# Sierra Club v. Korleski and the Ohio Best Available Technology Rule: Wine Turned into Vinegar for the Sierra Club

May 28, 2012

Full text of the 6th Circuit opinion

In dramatic fashion, on May 25, 2012 the U.S. Court of Appeals for the Sixth Circuit reinstated the ten-ton Best Available Technology ("BAT") rule which permits the Director of Ohio EPA to issue permits to smaller emission sources that produce less than ten tons of emissions per year without first determining whether those sources will employ BAT. The decision reverses a victory by the Sierra Club in the lower U.S. District Court for the Southern District of Ohio that ordered Ohio EPA to enforce BAT requirements against all emitters, even those that emitted ten tons or less.

This extraordinary development is not without a lengthy history, however. In 2006, the Ohio General Assembly passed Senate Bill 265 and amended Revised Code 3704.03(F) to require Ohio EPA to exempt all sources of air pollution that produce less than ten tons per year of any National Ambient Air Quality Standards ("NAAQS") pollutant or pre-cursor of a pollutant from Ohio's State Implementation Plan ("SIP") requirement that all sources of air contaminants employ BAT to reduce air emissions. With the mandate from the General Assembly, Ohio EPA adopted Ohio Administrative Code 3745-31-05(A)(3)(ii) implementing the ten-ton BAT rule and began employing the rule exemption accordingly.

Ohio EPA did not immediately submit the statutory and regulatory revisions to U.S. EPA for inclusion to the SIP, but instead waited until January 2008. In June 2008, U.S. EPA communicated to Ohio EPA that the proposed SIP revision was incomplete and could not be processed. In the interim, Ohio EPA continued to enforce the BAT exemption. Given the opening, Sierra Club seized on the opportunity.

In September 2008, the Sierra Club filed a citizen suit under the Clean Air Act ("CAA") against Ohio EPA in the U.S. District Court for the Southern District of Ohio. The Sierra Club alleged that the refusal by Ohio EPA to make a BAT determination before issuing permits to small emitters constituted a "violation of an emission standard or limitation" within the meaning of the Clean Air Act's citizen-suit provision, 42 U.S.C. § 7604(a)(1). At first the district court disagreed with Sierra Club's allegations, determining that the CAA authorizes citizen suits against a state only to the extent the state itself emits pollutants in violation of an emissions standard, rather than against the state in its regulatory capacity.

However, Sierra Club brought an old appellate decision, United States v. Ohio Department of Highway Safety, 635 F.2d 1195, 1204 (6th Cir. 1980), to the attention of the court. The district court changed course, and decided based on that case that the Sierra Club could bring an action under the citizen-suit provisions of the CAA. Since the ten-ton BAT rule had not been incorporated into the Ohio SIP, according to Sierra Club and the district court, Ohio EPA was in violation of an emission standard or limitation. The district court ordered Ohio EPA to enforce BAT requirements against all emitters as those requirements existed in the Ohio SIP - judicially eliminating the ten-ton BAT rule.

Ohio EPA appealed the decision to the U.S. Court of Appeals for the Sixth Circuit. Interestingly, U.S. EPA joined the Sierra Club in filing briefs against Ohio EPA. On appeal, the issue squarely before the appellate court was whether Sierra Club could bring a citizen suit against Ohio EPA for the failure to enforce a rule or standard.

Essentially, Sierra Club argued that if the SIP requires Ohio EPA to administer the BAT regime, and Ohio EPA fails to administer it, then Ohio EPA has "violated" that requirement. Ohio EPA, on the other hand, citing Bennett v. Spear, 520 U.S. 154 (1997), argued that the term "violation," as used in the CAA, does not include the Director of Ohio EPA's failure to perform his duties, including his alleged failure to administer the BAT regime.

The Sixth Circuit agreed with Ohio EPA. The appellate court observed that the text and structure of the CAA does not permit citizen suits against state regulators as regulators — they can be sued under the CAA, but only if the state is emitting pollution itself. The appellate court further disregarded any reliance on Highway Safety, criticizing the Highway Safety court for failing to analyze all of the textual and structural interactions of the CAA and fully reviewing its legislative history.

More important, the Sixth Circuit noted that the understanding of the CAA and the state-federal regulatory relationship has come a long way since 1980. The appellate court, quoting Ellis v. Gallatin Steel Co., 390 F.3d 461, 467 (6th Cir. 2004), emphasized that "[t]he federal Clean Air Act is a model of cooperative federalism," and that the U.S. Supreme Court has ruled that the federal government cannot compel a state to enact or administer a federal regulatory program.

The Sixth Circuit determined that Highway Safety is no longer good law — but stated it far more poetically. The court mused: "In summary, Highway Safety is a bottle of dubious vintage, whose contents turned to vinegar long ago, and which we need not consume here."

Based on this conclusion, the appellate court decided that it was inappropriate for the district court to order Ohio EPA to disregard the ten-ton BAT rule and enforce BAT requirements against all emitters, even those that emitted ten tons or less.

However, all is not over with the ten-ton BAT rule. The appellate court offered for consideration the fact that the CAA provides U.S. EPA several methods to encourage compliance with what it believes may be the failure of a state to enforce a SIP or permit program. Among the methods noted by the court include U.S. EPA ordering regulated entities to comply with the BAT requirement in the SIP, imposing administrative penalties for the failure to comply, or even filing a lawsuit against regulated entities for such failure. Moreover, the court noted U.S. EPA can administer the BAT requirement itself. However, above all, the Sixth Circuit emphasized the structure and intent of the CAA encouraged U.S. EPA to engage states directly to address these issues cooperatively.

In a parting shot to U.S. EPA, the court offered one final observation. It detailed how U.S. EPA can force a state into compliance after cooperative efforts have failed, including imposing sanctions against a state, such as the withdrawal of a state's highway funds. The court then implied that U.S. EPA's time would have been better spent cooperatively working with Ohio EPA instead of filing amicus briefs in support of Sierra Club - but that if Sierra Club thought that U.S. EPA was not doing its job, Sierra Club itself would have recourse - by suing U.S. EPA.

In the end, Sierra Club's initial viniferous result in U.S. District Court ultimately turned to bitter vinegar in the U.S. Court of Appeals. What now happens to that vinegar remains to be seen, however. Sierra Club may further appeal to the U.S. Supreme Court. Alternatively, U.S. EPA may begin to use some of its tools under the CAA to compel Ohio EPA to comply in the manner it thinks appropriate - perhaps with some legal inducement by Sierra Club.

As the case of the ten-ton BAT rule continues, it remains important for manufacturers to keep apprised of the status of the rule, and to seek good counsel as to how legal challenges may impact the effectiveness of the rule.

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