

CLEAN AIR ACT

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EPA's Air Quality Management Work Group Issues Final Report

In early 2004, the National Research Council (NRC) of the National Academy of Sciences released a report entitled *Air Quality Management in the United States*. In its report, the NRC both outlined substantial achievements of the federal air quality management (AQM) program over the past 30 years, and issued a number of recommendations for improvements in those programs. In response, EPA established an AQM work group to review the NRC recommendations and make recommendations to the EPA Clean Air Act Advisory Committee.¹

In December 2004, the AQM work group issued a report outlining a series of recommendations for further improvements of the federal clean air programs. At the beginning of its work, the work group formed into two subgroups: one to address scientific and technological issues; and the other to address policy and planning issues. These two subgroups then formed teams to address a host of sub-issues. The principal participants in the work groups were representatives of state and local agencies, EPA representatives, and

environmental groups. Because of the substantial time commitment required, industry did not have substantial numbers of individuals who participated. The work group recommendations contain a series of both short-term and long-term recommendations, as well as a series of possible long-term options to be considered.

Set out below are highlights of the AQM work group recommendations. They are organized according to the categories of recommendations included in the NRC report.

NRC Recommendation 1: Strengthen Scientific and Technical Capacity

Among the work group's key recommendation in this category are recommendations that EPA, in conjunction with other affected stakeholders, improve emissions measurements and reporting, and develop improved emissions factors. The clear objective of the work group recommendations is for EPA to require much more extensive continuous emissions monitoring than in the past. The focus appears to be on requiring continuous emissions monitoring if it is technically feasible.

¹ See March 2004 *Washington Report* at WR-515-518 for discussion of the recommendations in the NRC report.

NRC Recommendation 2: Expand National and Multi-State Control Strategies

The work group points out that the NO_x SIP call, the proposed Clean Air Interstate Rule, the heavy-duty diesel rule and the non-road rule are expected to expand the use of regional and national strategies. However, it nonetheless identified a number of other significant stationary and mobile source categories for potential controls, even though a number of these have already been targeted for significant reductions. Among the high priority stationary source categories identified for further controls were: industrial, commercial, and institutional boilers; industrial surface coatings, non-industrial solvents, and architectural coatings. The work group also recommended reductions in emissions from the existing fleet of heavy-duty diesel engines, controls on ships, locomotives, and aircraft and mobile source air toxics. It recommended for further study and possible future controls the following categories: cement manufacturing, petroleum refining, pulp and paper, and residential fossil fuel combustion.

NRC Recommendation 3: Transform the SIP Process

The work group report contains numerous recommendations for improving the SIP process. Among the near-term procedural changes recommended are: alignment of submittal dates for PM 2.5, ozone and regional haze SIPs; development of a website containing interpretations of rules and other SIP approval-related issues; establishment of a SIP

approval/disapproval process under which “letter approvals” or similar expedited procedures could be used for a “de minimus” level of SIP revisions; development of an EPA regulation that would require a public hearing for SIP revisions only where one is requested after public notice; and expediting the redesignation process for areas that have achieved attainment. The work group also proposes measures to improve communication to the public and steps to increase adoption of innovative measures.

The work group report next identifies a series of “Steps Toward Transformation: Improving SIP Development and Evaluation.” These recommendations deal with approaches for coordinating revisions to SIPs for two or more separate non-attainment areas that are part of the same regional scale air quality problem; identifying and pursuing emissions reductions from federal and international sources; improving tracking and evaluation of results through various steps, among which are recommendations to modify EPA guidance to promote “weight-of-evidence” demonstrations for SIP planning and implementation in which modeling reliance would be reduced and monitoring data and analysis would be increased.

NRC Recommendation 4: Develop Integrated Program for Criteria and Hazardous Air Pollutants

The work group makes two recommendations under this category. First, it urges that there be consideration of multi-pollutant impacts, including the impacts of air toxics, in

connection with SIPs submitted in the next several years. Also, it recommends that EPA explicitly outline and quantify multi-pollutant benefits and disbenefits in setting up emissions standards.

NRC Recommendation 5: Enhance Protection of Ecosystems and Public Welfare

The work group recommends that EPA begin to examine approaches that would advance protection of ecosystems from the effects of air pollution and identifies as possible alternatives: a regional cap-and-trade program, protection of ecosystems based on critical loads, and a statewide planning program for protecting and enhancing air quality in areas that attain the NAAQS (including national parks and wilderness areas).

Finally, the work group indicates that it considered more sweeping changes to the air quality management framework in the United States. The work group identified core principles and then proceeded to develop a series of framework options for a long-term vision. The four options identified were: requiring all stationary sources that emit above a specified threshold of a criteria pollutant or hazardous air pollutant to reduce emissions through state-of-the-art controls (with new sources required to install lowest achievable emission rate technology and existing sources capped at a specified minimum level of control); establishment of emissions caps from certain source categories and allowing trading, as currently authorized under the acid rain program; a hybrid consisting of elements of the first two options that would provide for

establishing federal performance standards and authorizing trading; and a program for continuous improvement based on the Toxics Release Inventory which would establish goals to be met within a three to five year period and metrics for determining relative pollution efficiency, with the goal adjusted on a fixed cycle (e.g., 3-5 years).

The work group intends to proceed with considering the unresolved issues and long-term vision over the next year. The report urges that EPA proceed with implementation of the short-term recommendations in 2005. "

Sixth Circuit Rules EPA Has Discretion Whether to Issue Title V Notices of Deficiency

On October 21, 2004, in *Ohio Public Interest Research Group (Ohio PIRG) v. Whitman*, 386 F.3d 792 (6th Circ. 2004), the Sixth Circuit Court of Appeals considered the question whether EPA was required to issue a notice of deficiency to Ohio when EPA concluded that there were deficiencies in Ohio's operation of its Title V permit program. Ohio PIRG focused on several areas EPA had identified for improvement, including Ohio's failure to abide by Title V reporting requirements with respect to deviations caused by malfunctions. Ohio PIRG also challenged EPA's interpretation that minor NSR changes do not constitute "Title I modifications."

Ohio PIRG based its challenge on language in section 502(I)(1). That provision states:

Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State[.]

Ohio PIRG's argument was that EPA is required to issue a notice of deficiency (NOD) when any inadequacies are found.

EPA responded that its recognition of deficiencies did not constitute a determination that Ohio was not "adequately administering and enforcing" its Title V program. EPA takes the position that Congress gave the Agency discretion under the Clean Air Act to determine whether Ohio is not "adequately administering and enforcing" its Title V program when implementation improvements are needed. The court pointed out that EPA's interpretation is supported by decisions from two other federal courts of appeal.

In *New York Public Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003), the Court addressed the same legal question regarding whether EPA was required to issue a NOD when it identified inadequacies in New York's Title V program. The Second Circuit in the *NYPIRG* case found that the phrase "Whenever the Administrator makes a determination," grants EPA discretion whether

to make a determination regarding a state is adequately administering and enforcing its permitting program. Only when that determination is made is EPA required to issue a NOD. *Id.* at 330-31. In *NYPIRG*, the Court concluded that EPA's decision not to issue a NOD was equivalent to "an agency's decision not to invoke an enforcement mechanism provided by the statute." *Id.* at 332. The Sixth Circuit also reviewed a number of other decisions in which similar language had been interpreted to give EPA discretion as to whether to act.

Ohio PIRG argued that, even if the court concluded that EPA's action constituted enforcement and thus is presumptively unreviewable under Supreme Court and other federal court decisions, Ohio PIRG could rebut the presumption where Congress has provided guidelines for the Agency to follow in exercising its enforcement powers. In *Heckler v. Cheney*, 470 U.S. 821 (1985) the Supreme Court ruled that where Congress has indicated "an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2), and courts may require that the agency follow that law. . . ." *Id.* at 834-35.

The Sixth Circuit ruled, however, that Congress had not provided specific guidance for EPA to follow in exercising its oversight of state implementation of permitting programs and that the only guidance is regarding "what is required *after* a determination of inadequacy is made." Accordingly, the court ruled that it was "unable to review the EPA's refusal to issue a

NOD, as the determination upon which its issuance hinges is committed to agency discretion by law, and the Act leaves us with no standards by which to judge the EPA's non-enforcement decision."

The court also considered Ohio PIRG's challenge to EPA's interpretation that minor NSR changes do not constitute Title I modifications. The court ruled that Ohio PIRG's challenge of EPA's interpretation was not timely made. It stated that EPA's solicitation of public comments regarding implementation of the Title V program did not start a new clock for parties to challenge the Title V regulations. The court reviewed the case law addressing whether EPA's solicitation of comments had created a renewed opportunity for comment and objection on the one hand and, on the other, those cases where there is no indication that EPA is reconsidering its underlying regulations. The court ruled that EPA had not reopened its regulations for public comment but rather "merely sought public comment on whether state Title V programs were acting in accordance with those regulations," including the interpretation of what constitutes a Title I modification. "

Sixth Circuit Overturns Grant of Injunctive Relief in Citizen Suit

On October 26, 2004, in *Ellis, et al. v. Gallatin Steel Co., et al.*, 390 F.3d 461 (6th Cir. 2004), the Sixth Circuit considered appeals

by plaintiffs and defendants in a case brought against Gallatin Steel and Harsco by neighboring landowners. The case involved numerous state and federal claims. The principal Clean Air Act rulings of interest related to the court's overturning a permanent injunction against Gallatin and Harsco that included the assignment of a court-appointed expert to monitor compliance, and the court's upholding the district court's dismissal of PSD claims under the "abstention doctrine."

Factual and Procedural Background

The plaintiffs alleged fugitive dust violation claims based on the fact that dust originating from the Gallatin and Harsco plants had settled on their property. They had spent over 8,000 hours monitoring the steel manufacturing and slag processing operations of the defendants. Plaintiffs sent a 60-day notice letter in December 1998, and less than 60 days later EPA filed an enforcement action in the federal district court. In July 1999, the plaintiffs filed their first citizen suit alleging, among other things, numerous violations of the Clean Air Act. Four months later, in December 1999, the plaintiffs filed a second citizen suit alleging additional violations. In January 2000, the district court granted summary judgment against the Ellises on all but three of their claims in their first citizen suit because they had failed to give proper notice of the claims. The remaining three claims were consolidated with the plaintiffs' second citizen suit. In October 2000, EPA amended its complaint and proposed a consent decree to resolve the federal claims. The plaintiffs agreed that EPA's claims overlapped with the plaintiffs' then existing claims. Subsequently, the plaintiffs

were permitted to intervene in the EPA's enforcement suit. In July 2002, the district court granted EPA's motion to enter its consent decrees with Gallatin and Harsco. The consent decrees provided for civil penalties and injunctive relief, including various compliance measures.

In September 2002, the district court ruled on opposing summary judgment motions in the remaining citizen suits. The court concluded that the consent decrees operated as *res judicata* to bar relief based on all past violations up to the date the court entered the decree. Subsequently, the court held a bench trial concerning plaintiffs' second citizen suit and granted plaintiffs relief with regard to fugitive dust that crossed the property lines after entry of the consent decrees. In addition to granting relief under state nuisance law provisions, the court granted plaintiffs the permanent injunction described above under the Clean Air Act.

Both the plaintiffs and defendants sought to have the Sixth Circuit review the district court's rulings on every issue on which the court ruled against them. As noted above, the two Clean Air Act issues of particular interest relate to the Sixth Circuit's overturning the district court's granting of a prospective injunction to plaintiffs for post-consent decree fugitive dust violations and the Sixth Circuit's upholding the district court's ruling dismissing the plaintiffs' PSD claims.

Overturing Injunctive Relief Granted to Plaintiffs Under Citizen Suit Authorization

Gallatin and Harsco challenged the grant of injunctive relief based on plaintiffs' post-consent decree fugitive dust claims arguing: (1) that plaintiffs did not satisfy traditional standards for obtaining injunctive relief because they never notified EPA about the violations, never asked the Agency to enforce the consent decree, and did not give the remedial requirements of the consent decree sufficient time to work; and (2) that the alleged post-consent decree violations constitute "new" claims that must separately comply with the Clean Air Act notice provisions.

The Sixth Circuit agreed with Gallatin and Harsco and reversed the district court's grant of injunctive relief. The court pointed out that the consent decrees cover the same types of fugitive dust claims covered by the injunction, that the decrees are forward-looking and apply to "continuing" violations of the Act, that the decrees "reserve all rights to deal with anything that happens in the future," that the decrees impose stipulated monetary penalties, that there is no evidence that EPA failed to enforce the decrees, and that EPA was not notified that additional violations had occurred. The court also ruled that the citizens were required to file a second 60-day notice. It stated that the original 60-day notice did not satisfy the notice requirement for commencing an action regarding new claims alleging the inadequacy (or alleged under-enforcement) of a consent decree proposed and negotiated by EPA.

Two environmental attorneys have made public statements claiming that the Sixth Circuit decision could totally undermine Clean Air Act citizen suits in the states in that Circuit. Their

outrage is directed at the fact that EPA is able to bring an action after receiving a 60-day notice from citizens and negotiate a consent decree that will preclude the citizens obtaining separate relief, with the result that they very well may not be able to recover attorneys' fees. This claim is overblown and has little merit. At most, the court's decision shows, as many decisions have held in the past, that citizens must satisfy all prerequisites to prevail.

Dismissal of PSD Claims Under “*Burford* Abstention Doctrine”

The other principal Clean Air Act issue of interest relates to questions regarding the district court's dismissal of plaintiffs' PSD claims against Harsco. Whether Harsco was required to obtain a PSD permit turned on whether Harsco and Gallatin constituted a single source or two separate sources. Initially, the Kentucky air agency concluded that they are separate sources and that only Gallatin would be required to obtain a PSD permit. Subsequently, the agency reversed its position and ruled that they are a single source and that Harsco should be covered by a PSD permit as well. The later Kentucky ruling was challenged by Gallatin and Harsco, and this issue was being reviewed by the state agency and courts while the plaintiffs' claims were being pursued.

The court ruled that the pending administrative posture offered a classic case for applying “*Burford* abstention.” The court ruled that “where the state has supplied a concentrated and comprehensive review process that is currently addressing the very subject of these federal claims,” this unusual situation counsels “*Burford*

abstention.” The court also ruled that federal review would be disruptive because it would require the district court to revisit earlier Kentucky decisions regarding whether Gallatin and Harsco are a single source, “an issue committed by the Clean Air Act to state resolution.” Accordingly, the court upheld dismissal of plaintiffs' PSD claims. ”

D.C. Circuit Rules That Competitor Has Standing and Addresses Whether Vacatur Is the Only Remedy for Certain EPA CAA Rulemaking Errors

On July 23, 2004, the D.C. Circuit decided *Honeywell International, Inc. v. EPA*, 374 F.3d 1363 (D.C. Cir. 2004), overturning EPA's authorization of two substitutes for HCFC-141b. In that decision, the Court made two rulings of particular interest. The first dealt with whether a market competitor has standing to challenge a rule that will adversely affect its economic interests. In this case, the Court found that Honeywell, the competitor, did have standing. The second is whether the Court has the authority to remand, rather than vacate a Clean Air Act rule when the Court finds that the rule violates EPA's statutory authority. In a split decision, the Court initially ruled that section 307(d)(9) of the Act compels it to vacate such EPA rules. In a one-paragraph per curiam opinion issued on January 7, 2005, the judges

reconsidered the ruling on vacatur and stated that it found it “unnecessary” to decide whether section 307(d)(9) requires vacatur.

Standing of Competitor

In this case, the petitioner (Honeywell) argued that EPA premised its approval of the HCFC substitutes on the economic impact of denying a competitor’s petition for approval of the substitutes. Honeywell claimed that the relevant Clean Air Act section does not permit EPA to consider economic factors in the approval process. EPA argued that Honeywell did not have standing to bring an action to protect its commercial interests. EPA asserted that Honeywell’s interest “‘is nothing more than a concern [about] EPA’s alleged regulatory laxity.’” EPA relied on cases holding that commercial interests lacked prudential standing to enforce regulatory burdens against competitors, because “when those interests and those of the statute are not aligned, such suits [c]arry a considerable potential for judicial intervention that would distort the regulatory process.”

The Court reviewed the basic principles of Article III standing and then focused specifically on when a competitor seeking to protect its commercial interests might have standing. It pointed out that, where “there is reason to believe that a party’s interest in statutory enforcement would advance rather than hinder, the operation of a statute, the Court can reasonably assume that Congress intended to

permit the suit.” It further ruled that the Court has held that cases rejecting competitors’ rights to protect their commercial interests are “inapposite when a competitor sues to enforce a ‘statutory demarcation,’ such as an entry restriction, because ‘the potentially limitless incentives of competitors [are] channeled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation.’” The Court ruled that the Clean Air Act statutory authority at issue was sufficiently aligned with Honeywell’s competitive interest to make it “a suitable challenger” to enforce the Act’s terms.

Vacatur, Not Remand, Is Only Proper Remedy

After deciding that EPA acted improperly in considering economic factors in adopting the rule at issue, the Court considered the proper remedy to correct EPA’s error. Judges Sentelle and Randolph initially ruled that, because Honeywell’s challenge was a substantive challenge to EPA’s statutory authority to promulgate the rule at issue, the only permissible remedy was vacatur of the rule.

The Court reviewed section 307(d)(9) of the Act, which it pointed out governs challenges under the Act rather than the Administrative Procedure Act. It provides that “‘the Court may *reverse* any . . . action found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.’” The Court stated that the ordinary meaning of the

term “reverse” could only be read to authorize the Court to vacate the impermissible portions of EPA’s rule. The judges stated that they were only aware of one case under the Act holding that remand, rather than vacatur, is the proper remedy for a decision finding that EPA exceeded its statutory authority under the Act. Judge Randolph issued a separate concurring opinion in which he explained he believes that vacating and remanding unlawful agency action, rather than simply remanding, should always be the preferred course. Judge Rogers dissented from the ruling that vacatur was the proper remedy and indicated that remand was preferable because EPA might be able to support its rule through further explanation and the “consequences of vacating may be quite disruptive.”

On reconsideration, in a per curiam opinion, the Court ruled that it finds it “unnecessary” to decide the issue of whether section 307(d)(9) requires a court to “vacate erroneous action” of EPA. The opinion further stated that “[e]ven if § 307(d)(9) gives a court discretion to remand without vacating,” Judges Sentelle and Randolph would vacate EPA’s rule. Judge Rogers concurred with the withdrawal of the earlier finding that vacatur was required, but dissented from the vacatur of the challenged rule. ”