

OHIO SUPREME COURT RULES THAT OHIO EPA MUST CONSIDER TECHNICAL FEASIBILITY AND ECONOMIC REASONABLENESS WHEN MODIFYING A PERMIT

In a major victory for Ohio businesses, the Ohio Supreme Court unanimously held that the Ohio EPA, in modifying a permit to operate (PTO) to require the abatement of, or the prohibition of, air emissions, must take into account the technical feasibility and economic reasonableness of the modification (*Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274, 2005-Ohio-4982). This case was argued by Marty Lewis of Tucker Ellis & West LLP with the assistance of Richelle Kidder on February 15, 2005. The Ohio Supreme Court issued its decision on October 5, 2005.

In its ruling, the Ohio Supreme Court affirmed a decision of the Franklin County Court of Appeals which had overruled a decision of the Environmental Review Appeals Commission (ERAC). In its decision, ERAC concurred with the Director of the Ohio EPA that in modifying such a PTO, the Director of the Ohio EPA need not analyze the technical feasibility and economic reasonableness of the modification. In this case, Sandusky Dock held a PTO for the fugitive dust at its coal dock facility in Sandusky, Ohio. Although Sandusky Dock held a valid PTO, the Ohio EPA, after receiving a verified complaint from some boat owners who docked their boats adjacent to Sandusky Dock, modified the PTO to include an emission control requirement which limited visible emissions to 13 minutes in any hour. Sandusky Dock argued that such an emission limitation during particular weather conditions was not technically feasible or economically reasonable to achieve.

However, upon motion of the Director of the Ohio EPA, ERAC precluded the submittal at the hearing of evidence pertaining to technical

feasibility and economic reasonableness. On appeal, the Court of Appeals of Franklin County reversed ERAC in a 2 to 1 decision and agreed with Sandusky Dock. This decision was then appealed by the Director of the Ohio EPA to the Ohio Supreme Court.

The Ohio Supreme Court's decision hinged on the analysis of two provisions of Ohio's Air Pollution Statute, R.C. 3704.03(G) and R.C. 3704.03(R). R.C.3704.03(G) authorizes the Director to issue, deny, revoke, or modify a PTO. R.C. 3704.03(R) provides the Director with the authority to issue orders requiring abatement of or prohibiting emissions. In issuing such orders, the Director shall give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of compliance. The Ohio EPA argued in front of the Court, consistent with its historical practice, that once an entity has a PTO, the Ohio EPA can modify the permit without considering the language in R.C. 3704.03(R).

The Ohio Supreme Court agreed with Sandusky Dock that such a reading of the statute violates the legislative intent and also defies common sense, in that it would treat those entities with a permit more harshly than those without a permit. The Ohio Supreme Court held that R.C. 3704.03(G) and R.C. 3704.03(R) must be read together, and that the Ohio EPA must consider technical feasibility and economic reasonableness when modifying a PTO to require the abatement of, or prohibition of, emissions. The Court noted that the intent of the Ohio legislature was to balance protection of the environment with the encouragement of business within the state of Ohio.

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Ohio Supreme Court Decision, continued

This decision is significant because the Ohio EPA can no longer modify a PTO to add new emission limitations or abatement requirements without first analyzing the technical feasibility and economic reasonableness of the modification. This decision changes a policy which EPA has been following throughout its history in modifying PTOs without an economic and technical analysis. Therefore, this decision is a victory for Ohio business and provides additional protections for those companies throughout Ohio which have permits from the Ohio EPA.

If you have additional questions regarding this decision please contact:

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