

## Three defeats in three weeks – Will EPA get the message?

By Randall M. Lutz

### Contacts:

Randall M. Lutz  
Chair

Deborah Shuff  
Vice Chair

### SUMMARY

In the last three weeks, we have seen the United States Environmental Protection Agency lose three major decisions, all under the Clean Air Act. In all three, it was determined that EPA was overstepping its bounds – a persistent complaint of the business community.

On August 7, 2012, the Sixth Circuit U.S. Court of Appeals vacated EPA's determination that a gas operations plant and some wells within a 43-mile area were "adjacent" for purposes of aggregating emissions and, therefore, becoming regulated as a single stationary source. The court had to tell EPA that "adjacent" referred to proximity and not relationships. On August 13, the Fifth Circuit U.S. Court of Appeals vacated EPA's disapproval of Texas' flexible permit program under the Clean Air Act, criticizing EPA's analysis of the program and the law. And, on August 23, the D.C. Circuit U.S. Court of Appeals struck down EPA's cross-state emissions rule that required 28 states to reduce power plant emissions that cross state lines into other states. Again, the court found EPA overstepping its bounds.

All three decisions point to the same underlying flaw in EPA's rulemaking: the agency has overstepped its bounds and has sought impermissibly to expand the mandates of the Clean Air Act. Congress has spoken and has mandated requirements that only Congress may mandate. The law is expansive enough as it is. EPA's effort to arbitrarily and capriciously go beyond the requirements of the law has been reined back by three separate Courts of Appeal. A clear message is being sent to EPA by the courts - regulate as you must do, but do not over-regulate beyond the terms of the statute.

Is this a trend? Will these decisions send a message to EPA resulting in any change in its execution of the law? Don't bet on it. There are numerous regulations that have been overturned by the courts that are still "on the books." EPA is overreaching and needs to do some soul searching and comply with the requirements of law to the same extent as they try to make the regulated community comply.

If you have questions about this article or other issues in environmental law please do not hesitate to call on attorneys in Saul Ewing's Environmental and Natural Resources Practice

This Alert was written by Randall M. Lutz, Chair of the firm's Environment and Natural Resources Practice. Randall can be reached at 410.332.8614 or [rlutz@saul.com](mailto:rlutz@saul.com). This publication has been prepared by the Environment and Natural Resources Practice for information purposes only.

The provision and receipt of the information in this publication (a) should not be considered legal advice, (b) does not create a lawyer-client relationship, and (c) should not be acted on without seeking professional counsel who have been informed of the specific facts. Under the rules of certain jurisdictions, this communication may constitute "Attorney Advertising."

© 2012 Saul Ewing LLP, a Delaware Limited Liability Partnership.  
ALL RIGHTS RESERVED.