

Report Issued on U.S. Air Quality Management

In January of this year, the Committee on Air Quality Management in the United States issued a report making findings and recommendations on the overall effectiveness of the Clean Air Act and its implementation by federal, state and local agencies. The Committee was formed by the National Research Council of the National Academies of Science in response to a request made by members of Congress. EPA has announced that a new subcommittee of its Clean Air Act Advisory Committee will be established to review the report and make recommendations on how the Agency should use the extensive analysis and recommendations in the report.

Findings

After reviewing the statutory framework and federal, state and local implementation of the Act's programs, the report first sets out a number of findings made by the Committee. Among the highlights of those findings are the following:

Standard Setting

Standard setting, planning and control strategies for criteria pollutants and hazardous air pollutants have largely focused on single pollutants "instead of potentially more protective and more cost-effective multi-pollutant strategies. Integrated assessments that consider multiple pollutants (ozone, particulate matter, and hazardous air pollutants) and

multiple effects . . . in a single approach are needed."

Current risk assessment and standard-setting programs "do not account sufficiently for all the hazardous air pollutants that may pose a significant risk to human health and ecosystems or for the complete range of human exposures both indoors and outdoors."

EPA's current setting of secondary standards for most criteria pollutants "does not appear to be sufficiently protective of sensitive crops and ecosystems."

Designing and Implementing Controls

Although pollutant concentrations have decreased, control programs have not resulted in NAAQS attainment for ozone and particulate matter in many areas. The SIP process "has become overly bureaucratic, places too much emphasis on uncertain emission-based modeling simulations of future air pollution episodes, and has become a barrier to technological and programmatic innovation."

Although progress has been made in recognizing and addressing multi-state transport of air pollution, transport issues

need to be identified and addressed more proactively, and the scope broadened to include international transport.

Although mobile source emissions have been greatly reduced, gaps remain, especially from non-road vehicles, heavy-duty diesel trucks, and malfunctioning automobiles.

Emissions reductions from stationary sources have also been substantial. But the report states that “most of the reductions have been accomplished through regulations on new facilities, while many older, higher-emitting facilities continue to be a substantial source of emissions.” This finding may be the most extraordinary in the report, since emission reductions only occur through control on existing facilities, not new facilities.

Emissions cap and trade programs are an effective mechanism for achieving stationary source emissions reductions at reduced cost, but “the process of revising caps and targets in response to new technical and scientific knowledge has been cumbersome.”

Assessing Status and Measuring Progress

With the exception of continuous emissions monitoring at some large stationary sources, the nation “lacks a comprehensive and quantitative program to confirm the emission reductions claimed to have occurred.”

The air quality network is a national resource but “is nevertheless inadequate to meet important objectives, especially that of tracking reasonable patterns of pollutant

concentrations, transport, and trends.”

A program has not been developed to track health and ecosystem exposures and effects and to document improvements in health and ecosystem outcomes achieved from improvements in air quality.

Major Challenges

The report indicates that the seven major air quality challenges facing the nation are: (1) reducing emissions to meet new standards for ozone and particulate matter and regulations for regional haze; (2) conducting greater research on exposure to toxic pollutants, the sources of such pollutants, atmospheric distribution, and their effects in order to “address health risks and ensure adequate protection to the public”; (3) achieving a better understanding of health effects at low pollutant concentrations; (4) establishment of environmental justice programs aimed at mitigating pollution effects “that might be borne disproportionately by minority and low-income communities in densely populated urban areas”; (5) establishing programs to protect ecosystems; (6) development of more effective programs to address multi-state, cross-border, and intercontinental transport; and (7) establishment of programs to consider climate changes and approaches that might prove necessary to address climate warming.

Recommendations

The report makes five broad recommendations that include multiple elements. The recommendations are:

Recommendation 1: “Strengthen scientific and technical capacity to assess risk and track progress,” including improvement of

emissions tracking (new emissions monitoring techniques and updated and field-evaluated inventories), enhancing air pollution monitoring, improving modeling, enhancing exposure assessment, developing and implementing a system to assess and monitor human health and welfare effects, continuing to track implementation costs, investing in research to facilitate multi-pollutant approaches that target the most significant risk, and investing in human and technical resources.

Recommendation 2: “Expand national and multi-state performance-oriented control strategies to support local, state and tribal efforts,” including expanding federal emission-control measures, emphasizing technology-neutral standards for emissions controls, using market-based approaches whenever practical and effective, reducing emissions from existing facilities and vehicles, and addressing multi-state transport problems.

Recommendation 3: “Transform the SIP process,” including transforming the SIP into an air quality management plan and reforming the planning and implementation process (by encouraging regulatory agencies to concentrate their resources on tracking and assessing the performance of strategies that have been implemented rather than on preparing detailed documents to justify the effectiveness of strategies in advance of their implementation, carrying out a formal and periodic review process and reanalysis of the Air Quality Management Plan, encouraging the development and testing of innovative strategies and technologies by not requiring

predetermined and agreed-upon benefits, retaining the federal requirement for conformity between air quality planning and transportation planning, and continuing to require that states implement agreed-upon strategies, ensure private-sector compliance and are held accountable for failure to meet the commitments through federally mandated sanctions).

Recommendation 4: “Develop an integrated program for criteria pollutants and hazardous air pollutants” by developing a system to set priorities for hazardous air pollutants, instituting a dynamic review of pollutant classification that would reclassify and revise priorities for criteria pollutants and hazardous air pollutants accordingly, listing potentially dangerous but unregulated pollutants for regulatory attention, addressing multiple pollutants in the NAAQS review and standard-setting process by beginning to review and develop NAAQS for related pollutants simultaneously, and enhancing assessment of residual risk by performing an increased number of assessments in the years to come and by attempting to include in the assessments other major sources of the same chemicals.

Recommendation 5: “Enhance protection of ecosystems and other aspects of public welfare” by completing a comprehensive review of standards to protect public welfare, developing and implementing networks for comprehensive ecosystem monitoring, establishing acceptable exposure levels for natural and managed ecosystems, promulgating secondary standards where needed, and tracking

progress toward attainment of secondary standards.

The Committee urges EPA to convene an implementation task force from the key interested parties to prepare a plan of action and an analysis of legislative actions, if any are needed. It also indicates that a significant increase in resources and commitment by all parties to implementation will be needed. "

Environmental Groups Ask EPA To Stay Monitoring "Sufficiency Review" Action

On February 18, 2004, a number of environmental groups filed an administrative stay request with EPA seeking to have the Agency stay the effectiveness of its final action on the Title V monitoring "sufficiency review" proposal. In its January action, EPA declined to adopt proposed changes to regulatory text and announced a different interpretation of the Title V "umbrella monitoring" rules (section 70.6 and 71.6). 69 Fed. Reg. 3,202 (January 22, 2004). The effect of EPA's interpretation was to reinstate the preamble interpretation of the monitoring provisions of the Title V rule, which made clear that EPA and permitting authorities are only authorized to require new periodic monitoring where applicable requirements do not contain such monitoring.^{1/}

In their stay request, the environmental groups (which include the Environmental Integrity Project, NRDC and Sierra Club) argue that EPA's action violates the Clean Air Act's requirement for enhanced monitoring of major sources, is contrary

^{1/} For a more complete discussion of EPA's action, see January 2004 *Washington Report* at WR-507.

to the requirement that all Title V operating permits include monitoring sufficient "to assure compliance" with permit terms and conditions, and frustrates the purposes of the 1990 Clean Air Act Amendments. The environmental groups also argue that the rulemaking record does not support EPA's action.

EPA has not yet acted on the stay request, but it is expected that EPA will act on it shortly. It appears that the environmental groups have not filed the expected petition for review of EPA's final action. The deadline for filing the petition is Monday, March 22. "

Court Denies Government Reconsideration Motion in *Duke Energy* Case

Two of the most significant electric utility NSR enforcement rulings that have been issued were in the *Ohio Edison* and *Duke Energy* cases.^{2/} In the *Ohio Edison* case, the court issued a very unfavorable ruling on the scope of the routine maintenance, repair and replacement (RMRR) exclusion and held that a number of utility projects should have been permitted under the NSR requirements. In stark contrast, the court in the *Duke Energy* case issued a preliminary ruling on the scope of the RMRR exclusion and the appropriate methodology to be used in determining emissions increases that accepted all aspects of the interpretations of the NSR applicability requirements put forth by Duke Energy.

In December 2003, the Department of Justice (DOJ) moved for reconsideration of the court's

^{2/} For a more complete discussion of the *Ohio Edison* and *Duke Energy* cases, see WR-484 and WR-492, respectively.

order in the *Duke Energy* case. The principal argument was that memoranda prepared by Hunton & Williams for the Utility Air Regulatory Group showed that electric utilities had long recognized that EPA interpreted the RMRR exclusion very narrowly. On February 23, 2004, the court denied DOJ's reconsideration motion and its request that the court certify the prior court order for interlocutory appeal.

The court's order denying the reconsideration motion contains a number of statements that show that the court continues to be very much inclined to find that the major replacement projects undertaken by Duke Energy were not subject to NSR permitting. The court points out that, in drafting its opinion and order, it "undertook a painstaking review of the statutory and regulatory framework." The court's order then states:

Relying on the statutes and legislative intent, the court held that "[i]n order to give [the] PSD RMRR exemption its proper scope, this provision must be defined according to what is routine maintenance, repair, and replacement within the relevant source category. This construction is compelled by the statutory mandate of the PSD program and congressional intent." (Citation omitted.) The court also found "based on the PSD rules, the contemporaneous interpretations of the PSD rules and the statutory language incorporating the NSPS concept of modification into PSD, post-project emissions must be calculated on an annual basis, measuring emissions in tons per year, and in calculating post-

project emissions levels, the hours and conditions of operation must be held constant." (Citation omitted.) *Thus, even assuming that the EPA may have spoken out of both sides of its mouth on these issues, the primary basis for the court's holding was the plain statutory language and congressional intent.* The question of fair notice, the basis for the Plaintiff's relevance argument, is no longer an issue for trial. (Emphasis added.)

Later, in denying DOJ's request that the court certify its order for an immediate appeal, the court makes a number of additional statements indicating that it is almost a certainty that the court will rule that all, or almost all, the projects did not trigger NSR permitting. The court points out that an interlocutory appeal would delay rather than advance the ultimate termination of the case and notes that "it does not appear that a trial would be unusually lengthy." The court then states:

Plaintiff [DOJ] has conceded that the court's ruling that PSD is triggered only by projects that increase the unit's maximum hourly emissions rate will likely be determinative "of most if not all of the PSD claims in this case." Plaintiff has also admitted that it does not contend that projects of the type performed by Duke are unprecedented or even uncommon in the utility industry. While these standards are ones on which reasonable minds might disagree, this alone does not warrant interlocutory appeal.

The trial on the applicability of NSR to the projects will be held in July of this year.”

D.C. Circuit Addresses Key MACT Issues In Rejecting Challenge To Copper Smelter Standard

On January 13, 2004, the D.C. Circuit upheld EPA’s MACT standard for primary copper smelters. *Sierra Club v. EPA*, 353 F.3d 976 (D.C. Cir. 2004). The court’s decision rules on a number of key issues that arise in connection with challenges to EPA’s adoption of MACT standards. Each issue and the court’s holding on it are briefly discussed below. The court points out that this is the “latest in a series of challenges” to MACT standard rulemakings.

Particulate Matter (PM) as a Surrogate

In the *National Lime* case, the court confirmed that “EPA may use a surrogate to regulate pollutants if it is ‘reasonable’ to do so.” 233 F.3d 625, 637 (D.C. Cir. 2000). Sierra Club argued here, however, (1) that EPA set the standard on the basis of what PM control can achieve, not on what the best performing sources actually achieve; and (2) that PM as a surrogate is not “reasonable.”

Sierra Club’s argument that the standards were not based upon what the best performing sources actually achieve was premised on the position that EPA failed to take into account the control that could be achieved through “altering ore inputs.” The court reviewed the record in the rulemaking and concluded that EPA had not based the standard on what emissions levels PM control

could achieve but, instead, had properly based the standards on what the best performing sources were achieving.

The court next reviewed whether it was reasonable for PM to be established as a surrogate. It reviewed it under the three-part analysis established in the *National Lime* case. Under that analysis, PM is a reasonable surrogate for hazardous air pollutants (HAPs) if (1) “HAP metals are invariably present in... PM;” (2) “PM control technology indiscriminately captures HAP metals along with other particulates;” and (3) “PM control is the only means by which facilities ‘achieve’ reductions in HAP metal emissions.” 233 F.3d at 639. If these criteria are satisfied and the PM emissions standards reflect what the best sources achieve, “EPA is under no obligation to achieve a particular numerical reduction in HAP metal emissions.” *Id.* The court then reviews the record and determines that each of these tests were met in the MACT standard setting process.

EPA Consideration of Alternatives to the PM Standard

Sierra Club argued that EPA’s using PM as a surrogate was arbitrary and capricious in light of standards promulgated for other industries under which PM was not similarly used as a surrogate. The court reviews EPA’s analysis in which it explains that a surrogate was needed in light of the impracticality of setting individual standards for each metal due to the variability of HAPs in copper ore stocks and then reviews EPA’s reasoning for using PM as the surrogate. Based on its review, the court concludes that EPA adequately considered alternatives to the PM standard.

Opacity-Based Emissions Standard

EPA established an opacity standard as a method for controlling fugitive HAP emissions. Sierra Club challenged the use of opacity as a surrogate for HAPs, and argued that it could not be defended as a work practice or operational standard under the relevant statutory prerequisites. The court accepted EPA's reasoning that opacity is an indicator of the level of particulate matter emitted and, thus, minimizing visible emissions will increase the amount of PM captured and vented to a control device. The court also concludes that EPA established the opacity-based standard according to the statutory criteria for MACT, not as a work practice or operational standard.

EPA's Rejection of Beyond-the-Floor Standards

Sierra Club argues that EPA should have established standards that are more stringent than the "MACT floor" for primary copper smelters. Sierra Club's principal argument is that EPA could have set more stringent standards by requiring that smelters use cleaner copper ore. EPA responded that it properly rejected ore-switching because (1) it is not permitted to consider ore-switching as a control strategy, and (2) substitution of cleaner ore stocks is not feasible. Although the Clean Air Act includes "substitution of materials" as a means for reducing emissions, the court points out that the legislative history indicates that EPA is not to consider substitution of raw materials used as feedstocks or material inputs in mining and extraction industries. Without resolving the statutory question, the court accepts EPA's explanation that the substitution of cleaner ore stocks was not a "feasible basis on which to set emissions standards."

Sierra Club also argued that EPA improperly rejected establishment of standards at the level of the 1986 NESHAP for copper smelters. The court

pointed out that the 1986 NESHAP level was set under old section 112, which was premised on a "risk-based methodology." The court explained the distinction between new section 112 MACT standards and the predecessor NESHAP standards and concluded that EPA acted reasonably by not adopting the 1986 NESHAP standard as a beyond-the-floor standard.

The court also rejects Sierra Club's claim that EPA was arbitrary and capricious by not responding to a commenter's contention that the standard should be set at a specific level because one state air permit limits emissions to that level. The only support for the achievability of that standard was the commenter's statement that it was "evidentially achievable" because it was included in a state permit. The court held that EPA was justified in not responding to that assertion and quoted a portion of the medical waste incinerator decision in which the court found that the absence of any type of quantification of benefits or costs means that EPA has no basis for finding that emissions reductions, "taking into account the costs," are "'achievable' as the statute uses the word." 353 F.3d at 989, quoting *Sierra Club v. EPA*, 167 F.3d 658, 666 (D.C. Cir. 1999).

Non-Air Quality Environmental Effects

Sierra Club also argues that EPA refused to consider "non-air quality health and environmental impacts," as required under section 112(d)(2). Sierra Club interprets this provision to require consideration of "impacts of deposition, persistence, toxicity and bio-accumulation of metal HAP emissions on people, welfare and the environment." In other words, Sierra Club argues that "non-air quality . . . impacts" are just like air quality impacts, except that "the impact is not delivered directly through the air but instead, for

example, by ‘deposition.’” EPA views the “non-air quality . . . impacts” provision differently. EPA’s position is that the impacts referenced are those health and environmental impacts that “may result directly or indirectly from measures that will achieve the emission reductions.” The court reviews the statutory language and concludes that EPA’s interpretation is correct. It heavily relies on the fact that the statute establishes a two-phase approach to adopting emissions standards, with the first phase being a technology-based approach and the second a risk-based approach. The court points out that “Sierra Club’s interpretation would collapse the technology-based/risk-based distinction at the heart of the Act, undermining the central purpose of the 1990 amendments” by incorporating a risk-based requirement in the establishment of the technology-based MACT standards.

Monitoring

Sierra Club’s first monitoring argument is that parameter monitoring is, in this situation, inadequate to “provide a reasonable assurance of compliance” because the monitoring control device is not the only factor affecting emissions. It also asserts that temperature, content of gas streams and other factors also affect emissions. The court did not address this issue because it found that the sections of the administrative record cited by the Sierra Club refer only to pre-proposal letters not to public comments. Thus, the argument was waived because it was not raised below.

Sierra Club also argues that EPA’s failure to require continuous monitoring violates section 114(a)(3), providing for “enhanced monitoring” for major stationary sources. The court reviews the statutory language in the decision in the compliance assurance monitoring case, *NRDC v. EPA*, 194 F.3d 130 (D.C. Cir. 1999), and

points out that enhanced monitoring does not require continuous or direct emissions monitoring. It accepts EPA’s judgment that the parametric monitoring required will satisfy the statutory standard of “sufficiently reliable and timely information for determining compliance.” The court states that the “use of parameter monitoring verifies compliance with the required standard by showing that the control device continues to operate at the level achieved during emissions testing.” 353 F.3d at 991.

Alleged Violation of Endangered Species Act

Sierra Club argues that EPA violated the Endangered Species Act by failing to consult with the Fish and Wildlife Service and the National Marine Fisheries Service before taking action that could affect endangered species. The court summarily dismissed this claim, pointing out that “adverse environmental effects” are to be considered during the second, risk-based phase, not in setting MACT standards.”

Ninth Circuit Issues Broad Standing Ruling

On February 5, 2004, a three-judge panel of the Ninth Circuit issued a decision in *Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2004), in which the court reviews a district court decision in a citizen suit case involving a landfill alleging violations of the Clean Air Act and the Resource Conservation and Recovery Act. The ruling on standing with respect to the Clean Air Act claim and a concurring opinion of one judge on that issue are particularly noteworthy.

The plaintiffs alleged that Jefferson County violated the Clean Air Act by not following federal

procedures to account for removal or recapture of CFCs and other ozone-depleting substances before disposal or recycling. The district court held that the plaintiffs lacked standing, finding that there was no evidence of a leak of ozone-depleting substances and that the violation of the Act caused no injury to the Covingtons. The appellate court first finds that the district court's conclusion that there were no leaks of ozone-depleting substances "cannot stand in this summary judgment context" because the plaintiffs' affidavits stated that they had observed liquids and gas escaping.

The Ninth Circuit panel finds that the plaintiffs meet all of the prerequisites for standing. The finding with regard to whether there was injury in fact would, if accepted by other courts, be of particular import. The court stated that the "evidence of leakage" presented by the plaintiffs "is sufficient to show injury in fact because the failure to comply with [the Act] has increased the risk of harm" to the plaintiffs' property. Their observation of leaking liquids has caused them to "fear that this liquid will contaminate their property." The court then states that, as a result of this fear, "[plaintiffs'] enjoyment of their property is diminished by the attested leaks." The court concludes its analysis of injury in fact stating that a "credible threat of risk to their home yields the loss of enjoyment of property."

The concurring opinion of Circuit Judge Gould would, if accepted by courts, have much more far reaching consequences. Judge Gould indicates that there is an alternative theory based on stratospheric ozone degradation upon which the plaintiffs may have standing to advance their claims. The judge states that he "feel[s] it appropriate to set forth this theory because of potential application in any other cases where widespread or even global environmental impact is threatened by federal statutory wrong." 358 F.3d at 648. The judge states that he will "reserve

judgment" on the question posed in his concurrence because the argument was not briefed by the parties and its resolution is not necessary to decide the case. In other words, he provides an advisory opinion in his concurrence. He says that he sets forth his "preliminary views" because he believes "that the issues raised inevitably may have to be confronted in the future if and when plaintiffs relying on federal statutes raise claims of injury based on globally-shared harm with no unique personal injury."

Judge Gould first reviews the science with regard to the release of CFCs degrading the stratospheric ozone layer. After pointing out that stratospheric ozone gives humans necessary protection from "otherwise life-threatening ultraviolet-B (UV-B) radiation," the judge states that the plaintiffs, along "with every person on this planet, face an increased risk of [maladies such as skin cancer, cataracts, and suppressed immune systems] if the landfill releases CFCs into the air." Judge Gould acknowledges that the release of fluids and gases "from about hundred or so discarded refrigerators in rural Idaho" may be "perhaps minor," but states that "the cumulative harm from continuing unrestrained release of CFCs from thousands of landfills over decades of time, presents a clear picture of risk to the environment." He then states that "[w]hile the landfill here only contributes to a fraction of overall ozone depletion, it cannot be doubted that the actions of the landfill operators, to a degree, increase ozone depletion, which in turn increases UV-B radiation reaching the earth, which in turn increases the risk of maladies that flow from increased UV-B radiation, to the detriment of every person on the earth."

Having concluded that the landfill's release of CFCs "contributes to a process that can cause global harm if not restrained," he recognizes that this alone does not resolve the standing question. He correctly points out that the plaintiffs suffer no

greater injury than any other person and “that poses a very challenging question under some standing precedents.” Under certain precedents, the existence of a widely shared injury would appear to compel the conclusion that the injury was not “concrete and particularized.” He characterizes this interpretation as “injury to all is injury to none” for standing purposes. He argues that this interpretation is not compelled by precedent. He states that the Supreme Court’s precedents “may be read to support a general rule of standing along these lines: If the injury is not concrete, there is no injury in fact even if the injury is particularized; and if the injury is concrete and particularized, there is injury in fact even if the injury is widespread.” In other words, “[c]oncreteness of injury, so long as it is particularized, appears to be the touchstone for the injury in fact element of standing.” 358 F.3d at 651-652.

Judge Gould then reviews whether the injury suffered by the plaintiffs is “concrete” rather than “abstract and indefinite.” He concludes, not surprisingly in light of his preceding views, that it is concrete for several reasons. First, he asserts that the “marginal increase in the risk of serious maladies,” even though it “can cause only a small increase in risk to the world, including threat” to the plaintiffs, has no bearing on whether the increased risk to the plaintiffs is concrete. He states that the risk of “deadly serious maladies” “minimizes the required probability of their occurrence for injury in fact purposes.” Second, he points to the fact that Congress recognized the individual nature of the harm from CFCs by providing “an explicit grant of a right to citizen suit.” 358 F.3d at 652. Finally, he cites the *Laidlaw* Supreme Court decision as recognizing a “less concrete injury” as sufficient. In *Laidlaw*, the alleged harm resulted from plaintiffs refraining from using a river because of subjective fears of its pollution. Notwithstanding the judge’s view, there

is a significant difference between interference with an individual’s “recreational, aesthetic, and economic interests,” and fears of skin cancer, cataracts and depressed immune systems that might result from a systemic pollution problem. 358 F.3d. at 654.

Undaunted by the absence of a nexus between the pollution and the theorized injury, Judge Gould indicates his belief that the plaintiffs’ injury from increased risk of maladies caused by ozone depletion, which will follow from the mishandling of materials at the landfill, is “concrete and particularized.” He then proceeds to conclude that the other prerequisites for standing also “appear satisfied.” *Id.* "

Court Rules on Challenges to D.C. Area Ozone Plan

On February 3, 2004, the D.C. Circuit issued the latest of its decisions on the ozone nonattainment SIP for the Washington, D.C. Metropolitan Area. *Sierra Club v. EPA*, 356 F.3d 296 (D.C. Cir. 2004). The court vacated EPA’s “conditional” approval of the SIP revision, but upheld the specific elements that Sierra Club challenged.

EPA's Conditional Approval of Ozone SIP Revision

The first issue the court addressed was EPA's conditional approval of the D.C. area nonattainment SIP. The plan revision that had been submitted identified a number of specific measures to be implemented. However, it did not include measures required for severe ozone nonattainment areas that relate to reasonably available controls, 3% per year emissions reductions, and contingency controls. Instead, the jurisdictions within the D.C. area submitted letters to EPA in which they committed to adopt specific measures not included in the plan revision.

Based upon its review of the SIP revision and commitment letters, EPA conditionally approved the nonattainment plan under its authority in section 110(k)(4). That provision provides that EPA may approve a plan revision based upon a "commitment of the State to adopt specific enforceable measures" within a year after approval of the plan revision. EPA argued that the letters had satisfied the provisions of section 110(k)(4), because they constituted a "commitment" to adopt specific enforceable measures. The court held that the letters did not identify "specific" measures, but simply were a commitment to adopt "unspecified" measures, "with the specifics to be named later." The court stated that EPA's construction of that statutory provision had been rejected in cases decided in the 1990's dealing with EPA's approval of "committal" SIPs. Accordingly, the court vacated EPA's conditional approval of the nonattainment SIP revision.

Review of Elements of Ozone Plan

The court also ruled on Sierra Club's attacks on the substance of two elements that were included in the D.C. area SIP revision. Sierra Club first

challenged EPA's approval of the attainment demonstration, arguing that it was not based on acceptable modeling or other analytical method. Sierra Club also challenged the rate-of-progress (ROP) plans, arguing that they were based on an outdated emissions model. The court rejected both challenges and found EPA's action on each issue to be reasonable.

Under section 182(c)(2)(A), a serious or severe ozone nonattainment area SIP revision "must be based on photochemical grid modeling or any other analytical method determined" by EPA to be at least as effective. The area's attainment demonstration began with an analysis using the Urban Airshed Model, a photochemical grid model. Using the three worst ozone days in making nonattainment predictions, the model also predicted nonattainment on three days in 2005. However, further analysis led to the conclusion that the model had either over-predicted or, in one case, the ozone level was anomalous and should not have been considered. The court reviewed EPA's analysis of the attainment demonstration and concluded that it was reasonable. It rejected Sierra Club's position that the attainment demonstration had to be based "solely" upon the photochemical grid model, finding that the statute is ambiguous on this issue and EPA's interpretation is reasonable. It also noted that it might have been unreasonable for the additional factors not to have been taken into account.

Sierra Club next argued that EPA should have rejected the ROP plans because they were not based on the latest motor vehicle emissions model, MOBILE6. The plan was based on MOBILE5. MOBILE6 was released one month before the ROP plan was submitted. The court upheld EPA's position that it would not require states that have already submitted SIPs, or will submit SIPs shortly after the release of MOBILE6, to revise their SIPs. The court accepted EPA's view that requiring

revision of the plans each time a new model is announced would lead to significant costs and potentially endless delays in the approval process. Accordingly, it found that EPA's action was neither arbitrary nor capricious.

Deadline for Submission of ROP Plans

Sierra Club also challenged EPA's establishment of a date for submission of post-1999 ROP plans that was later than the statutory deadline for such submittals. EPA had established the later date because the Agency did not extend the attainment deadline for the area to 2005 until after the date had passed for submission of such plans. The court held that, under section 182(i), EPA had the authority to adjust statutory deadlines other than attainment dates when it reclassifies an attainment area. The court also pointed out that it had previously ruled on this same issue in an earlier decision and that the Sierra Club's argument here was "indistinguishable." Accordingly, it rejected this challenge. "