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Chapter 1

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What EPA's Emerging Series of Clean Air Act Regulations Tells the Coal Industry: You're Not Paranoid — We're Really After You!

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Synopsis

§ 1.01. Introduction.

Historically, EPA (the Environmental Protection Agency) has – in implementing the Clean Air Act (CAA or the Act)[1] – read the statute and set about using notice-and-comment rulemaking to implement it in the way Congress intended. And generally when EPA has done that in rulemaking, the agency's regulations have been upheld by the courts. But there have been times – during the past half dozen years – when EPA has exceeded the discretion Congress has given it under the Clean Air Act. In these instances, EPA seems to have determined its overall goal in advance

[1] 42 U.S.C. §§ 7401, *et seq.* (Hereinafter, statutory citations are to the Act).

of rulemaking and then proceeded to adopt rules that accomplished that goal, without worrying excessively – or at all – about whether the Clean Air Act authorized the agency's actions. And when EPA's rules have been challenged in such cases, the courts have put roadblocks in the paths that EPA has chosen: they have vacated or remanded the challenged rules.

For example, in 1993-1994, EPA made plain its intention to require the states in the Northeast Ozone Transport Region to adopt uniform programs requiring new cars sold in those states to meet lower emission standards. Once EPA determined its goal – the mandatory sale of low emitting vehicles (LEVs) – it set about twisting the Clean Air Act to interpret the Act in a manner consistent with accomplishing that goal, even though its interpretations of the statute required the agency to abrogate to itself authority not given to it by the Clean Air Act.[2]

Similarly, during that same time period, EPA decided to adopt reformulated gasoline rules that would confer benefits upon the ethanol industry – at great cost to the oil and refining industry, which had to meet the new rules. Again, once determining its goal, the agency set about interpreting the reformulated gasoline provisions in Section 212(k) of the Clean Air Act in a manner consistent with accomplishing that goal even though (once again) its interpretations conflicted with Congress' unambiguous intent in enacting the statute's reformulated gasoline provisions. [3]

EPA took a short break in issuing major new programs in late 1994/ early 1995, while it took time to assess what (if any) impact the newly elected Republican Congress might have on the agency initiatives. By late 1995/early 1996, however, EPA determined that Congress would not interfere with its efforts, and the agency came up with a new target: coal burning power plants. In a series of meetings with various groups of EPA-chosen "stakeholders" – representatives from states, environmental groups,

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[2] As discussed in greater detail below, one of the affected states – Virginia – promptly challenged EPA's low emitting vehicle rule in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) and won. Virginia v. EPA, 108 F.3d 1397 (D.C. Cir. 1997), modified on other grounds, 116 F.3d 499 (D.C. Cir. 1997).

[3] As discussed in greater detail below, the American Petroleum Institute challenged EPA's ethanol-favoring reformulated gasoline rules in the D.C. Circuit and won. American Petroleum Institute v. EPA, 52 F.3d 1113 (D.C. Cir. 1995).