

9th Circ. Gives OK To Emissions Swap For \$1B LA Plant

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Law360, New York (March 16, 2015, 7:23 PM ET) -- The Ninth Circuit on Monday tossed a lawsuit seeking to overturn the U.S. Environmental Protection Agency's approval of the Los Angeles air quality district's transfer of emissions credits to a new, \$1 billion power plant, finding the deal didn't violate any rules.

California Communities Against Toxics and Communities for a Better Environment had argued that the EPA failed to properly ensure that the emissions offsets were valid under the Clean Air Act. But the appeals panel disagreed, finding the agency reasonably determined that the South Coast Air Quality Management District was not obligated to track the credits transferred to the CPV Sentinel LLC project using one specific district rule.

The appeals panel said Rule 1315 of Regulation XIII, which contains the rules adopted into the California state improvement plan governing offsets in the area, is just one way in which the SCAQMD chooses to demonstrate compliance with the CAA's requirements that emission credits be "quantifiable and surplus."

"The district is free to use another method of showing compliance with those requirements if that other method is written into an amended State Implementation Plan (SIP), as was the case here," the panel said.

According to the panel, the EPA did not act in an arbitrary or capricious manner in determining that the credits transferred to Sentinel were quantifiable and surplus. The panel said contrary to environmental groups' assertion, EPA did not extrapolate emission savings from shut down sources based on the emission limits those sources were permitted to have, but instead relied on the amount they were actually emitting.

Nor was it arbitrary or capricious for the EPA to accept credits from sources for which only one year of data was available, the panel said.

“EPA’s conservative estimates provided an adequate margin of error to ensure statutory requirements were met,” it said.

And it said that in determining whether the transferred credits were surplus, the EPA reasonably applied only the discounting effects of those regulations enacted between the time of a source’s shutdown and the time of transfer, rather than discounting by all the regulations that came into effect from the time of the source’s initial permitting.

The panel said regulations that came into effect between the time of permitting and the time of shutdown were already factored into each source’s emission output at the time of shutdown, because a source is assumed to be in compliance with applicable regulations when it closes.

“Requirements that wouldn’t have affected a source had it not shut down do not need to be discounted,” the panel said.

Finally, the panel said it was reasonable for the EPA to assess the surplusage and quantifiability of only those credits actually used on the Sentinel project. There is no mechanism in the SIP for credits to be transferred from a Sentinel-specific tracking system to a project other than Sentinel.

“Hence, even if any excess credits were not technically ‘retired,’ they cannot be used to warrant new emissions until the SIP is amended to allow for that possibility. EPA need not validate those excess credits until such a transfer is contemplated,” the panel said.

Judges Sidney R. Thomas, Alex Kozinski, and Ronald M. Gould sat on the panel.

The plaintiffs are represented by Shana Lazerow, Maya Golden-Krasner, and A. Yana Garcia of Communities for a Better Environment; and Angela Johnson Meszaros and Timothy R. Grabiell of Law Offices of Angela Johnson Meszaros.

The EPA is represented by Amy J. Dona of the U.S. Department of Justice; and Ann Lyons and Scott Jordan of the EPA.

The SCAQMD is represented by its own Kurt R. Wiese, Barbara Baird, Megan E. Lorenz-Angarita, and Lauren B. Nevitt.

CPV Sentinel is represented by Michael J. Carroll, Marc Campopiano and Joshua T. Bledsoe of Latham & Watkins LLP.

The case is *Communities for A Better Environment et al. v. U.S. Environmental Protection Agency et al.*, case number 13-70167, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Brandon Lowrey. Editing by Kelly Duncan.