

Heightened Risk to the Regulated Community: US EPA Overfiling

Publications

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By: Steven Siros

In what could portend significant risk to the regulated community, a recent “overfiling” by US EPA in connection with a Clean Air Act (CAA) settlement between the Louisiana Department of Environmental Quality (LDEQ) and a steel plant should at a minimum cause the regulated community to be cautious when entering into settlement agreements with state regulators. On January 24, 2022, US EPA Region 6 filed a Notice of Violation (NOV) alleging that a steel plant in Louisiana was emitting excess hydrogen sulfide, sulfuric acid mist and sulfur dioxide in violation of the plant’s CAA Title V permit.

Back in October 2021, the Tulane Environmental Clinic had filed a formal request that US EPA exercise its overfiling and supervisory authority pursuant to 42 U.S.C. § 7413(a)(a), (b), and (d) on the basis that the LDEQ settlement agreement imposed insufficient penalties and mitigation measures to ensure future compliance. It is interesting to note that the US EPA NOV does not specifically reference the LDEQ settlement nor directly challenge its provisions. Moreover, the three pollutants identified in the NOV were not specifically called out in the LDEQ settlement, and, in fact, hydrogen sulfide and sulfuric acid mist are not currently part of the plant’s Title V permit.

However, it would be naïve to believe that US EPA’s NOV is unrelated to the request filed by the Tulane Environmental Law Clinic. In fact, US EPA held a number of meetings with the Tulane Environmental Law Clinic and other environmental groups following the overfiling request. US EPA’s decision to overfile may be an indication of more aggressive enforcement oversight over state regulatory agencies, especially in situations involving vulnerable communities. As such, when evaluating whether to enter into settlements with state regulatory entities to address compliance issues with federal environmental statutes, companies should carefully consider the possibility of US EPA overfiling, especially in situations where objections to the settlement have been raised by environmental groups, or in circumstances involving vulnerable communities.

We will continue to provide updates on US EPA enforcement trends on the *Corporate Environmental Lawyer*.

Related Attorneys



Steven Siros

Partner

ssiros@jenner.com

+1 312 923 2717

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