict the EPA from engaging in such subsequent rulemakings. The Sierra Club argued that once the EPA complied, the EPA contravened what the order required. However, the court reasoned that this would be too broad a reading of the court's order and thus, by the time the Sierra Club moved to enforce the judgment, the EPA had complied with the court's order.

The court finally noted that, regarding its denial of the Sierra Club's petition for a writ of prohibition, the Sierra Club has an adequate forum to challenge the extension of St. Louis' attainment date and withdrawal of its nonattainment classification. The court reasoned that a writ of prohibition will only issue if the applicant has no other forum in which to seek relief. The court pointed out that the Sierra Club could seek review of the rulemaking in the Seventh and Eighth Circuits, and that in fact the Sierra Club had sought relief in those fora. Therefore, denial of the writ of prohibition was proper.

PATRICK R. DOUGLAS

ENVIRONMENTAL NEWS

EPA Responds to September 11th Attacks

At the request of the Federal Emergency Management Agency ("FEMA"), the EPA has been involved in the cleanup and monitoring efforts, working with the U.S. Coast Guard, the Centers for Disease Control, the Occupational Safety and Health Administration, and state and local authorities. The EPA's role following the attack has been to provide expertise on cleanup methods for hazardous materials, as well as monitoring areas around the World Trade Center and the Pentagon to detect contaminants in ambient air quality, drinking water sources, and runoff near the disaster sites. FEMA has provided the EPA with a Total Project Ceiling of slightly more than $83 million for the Agency's cleanup and monitoring efforts at the sites.

Initially, the EPA's involvement was funded using emergency funding of $23.7 million. If costs exceed this level, FEMA will authorize the EPA to use additional funding in $15 million increments. As part of the additional funding, the EPA was placed in charge of hazardous waste disposal, general site safety and providing sanitation facilities for rescuers and cleanup personnel. Immediately following the attack, the EPA coordinated with the U.S. Air Force Center for Environmental Excellence and the U.S. Coast Guard to quickly implement these additional responsibilities in order to provide maximum support and protection from hazardous materials that rescuers and workers may come in contact with.

While careful not to impede on the search, rescue and cleanup efforts, the EPA's primary concern was to ensure that rescue workers and the public were not being exposed to elevated levels of potentially hazardous contaminants in the dust and debris, especially where practical solutions were available to reduce exposure. The EPA provided dust masks to workers to minimize inhalation of dust, and recommended that the blast site debris continue to be kept wet, reducing the amount of airborne dust which could aggravate respiratory ailments. This also involved spraying water over buildings, streets and sidewalks in lower Manhattan. In addition, on-site facilities were provided which allowed workers to clean themselves, change their clothing and have dust-laden clothes cleaned separately from their household wash.

Results, a week following the attack, indicated that the air and drinking near the disaster sites was safe, according to EPA Administrator Christie Whitman. Initially, the EPA established 10 continuous (stationary) air monitoring stations near the World Trade Center site, which were used to detect asbestos, lead and volatile organic compounds. These samples are evaluated against a variety of benchmarks, standards and guidelines established to protect public health under various conditions. The majority of the results were either non-detectable or below established levels for concern. The highest level of asbestos were detected within one-half block of ground zero, with the EPA responding by providing rescuers and workers with appropriate protective equipment.

The EPA also performed dust samples in an attempt to locate areas with dangerous levels of asbestos and other substances. Most fell below the EPA's definition of "asbestos containing material," which is material that is composed of at least one percent asbestos. Where samples exceeded this level, the EPA has used High Efficiency Particle Arresting