Morgan Lewis

environmental lawflash alert

www.morganlewis.com

Fee-Shifting Ruling Encourages Intervention in Clean Air Challenges

D.C. Circuit awards attorneys' fees to intervenors whose issues were not addressed in and whose participation had no effect on the litigation.

January 12, 2012

On December 20, 2011, the U.S. Court of Appeals for the D.C. Circuit expanded fee-shifting incentives for parties that intervene in challenges to Clean Air Act rules issued by the Environmental Protection Agency (EPA). The novel ruling may encourage state and local governments, environmental groups, and many others to intervene in future EPA cases, with the expectation of a "free ride."

Under Section 307(f) of the Clean Air Act, courts may award reasonable attorneys' fees "whenever . . . such award is appropriate." One need not be a "prevailing party" to trigger fee shifting, but prior cases awarded fees only to parties that contributed to the "proper implementation and administration of the Act" by playing "a significant role in the litigation."

In *State of New Jersey v. EPA*, Native American tribes (Tribes) sought more than $300,000 in fees for intervening in a challenge to EPA rules regulating mercury emissions from power plants. Based on the arguments advanced by petitioners—states and environmental groups—the D.C. Circuit vacated EPA's rules in 2008. The separate arguments advanced by the Tribes as intervenors were never considered by the court and had no effect on the litigation.

EPA opposed the Tribes' request for attorney's fees, emphasizing that their intervention did not affect the outcome of the case. But the D.C. Circuit, in a 2-1 decision, ruled that EPA's approach "would discourage interventions that play a useful role."

Although the Tribe's participation admittedly played no role at all in the litigation, the court embraced a Ninth Circuit fee-shifting decision: "It is usually impossible to determine in advance . . . which issues will be reached or which parties will play pivotal roles in the . . . litigation. To retrospectively deny attorneys' fees because an issue is not considered or because a party's participation proves unnecessary would have the effect of discouraging the intervention of what in future cases may be essential parties." *Seattle School District No. 1 v. Washington*, 633 F.2d 1338, 1349 (9th Cir. 1980), *aff'd on other grounds*, 458 U.S. 457 (1982). The court's expansive view of fee shifting affects most Clean Air Act rulemaking cases, which by statute are nearly always heard in the D.C. Circuit.

In a strong dissent, Judge Brown of the D.C. Circuit called the majority's ruling a "radical departure" that rewarded the Tribes "for their decision to pile onto the petitioners' different—and much more substantial—claim." Denying fees to the Tribes, she reasoned, would remind potential intervenors in

future cases "to conduct a basic cost-benefit analysis to determine whether their claim is sufficiently likely to make an actual impact to justify the risk they will bear their own costs."

Judge Brown may not be alone in her dissent from this expanded fee shifting. Key Republicans in Congress have recently highlighted EPA's substantial payments of attorneys' fees to environmental groups that use the courts to advance their own agendas. The Government Accountability Office found that EPA pays out millions of dollars each year in attorneys' fees, most of it to environmental groups.

Implications

Companies affected by EPA's Clean Air Act rules should expect an increase in the number of intervenors joining in court challenges to those rules. State and local governments, environmental groups, and others will tend to view intervention as a "free ride" if the petitioners' underlying challenge has a reasonable chance of succeeding on any ground at all. Companies will need to evaluate the appropriate scope of intervenor participation, as well as the pros and cons of addressing issues raised by intervenors, recognizing that fee shifting may apply to some or all of the legal work.

Morgan Lewis lawyers are at the center of the Clean Air Act rulemaking arena. We help companies in virtually every industrial sector navigate these evolving requirements, including challenging them in court where appropriate. If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following attorneys:

Washington, D.C.

Michael W. Steinberg	202.739.5141	msteinberg@morganlewis.com
William H. Lewis, Jr.	202.739.5145	wlewis@morganlewis.com
Ronald J. Tenpas	202.739.5435	rtenpas@morganlewis.com

Now Available: Environmental eDeskbook

This eDeskbook is designed to be an up-to-date reference tool for people encountering environmental issues and the regulatory framework established to protect the environment. The eDeskbook provides quick access to current contact information, articles, environmental regulations, noteworthy calendar items, and other environmental resource materials. View the Environmental eDeskbook at environmentaldeskbook.morganlewis.com.

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—nearly 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.