Sierra Club v. EPA: Why Operators Should Not Be Able to Police Themselves

INTRODUCTION

In *Sierra Club v. EPA*, the Third Circuit Court of Appeal held that the Environmental Protection Agency's (EPA) approval of Pennsylvania's State Implementation Plan (SIP) was arbitrary and capricious because it failed to lower emissions, had a broad exception, and gave operators wide reporting discretion.[1] The court held that these elements, taken together, demonstrated that agency approval was inappropriate.[2] This In Brief argues that EPA should never have approved the Pennsylvania SIP because the operators' reporting discretion component demonstrated that the proposed limitations did not comply with the Clean Air Act (CAA). The plan did not comply with the CAA and lacked an enforcement mechanism because it gave wide reporting discretion to operators.[3] Here, undue reporting discretion refers to allowing operators to self-report exceedance of temperature thresholds without imposing strict data requirements as well as using vague EPA standards for when to report. As such, operators can choose what to report, giving EPA no way of ascertaining if a standard has been violated. Thus, EPA should reject a SIP when operators have undue reporting discretion because it makes regulation essentially unenforceable. Here, the court's reliance on the three characteristics taken together rather than just the undue reporting discretion and resulting unenforceability undermines the CAA.

I. LEGAL BACKGROUND

A. The Clean Air Act

Congress passed the CAA to benefit the public health and welfare of the country's population in three main ways.[4] First, the statutory purpose of the CAA

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1. Sierra Club v. EPA, 972 F.3d 290, 293, 308 (3d Cir. 2020) (explaining that "operators" refers to coal-burning power plant managers in Pennsylvania).
2. *Id.* at 293.
3. *Id.* at 309.
4. 42 U.S.C. § 7401(b).

is to "protect and enhance" the country's air quality.[5] Second, Congress intended the CAA to increase research and development to prevent and control air pollution.[6] Third, the CAA provides technical and financial assistance to state and local governments to develop prevention and control programs and helps develop regional programs for air pollution prevention and control.[7]

A primary goal of the act is to "encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this Act, for pollution prevention."[8] As such, the CAA requires EPA to set the National Ambient Air Quality Standards (NAAQS).[9] These standards set limits for emissions of air pollutants, including nitrogen oxide (NOx).[10]

States are charged with creating their own plans as to how they will meet the NAAQS through the creation of SIPs.[11] The CAA "identifies specific requirements that states must meet in their SIPs to attain and maintain the NAAQS."[12] When EPA finds that a SIP does not comply with the NAAQS, the state must revise its SIPs and include the use of Reasonably Available Control Technology (RACT). RACT requires implementation of the most advanced, economically feasible technology to improve air standards.[13] In defining "reasonably available," the EPA administrator considers both technological and economic feasibility. However, because "reasonably available" is an ambiguous term, deference is generally given to the agency to determine what technology qualifies as RACT.[14]

The Clean Air Act gives appellate courts original jurisdiction over EPA approval of a state's proposal, meaning they are the "sole forum for challenging procedural determinations made by the Administrator."[15] The court defers to the agency unless the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[16]

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5. *Id.* § 7401(b)(1).

6. *Id*. § 7401(b)(2); Brigham Daniels et al., *The Making of the Clean Air Act*, 71 HASTINGS L.J. 901, 916 (2020) (discussing the inception of the CAA in the legislature and its intention to be "technology-forcing").

7. 42 U.S.C. § 7401(b)(3)–(4).

8. *Id.* § 7401(c).

9. *NAAQS Table*, EPA, https://www.epa.gov/criteria-air-pollutants/naaqs-table (last visited Aug. 28, 2021); 42 U.S.C. § 7409.

10. 42 U.S.C. § 7409; *see also* Sierra Club v. EPA, 972 F.3d 290, 293 (3d Cir. 2020) (explaining that the primary pollutant at issue in this case was NOx).

11. 42 U.S.C. §§ 7410, 7502.

12. *SIP Requirements in the Clean Air Act*, EPA, https://www.epa.gov/air-quality-implementation-plans/sip-requirements-clean-air-act (last visited Aug. 28, 2021); *see also* 40 C.F.R. § 51 (defining the requirements EPA uses to approve proposed SIPs).

13. *See* 42 U.S.C. § 7502(c)(1); Navistar Int'l Transp. Corp. v. EPA, 941 F.2d 1339, 1343 (6th Cir. 1991); *see also* 40 C.F.R. § 51.912 (2021).

14. Nat. Res. Def. Council v. EPA, 571 F.3d 1245, 1252–53 (D.C. Cir. 2009).

15. 42 U.S.C. § 7607(d)(8).

16. *Id.* § 7607(d)(9)(A); *see also* Nat'l Parks Conservation Ass'n v. EPA, 803 F.3d 151, 158 (3d Cir. 2015); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

In *New York v. EPA*, the D.C. Circuit Court found that the lack of an adequate reporting requirement was enough to demonstrate noncompliance with the Clean Air Act.[17] New York's SIP gave operators reporting discretion to decide if there was a "reasonable possibility" they had created a physical or operational change to their source that amounted to a modification under the New Source Review and, therefore, subject to more stringent emissions controls including a reporting requirement.[18] By essentially giving operators discretion to avoid the reporting requirement altogether, the SIP made meaningful enforcement impossible.[19] Accordingly, the court found that EPA approval was improper.[20] The court reviewed the "reasonable possibility" rule as codified in the CAA regulations.[21] The court ruled that such a standard was insufficient because EPA could not ensure compliance without the relevant data, so EPA had to provide a more detailed alternative than "reasonable possibility."[22]

B. Sierra Club v. EPA

In 2008, EPA changed its NAAQS to allow only 75 parts-per-billion of ozone instead of 80 parts-per-billion.[23] As a result, Pennsylvania had 17 nonattainment areas.[24] Accordingly, Pennsylvania had to revise its SIP to demonstrate how it would reach attainment.[25]

Sierra Club petitioned for review of EPA's approval of Pennsylvania's SIP in 2019 while the Pennsylvania Department of Environmental Protection (DEP) joined as an intervenor respondent.[26] The SIP was proposed in May 2016 and formalized in May 2019 after a comment period.[27] Pennsylvania's proposed SIP

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17. New York v. EPA, 413 F.3d 3, 22 (D.C. Cir. 2005) (finding that a regulating system that allows operators to self-report a potential increase in pollution did not comply with the Clean Air Act).

18. *Id*. at 11.

19. *Id*. at 22.

20. *Id*. at 11; *see also* 42 U.S.C. § 7411(a)(4).

21. *New York*, 413 F.3d at 33 (alteration in original) (quoting Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80,186, 80,279 (Dec. 31, 2002) (to be codified at 40 C.F.R. pt. 51, 52)).

22. *Id*. at 35–36.

23. *See* National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436, 16,437–39 (Mar. 27, 2008) (to be codified at 40 C.F.R. pt. 50, 58).

24. *See Attainment Status by Principal Pollutants*, PA. DEP'T OF ENV'T PROT., http://www.dep.pa.gov/Business/Air/BAQ/Regulations/Pages/Attainment-Status.aspx (last updated July 7, 2021); *see also US EPA Nonattainment Areas and Designations*, EPA, https://edg.epa.gov/metadata/catalog/search/resource/details.page?uuid=%7B6D412E16-523A-4466-AE04-09EAEF7C16F3%7D (last visited Aug. 28, 2021) (explaining that nonattainment areas are areas that do not meet the primary standards, limits that protect public health).

25. *See* 42 U.S.C. §§ 7511c(a), 7502(c)(1).

26. Sierra Club v. EPA, 972 F.3d 290, 293 (3d Cir. 2020).

27. *Id*. at 296–97 (explaining that comments from the comment period described the SIP as fulfilling existing, or lower than existing, emissions practices with Sierra Club, and neighboring states, providing some of the comments).

had a 0.12 NOx/MMBtu limit, a 600-degree temperature threshold, and an unclear reporting requirement for coal-burning power plants.[28] In *Sierra Club*, the court found that Pennsylvania's SIP, which would have applied to coal-burning power plants, should not have been approved because of three characteristics: it failed to lower emissions, had a broad exception, and gave operators wide reporting discretion.[29]

The court ruled that these characteristics taken together were enough to demonstrate that EPA approval was arbitrary and capricious.[30] The court found that these three characteristics come together around the 600-degree temperature threshold to create a regime that allows operators to easily avoid complying with the 0.12 NOx/MMBtu limit.[31] The court demonstrated that the lack of a substantive reporting requirement made approval arbitrary and capricious because compliance with the SIP required accurate reporting while operators could exercise their discretion to not report relevant data.[32] However, the court's reliance on the "three defining characteristics" taken together rather than any one being sufficient may limit the reach of the decision because it could forestall future courts from vacating a SIP based solely on wide reporting discretion to operators.[33] The court likely ruled this way because it found that, while these characteristics were already questionable on their own, together, they formed a "pernicious loophole."[34]

II. EPA SHOULD NOT HAVE APPROVED THE PENNSYLVANIA SIP BECAUSE THE OPERATORS' WIDE REPORTING DISCRETION MEANT THE PLAN LACKED ENFORCEMENT

The *Sierra Club* precedent will be valuable in future cases involving discretion in reporting requirements in SIPs for the CAA. Despite a growing economy, the United States has decreased emissions of the six key pollutants by 73 percent from 1970 to 2017.[35] Similarly, power plants in Pennsylvania have already voluntarily achieved reductions.[36] However, the state of New York complained that Pennsylvania's proposed plan did not further reduce

28. *Id.* at 293; *see also* 25 Pa. Code § 129.97(g)(1).

29. *Sierra Club*, 972 F.3d at 293 (explaining that these three characteristics were the same characteristics that Sierra Club challenged the SIP on when it petitioned the court).

30. *Id*.

31. *See id.* at 299.

32. *See id.* at 309.

33. *See id.* at 293.

34. *See id.* at 299.

35. *EPA Releases 2018 Power Plant Emissions Demonstrating Continued Progress*, EPA (Feb. 20, 2019), https://archive.epa.gov/epa/newsreleases/epa-releases-2018-power-plant-emissions-demonstrating-continued-progress.html; *Criteria Air Pollutants*, EPA, https://www.epa.gov/criteria-air-pollutants (last visited Aug. 28, 2021) (stating that the six criteria pollutants are Carbon Monoxide, Ground-level Ozone, Lead, Nitrogen Oxides, Particulate Matter, and Sulfur Dioxide).

36. *Sierra Club*, 972 F.3d at 301.

emissions.[37] Maryland's state government also argued that the proposed limitations did not further reduce emissions and emissions were "nearly 60% higher than what they have achieved in the past."[38] As such, the SIP did not fulfill the purpose of the CAA to reduce emissions *even if it were enforceable*.[39]

Even though the court in *Sierra Club* clearly stated there was a "gaping loophole found in the [Pennsylvania SIP] enforcement regime" and vacated the SIP because approval was arbitrary and capricious, the court did not go far enough.[40] The court's reliance on the "three defining characteristics" taken together meant that one characteristic alone was not sufficient to demonstrate noncompliance.[41] Indeed, the court remarked that taken individually, these characteristics were merely "questionable."[42] Instead, the court ruled that "working in tandem," the characteristics established noncompliance.[43]

Such a cautious approach weakens the CAA and makes enforcement impossible.[44] *Sierra Club* does not change the law since the ruling relies on existing law without fully committing to the conclusion that such reasoning provides.[45] However, the reasoning supports and builds on the precedent found in *New York* by emphasizing how approval would have created an undue amount of reporting discretion and would have made the Pennsylvania SIP unenforceable.[46]

Under *Chevron* Deference, courts defer to reasonable agency interpretations of ambiguous law.[47] The RACT requirement is not defined in the CAA, which leaves room for ambiguity.[48] However, in *Sierra Club*, the parties agreed to use EPA's longstanding definition that focuses on technological and economic feasibility.[49] It was unambiguous that RACT should represent "the toughest controls considering technological and economic feasibility that can be applied to a specific situation."[50] Accordingly, EPA "should select the best available controls, deviating from those controls only where local conditions are such that

37. *Id.* at 296–97 (explaining that New York and Maryland submitted public comments opposing Pennsylvania's SIP during its comment period).

38. *Id.*

39. *See id.* at 300; *see* also 42 U.S.C. § 7401.

40. *See Sierra Club*, 972 F.3d at 309.

41. *See id.* at 293.

42. *Id.* at 299.

43. *Id.*

44. *See* New York v. EPA, 413 F.3d 3, 34 (D.C. Cir. 2005).

45. *See Sierra Club*, 972 F.3d at 308.

46. *See id.* at 309; *see also New York*, 413 F.3d at 34.

47. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984) (establishing standard of review for judicial deference given to administrative actions); *see also* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 315 (2014).

48. *See Sierra Club*, 972 F.3d at 294.

49. *Id.*

50. Memorandum from Roger Strelow, Assistant Adm'r for Air & Waste Mgmt., EPA, to Reg'l Adm'rs, Regions I–X 3 (Dec. 9, 1976), https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/19761209_strelow_ract.pdf.

they cannot be applied there and imposing even tougher controls where conditions allow."[51] Here, EPA failed to impose such controls by allowing reporting discretion to operators.[52] This is problematic because it gives an undue amount of reporting discretion to operators and makes enforcement impossible.

A. Undue Amount of Reporting Discretion

EPA's decision violated the CAA because the SIP gives operators an undue amount of reporting discretion. Allowing operators to report when they have reached the 600-degree temperature threshold and not requiring specific record data gives an undue amount of reporting discretion to operators. This undue amount of reporting discretion should have been sufficient to demonstrate that EPA approval was improper. Indeed, the court states that "effective regulation must not depend on the candor or veracity of the very entities being regulated."[53]

Past precedent suggests that reporting discretion should be limited if it jeopardizes the goals of the CAA. In *New York*, operators had discretion to report when there was no "reasonable possibility" of exceeding the stated emissions limits.[54] Such a standard by EPA was unacceptable without providing a more detailed explanation for when operators had a duty to report.[55] Similarly, in *Sierra Club*, the SIP granted operators discretion to report the "data and calculations" that they deemed were "sufficient" for compliance with the temperature threshold.[56] The court also pointed out that this level of reporting discretion was particularly unacceptable because other characteristics, such as economic feasibility, are already addressed and used as excuses for incomplete compliance.[57] This gave operators in Pennsylvania an undue amount of reporting discretion.

Taken alone, the high level of operator reporting discretion should have been sufficient to demonstrate that EPA approval of the Pennsylvania SIP was unacceptable. For EPA's review and subsequent approval to be overruled, a court must show that the agency acted in a way that was arbitrary and capricious.[58] In overcoming the arbitrary and capricious standard, the agency must show a rational connection between the facts and the decision.[59] Here, EPA struggled to show that any such connection existed between a reporting regime that gave operators reporting discretion over any infractions on their parts and approval of

51. *See Sierra Club*, 972 F.3d at 295.
52. *See id.* at 293.
53. *See id.* at 308.
54. New York v. EPA, 413 F.3d 3, 34 (D.C. Cir. 2005).
55. *Id.* at 35–36.
56. *Sierra Club*, 972 F.3d at 308.
57. *Id.*
58. 42 U.S.C. § 7607(d)(9)(A).
59. Sw. Pa. Growth All. v. Browner, 121 F.3d 106, 111 (3d Cir. 1997).

such a regime.[60] EPA attempted to argue that since the underlying permitting process required temperature data, such data was sufficient and objective enough to satisfy the reporting requirements.[61] However, DEP admitted during oral argument that operators did not always record the temperature data because data recording was at the discretion of the operators.[62] Therefore, there is not a rational connection between the facts found by EPA, or lack thereof, and its decision to approve the SIP.[63] However, the court did not rule on this alone despite it also leading to impracticable enforcement.[64]

B. Unenforceability

Additionally, EPA's decision violated the CAA because the SIP was unenforceable. Allowing operators' discretion in reporting when they have reached the 600-degree temperature threshold, and any other data that they deem sufficient creates an enforcement regime that is impracticable and does not comply with the CAA. Not only does such reporting discretion inherently create a problem with compliance because it makes it easy for operators to ignore regulations, but it also makes enforcement of those regulations impracticable because of the difficulty in ascertaining when an operator is out of compliance.[65] This is why the court in *New York* held that giving operators discretion to decide what they had to report created an enforcement regime that made it impracticable to enforce the regulation.[66]

Similarly, in *Sierra Club*, the Pennsylvania SIP allowed operators to choose what they wanted to report.[67] In comparing the two, the court stated that the "same logic applies here."[68] In *New York*, operators were given an undue amount of reporting discretion because it was ambiguous when they had to report their data and findings.[69] Thus, a new standard was required to ensure enforceability.[70] Similarly, in *Sierra Club*, the SIP required "sufficient data and calculations" to establish that the temperature requirements were met.[71] Therefore, this reporting requirement was too vague and lacked a "discernible enforcement mechanism."[72] However, while this ambiguity was enough to

60. *See Sierra Club*, 972 F.3d at 308–09 (discussing EPA's argument in conjunction with DEP as an intervenor).
61. *Id.*
62. *Id.*
63. *See id.*
64. *See Sw. Pa. Growth All.*, 121 F.3d at 111.
65. New York v. EPA, 413 F.3d 3, 35 (D.C. Cir. 2005).
66. *Id.*
67. *Sierra Club*, 972 F.3d at 308.
68. *Id.*
69. *See New York*, 413 F.3d at 35–36.
70. *Id*.
71. *See Sierra Club*, 972 F.3d at 307.
72. *Id.* at 308.

demonstrate that EPA approval was improper in *New York*,[73] the court stopped short in *Sierra Club* of this same finding.[74]

Instead, the court failed to see such reasoning as sufficient to demonstrate noncompliance by itself.[75] Unlike the bolder approach taken by the court in *New York*, the *Sierra Club* court unnecessarily padded its holding with two further characteristics.[76] The court pointed out that the provision that DEP used did not require operators to record temperature inlet data so this case was not just ambiguous in its reporting requirement but completely lacking.[77] Despite the cautious approach in *Sierra Club*'s ruling, the court provides plenty of reasoning to suggest that approval without a clear reporting requirement gives operators an undue amount of reporting discretion and is arbitrary and capricious.[78]

The enforcement regime created by allowing operators discretion in reporting when they have reached the 600-degree temperature threshold should have failed the approval process. Approval was arbitrary and capricious because there was no rational connection between the reporting regime that gave operators reporting discretion over any infractions on their parts and approval of such a regime.[79] EPA did not demonstrate that there was any reason to allow an enforcement regime that made enforcement impracticable or eliminated any possibility of enforcing the regulation.[80] Since the reporting requirement is not enforceable because of the discretion given to operators, EPA approval was improper based on that alone.

CONCLUSION

The wide reporting discretion component should have been sufficient to establish that the SIP did not comply with the CAA. Invalidating such broad reporting discretion is important in giving SIPs any substantive weight in enforcing the CAA. Although the court's ruling may appear to fall short in *Sierra Club*, its reliance on the same logic and reasoning found in *New York* indicates that the court might still have come to the same conclusion if it only had to rule on the wide reporting discretion given to operators. Future courts should make a ruling based solely on such wide reporting discretion for operators that make enforcement impracticable. It is likely that they will if they follow the reasoning in this case and not just the conclusions. As such, when a SIP gives such wide reporting discretion to operators and EPA approves it, approval is arbitrary and

73. *See New York*, 413 F.3d at 11.
74. *See Sierra Club*, 972 F.3d at 293.
75. *See id.* at 299.
76. *See New York*, 413 F.3d at 35.
77. *See Sierra Club*, 972 F.3d at 309.
78. *See id*. at 308.
79. *See* Sw. Pa. Growth All. v. Browner, 121 F.3d 106, 111 (3d Cir. 1997).
80. *See Sierra Club*, 972 F.3d at 308–09.

capricious because it provides operators an undue amount of reporting discretion and makes the regulation unenforceable.

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