

ATTACHMENT A District Lawsuits on Regulation of Marine Vessels Status Update

Santa Barbara County Air Pollution Control District, South Coast Air Quality Management District, and Friends of the Earth each filed two lawsuits in federal court asking that the U.S. Environmental Protection Agency (EPA) be ordered to adopt a rule that regulated air pollution from oceangoing marine vessels. The first were the “Deadline Lawsuits” filed in the United States district court for the District of Columbia. The second sought review of EPA’s “Extension Rule” in the federal Court of Appeals for the District of Columbia.

The “Deadline Lawsuits” were filed in December 2007 and sought a determination from the court that EPA had failed to take any action fulfilling a mandatory duty under Section 213 of the Clean Air Act to regulate air pollution from oceangoing marine vessels and that EPA be ordered to adopt such a rule as quickly as possible. EPA had previously had a deadline of April 2007 to adopt such regulation.

The “Extension Rule” was adopted by EPA in late December 2007. EPA essentially adopted a regulation giving itself more time to adopt a control rule for air pollution from marine vessels. EPA then filed a motion to dismiss the Deadline Lawsuits on the theory that because of the Extension Rule, EPA had taken final action under Section 213 of the Clean Air Act and therefore these lawsuits had to be dismissed because the District Court’s jurisdiction was limited to determining if EPA had acted by the deadline. EPA argued that any challenge to the Extension Rule had to be filed directly with the federal Court of Appeals for the District of Columbia under Section 307 of the Act. The District and other parties opposed the motion to dismiss because EPA had failed to adopt a substantive control rule on the timeline set by Congress. The matter was heard in mid-2008 and taken under submission by Judge Collyer.

In order to avoid the running of a 60-day statute of limitations, in March of 2008 the District and co-parties filed petitions for review in the Court of Appeals seeking review of the Extension Rule. Among many issues, the District and co-parties sought review of EPA’s failure to take any action to regulate foreign flagged vessels, which represented up to 90 percent of the air pollution generated from oceangoing vessels operating in U.S. waters. District Court Judge Collyer eventually issued an order staying all proceedings pending review by the Court of Appeals.

In October of 2009, the Court of Appeals heard the case on the merits and on February 6, 2009 issued a ruling upholding EPA’s Extension Rule (*South Coast AQMD et al v. EPA* 554 F.3d 1076 (D.C. Cir., 2009)). The Court of Appeals found that the record supported EPA’s determination that it needed more time to develop a “cost effective implementation and compliance programs for the advanced technologies” called for in Section 213 of the Clean Air Act. The Court also found that the Extension Rule had reaffirmed EPA’s commitment to decide the issue of foreign-flagged vessels when it finally issued standards for oceangoing vessels. This statement by the Court may well have helped prod EPA to take final action on regulating oceangoing vessels that included the proposed ECA that was recently approved under Annex VI to the Marpol Treaty.