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W.R. Grace & Co. v. EPA: An Arbitrary Outcome

By Andrea Issod*

In W.R. Grace & Co. v. U.S. Environmental Protection Agency, the Third Circuit ruled that an EPA emergency order to clean up an ammonia plume in a public water system was arbitrary and capricious although the agency based the order upon the recommendations of a technical study team that included representatives from Grace and the EPA. This unsavory result lends support for modification of the unpredictable "arbitrary and capricious" review standard that governs judicial review of agency decisions.

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And since I have the floor, thanks to my wonderful family for all of their support.
American environmental laws, including the Safe Drinking Water Act (SDWA), often contain special provisions that give the Environmental Protection Agency (EPA) flexibility to act quickly in response to emergency situations. When an ammonia plume threatened to contaminate a public water system in Lansing, Michigan, the EPA exercised its emergency authority under the Safe Drinking Water Act, ordering W.R. Grace & Co. (Grace) to undertake specific measures to contain and eventually remove the plume. The case that resulted from Grace’s challenge to this order, W.R. Grace & Co. v. U.S. Environmental Protection Agency,1 (W.R. Grace) provides two important lessons. First, administrative law’s arbitrary and capricious review standard fails to provide predictable or satisfying results, especially when an agency’s authority to act quickly in emergencies is challenged. Second, the EPA should be wary of entering into friendly agreements with polluters that may compromise its mission of protecting public health.

After providing the factual background of the Third Circuit’s decision in W.R. Grace in section I, section II provides an introduction to emergency provisions in the Safe Drinking Water Act. Section III summarizes the arbitrary and capricious standard, which guides judicial review of agency fact-findings in issuing orders, and then details the Third Circuit’s application of the standard in the W.R. Grace opinion. Section IV analyzes the opinion, arguing that the court distorted the statute’s language to reach a result that conflicts with the tenet of judicial deference to agency actions and the EPA’s broad emergency powers. This section concludes that the court overstepped its authority by scrutinizing the record too closely. Section V provides two recommendations in response to the W.R. Grace decision. First, courts should be especially deferential to agency actions under emergency provisions so that agencies can respond effectively to emergencies. Second, the EPA should deal with the polluting parties that it regulates at arm’s length. Finally, section VI ends on an upbeat note - despite the W.R. Grace decision, the ammonia plume never contaminated Lansing’s drinking water.

1. 261 F.3d 330 (3d Cir. 2001).
I. W.R. GRACE BACKGROUND

In *W.R. Grace & Co. v. U.S. Environmental Protection Agency*, Grace challenged an EPA emergency order issued under SDWA provisions. The Third Circuit Court of Appeals vacated the order and remanded the case, finding that the EPA’s determinations supporting the order were arbitrary, capricious, and not supported by a rational basis.

Ammonia that originated at a Grace fertilizer plant contaminated the Saginaw aquifer, which provides drinking water to 180,000 people in the City of Lansing, Michigan, and in thirteen other neighboring public water systems. Monitoring of the aquifer during the cleanup of an adjacent Superfund site had been proceeding under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), but the Michigan Department of Environmental Quality—concerned that the aquifer’s ammonia level might endanger public health as the plume moved closer and closer to the wells—contacted the Safe Drinking Water Branch of the EPA in May 1998. The EPA agreed with the State that excess ammonia in drinking water "could lead to excess nitrification and microbial growth that could cause noncompliance with a number of Federal and State regulations and pose a threat to the public’s health."

Water from the Saginaw Aquifer is treated at the Dye Water Conditioning Plant (Dye Plant) prior to distribution to Lansing residents. The Dye Plant’s water treatment process is carefully calibrated because excess ammonia in source water could cause a number of problems. Technicians introduce specific ratios of ammonia and chlorine, which form chloramines, to the water in order to kill bacteria. If the plant’s intake contains excess ammonia, more chlorine needs to be added, resulting in increased concentrations of disinfectants and by-products. Excess ammonia also can be transformed into nitrates and nitrites, which can cause serious illnesses in infants. In turn, the nitrates and nitrites

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2. *Id.*
3. *Id.* at 333.
4. *Id.* at 341-42.
10. *Id.*
12. *Id.* at 13. The EPA argued that excess disinfectants are a violation of federal law. *Id.*
13. *Id.* Excess nitrates and nitrites are also disallowed by federal regulation. *Id.* (citing 40 CFR § 141.62).
could decrease chloramine levels, which can result in dangerous increases in the bacteria count. Finally, excess ammonia could also corrode lead and copper in the distribution system, adding these toxins to the drinking water in the process.

In response to the urgency of the potential threats to public health as the ammonia plume moved closer to more wells, the EPA reacted swiftly. On February 26, 1999, the agency issued an emergency order requiring Grace to clean up ammonia levels in the Saginaw aquifer to a level of 0.5 mg/l and replace drinking water lost due to the 1997 closure of ten municipal wells located closest to the ammonia contamination. Upon Grace’s request, however, the EPA withdrew this order on April 12, 1999, and agreed to issue a new order based upon the findings of the Saginaw Aquifer Technical Evaluation Team (SATET). This cooperative team included representatives from Grace, the EPA, the Lansing Board of Water & Light (Lansing Board), which operates the Dye Plant, and the Michigan Department of Environmental Quality.

On July 29, 1999, after the SATET completed its study and issued a report, the EPA issued a second emergency order based upon its findings. The order required both long-term and short-term measures. As a long-term measure, Grace was required to install extraction wells or equivalent technology by January 1, 2003 to reduce ammonia levels in the aquifer to 1.2 mg/l over the long term. More immediately, Grace was required to ensure in the short term that the “combined influent ammonia concentrations of the Dye Plant do not exceed 1.2 mg/l, or fluctuate by more than 0.2 mg/l within a 24 hour period,” thereby limiting what entered the Dye Plant treatment facility. These measures represented a combination of two approaches discussed in the SATET report.

Grace did not agree to SATET’s final recommendations, which served as the basis for EPA’s July 29th order, and challenged the EPA’s decision to issue the order.

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14. Id. (a violation of 40 C.F.R. § 141.63).
15. Id. (a violation of 40 C.F.R. §141.80).
16. W.R. Grace, 261 F.3d at 335.
17. Martin, supra note 8, at 1A.
18. W.R. Grace, 261 F.3d at 335.
19. Id.
20. Id. at 337.
21. Id.
22. SATET’s recommended Approach 1 involved pumping contaminated water from the aquifer before it reached the city’s wells. Approach 2 suggested two different methods for keeping ammonia levels at 1.0 mg/l and preventing spikes greater than 0.2 mg/l: “blending” water from wells with large ammonia concentrations with purer wells or shutting down contaminated wells and drilling new replacement wells. Id. at 335-36.
23. Id. at 337. EPA claimed that Grace expressly concurred in SATET’s final recommendations. Id.; Brief for Respondent with Joint Appendix Citations, supra note 5, at 3, 5.
II. THE SAFE DRINKING WATER ACT'S EMERGENCY PROVISION

A. The Safe Drinking Water Act

According to Environmental Protection Agency, "[t]he United States has one of the safest water supplies in the world." This is due in part to the 1974 Safe Drinking Water Act, which regulates treatment of the nation's public water supplies by setting health-based standards for drinking water contaminants. Although this process is inherently inexact, EPA generally works with the states, the public, and water suppliers to set contaminant standards in congruence with the "essentially preventive purpose" of SDWA. Every public water system in the U.S. is tested periodically for compliance with SDWA's standards.


Emergency provisions permit agencies to respond quickly to crises by circumventing routine, time-consuming procedures. Congress enacted these emergency provisions in order to "confer completely adequate authority to deal promptly and effectively with emergency situations." EPA was granted power "to deal promptly and effectively with emergency situations which jeopardize the health of persons" instead of following normal standard-setting procedures. Section 1431 of SDWA authorizes the Administrator to "take such actions as [she] may deem necessary" if a contaminant "which may present an imminent and substantial endangerment to the health of persons" is present in or is "likely to enter a public water system." Congress intended SDWA to

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26. Id.
28. RODGERS, supra note 27, § 7.5 (1988) (including the Clean Air Act, oil pollution, and the Clean Water Act). In addition to the Safe Drinking Water Act's emergency provision, three other major environmental statutes contain similar emergency provisions: the Clean Air Act (CAA), 42 U.S.C. § 7603 (2003), the Clean Water Act (CWA), 33 U.S.C. § 1364 (2003), and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973 (2003). In general, emergency provisions allow the EPA Administrator to (1) take whatever actions she deems necessary (2) when there is an "imminent and substantial" endangerment, but the scope of their protections, the amount of information necessary to trigger the Administrator's action, and the consultation requirement with state and local governments differs.
32. Id.
allow administrators to issue orders "to obtain relevant information, . . . to require the issuance of notice, . . . to prevent a hazardous condition from materializing, to treat or reduce hazardous situations once they have arisen, or to provide alternative safe water supply sources."\(^3\)

The legislative history of SDWA paints a clear picture of the intended meaning of the phrase "imminent and substantial endangerment."

The Committee intends that this language be construed by the courts and the Administrator so as to give paramount importance to the objective or protection of the public health . . . . This means that "imminence" must be considered in light of time it may take to prepare administrative orders or moving papers, to commence and complete litigation, and to permit issuance, notification, implementation, and enforcement of administrative or court orders to protect the public health.\(^3\)

In keeping with congressional intent, courts have interpreted SDWA's emergency provision quite broadly. In *United States v. Price*,\(^3\) the Third Circuit evaluated the possible injunctive relief available under the SDWA's emergency provisions, finding that Congress "sought to invoke nothing less than the full equity powers of the federal courts in the effort to protect public health, the environment, and public water supplies from the pernicious effects of toxic wastes."\(^3\)

Following *Price*, the Fourth Circuit upheld EPA's broad powers under Section 1431 in *United States v. Waste Industries, Inc.*\(^3\) and *Trinity American Corp. v. EPA.*\(^3\) In *Waste Industries*, the court confirmed that an "imminent and substantial endangerment" is not "specifically limited to an 'emergency.'"\(^3\) More recently, in *Trinity*, the court quoted the legislative history of Section 1431 in support of its holding that SDWA's emergency provision grants the Administrator broad powers to act even when she believes only that there is an imminent risk of harm to public health.\(^4\) Courts must evaluate challenges to an EPA emergency order "with circumspection, recognizing such challenges result in a 'diversion of time and resources as well as the risk that a court will err in evaluating

\(^{33}\) H.R. REP. NO. 93-1185.
\(^{35}\) 688 F.2d 204 (3d Cir. 1982).
\(^{36}\) Id. at 214.
\(^{37}\) 734 F.2d 159 (4th Cir. 1984).
\(^{38}\) 150 F.3d 389 (4th Cir. 1998).
\(^{39}\) 734 F.2d at 165.
the positions of [EPA]... on technological and scientific questions at the outer limits of the court's competence.\textsuperscript{41}

Before the \textit{W.R. Grace} decision, SDWA cases had been limited to review of EPA's authority to take emergency action under Section 1431, and had not reviewed the reasonableness of the Administrator's factual determinations under the arbitrariness standard. In \textit{W.R. Grace}, the court conducted this second type of inquiry, scrutinizing the agency's record for adequate support. The \textit{W.R. Grace} Court did not question the agency's power to undertake the action, but instead evaluated only the factual support for EPA's particular choices.\textsuperscript{42}

III. JUDICIAL REVIEW OF EPA'S EMERGENCY ORDER IN \textit{W.R. GRACE}

A. The APA, the Arbitrariness Standard and the Hard Look Doctrine

The Administrative Procedure Act ("APA") sets standards for judicial review of agency decisions.\textsuperscript{43} Under the APA, a final agency action, such as the EPA order against Grace, is subject to judicial review.\textsuperscript{44} For informal agency decisions, including administrative orders, the APA mandates that a reviewing court afford the agency a great amount of discretion, reversing only if the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."\textsuperscript{45} As articulated by the Supreme Court in \textit{Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.},\textsuperscript{46}

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and

\textsuperscript{41} Id. (quoting United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 989 (2d Cir. 1984)).

\textsuperscript{42} The court did provide a warning to EPA, however, in a wordy footnote. The EPA states in a conclusory fashion at the outset of the July 29 Order – but not under its formal Findings of Fact – that ammonia in the Saginaw aquifer 'may present an imminent and substantial endangerment to the health of persons... [We] caution that... for the sake of clarity it would be better advised to make a finding of "imminent and substantial endangerment" under its formally articulated Findings of Fact. We also caution the EPA not to assume that the inclusion of these "magic words," without any support in the record to demonstrate that the finding is not arbitrary and capricious, will be sufficient to sustain an order under SDWA.

\textit{W.R. Grace}, 261 F.3d at 340 n.3.


\textsuperscript{44} SDWA's provisions also explicitly permit judicial review. 42 U.S.C. § 300j-7(a)(2) (2003).

\textsuperscript{45} 5 U.S.C. § 706(2)(a). Questions of fact in formal adjudication or rulemaking may be reviewed under the "substantial evidence" test, 5 U.S.C. § 706(2)(e), but courts also sometimes apply the "arbitrary and capricious" standard to these cases. JACOB A. STEIN ET. AL, \textit{ADMINISTRATIVE LAW} § 51.01 (2002).

\textsuperscript{46} 463 U.S. 29 (1983).
articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." 47 Although the agency needs only a rational basis for its decision, the court must perform an in-depth inquiry into the agency’s decision-making process to ensure that the agency considered all of the applicable information.

The arbitrariness standard has come under intense criticism for its inherent contradictions and lack of predictability. Professor Charles Koch argues that courts sometimes perform an in-depth review of both the record and the decision itself, a review incompatible with the “arbitrary” standard:

[C]ourts applying this formulation tend to . . . slip into a more active role than was intended for arbitrariness review. They tend to forget the counterpoise admonishment in the Supreme Court’s formulation that the standard is a narrow one. Whereas under the arbitrariness instruction the reviewing court is to inquire closely into the administrative record and the circumstances surrounding the decision, they are to reverse only if they find that the risk of error is extremely high. The Supreme Court’s formulation [in Overton Park], however, leads courts to undertake an in-depth inquiry and to evaluate the decision very critically. 48

A textbook co-authored by Supreme Court Justice Stephen Breyer notes that “the intensity of judicial review unquestionably varies in practice . . . . [T]he notion of arbitrary or capricious review embodies a range of standards; it is not applied uniformly.” 49 Thus, although courts and academic authorities continue to define the arbitrary and capricious standard as the “narrowest scope of judicial review,” 50 in practice, courts sometimes give only a small amount of deference to agency findings of fact, resulting in largely “arbitrary” judicial outcomes. 51

To confuse matters further, courts sometimes employ the common law “hard look” doctrine in concert with arbitrariness review. Certain types of agency actions, such as a change in policy direction, will warrant a hard look review. 52 Credit for the doctrine is given to Judge Levanthal, who set forth the test in Greater Boston Television Corp. v. FCC, 53 stating that an agency decision should be overturned if “the court becomes

47. Id. at 42.
49. STEIN, supra note 45, § 51.03.
50. RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 7.3.2 (2002).
52. 444 F.2d 841 (D.C. Cir. 1970).
aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."\textsuperscript{54} \textit{Motor Vehicle Manufacturers Ass'n, Inc. v. State Farm Mutual Automobile Insurance Co.},\textsuperscript{55} where the court found that the agency's failure to consider an important factor in rescinding a rule was arbitrary and capricious,\textsuperscript{56} remains the most cited example of the hard look approach.\textsuperscript{57} Although the doctrine was originally intended to ensure that agencies take a hard look at particular issues, it often results in \textit{the courts themselves} taking a hard look into the agency's decision.\textsuperscript{58} Thus, hard look review often becomes far more searching than arbitrary and capricious review, in that courts require not just a \textit{rational} reason for agency action, but also a \textit{good} reason for it.\textsuperscript{59}

\textbf{B. W.R. Grace Majority Opinion}

After EPA issued the July 29\textsuperscript{th} SDWA emergency order against Grace, Grace immediately filed suit in the Third Circuit, charging that EPA's order was arbitrary and capricious.\textsuperscript{60} The court agreed with Grace, finding that EPA failed to provide a rational basis for its determinations that the 1.2 mg/l ammonia standard and the specified methodology of cleanup were necessary to protect the public health.\textsuperscript{61}

First, the court found that the EPA had not engaged in any technical study to establish the 1.2 mg/l standard.\textsuperscript{62} The court stated that the EPA's only justifications for this standard were that 1 mg/l ammonia concentrations "will ensure that the Dye Plant can meet its disinfectant levels" and that the Dye Plant could tolerate 0.2 mg/l fluctuations.\textsuperscript{63} EPA argued that the SATET had in fact performed a technical study, which was summarized in the record:

The SATET met in Lansing on April 8, 15, and 29, 1999. A technical workshop meeting that included the SATET and an additional technical representative from Grace was held in Lansing on May 5, 1999. In each of the meetings the SATET endeavored to understand the data available,

\textsuperscript{54} \textit{Id.} at 851.
\textsuperscript{55} 463 U.S. 29 (1983).
\textsuperscript{56} \textit{Id.} at 43.
\textsuperscript{57} KOC\textit{h, supra} note 48, §10.5.
\textsuperscript{58} \textit{Id.} For the clearest explanation of the concepts of arbitrariness review and the hard look doctrine, see \textit{id.} §10.4 (arbitrariness), §10.5 (Hard Look).
\textsuperscript{59} AMAN, \textit{supra} note 42, § 13.10.2.
\textsuperscript{60} \textit{W.R. Grace}, 261 F.3d at 337.
\textsuperscript{61} \textit{Id.} at 340.
\textsuperscript{62} \textit{Id.} at 341.
\textsuperscript{63} \textit{Id.}
recommend additional data collection needed, and discuss the alternative ways the mission could be met.64

The court rejected this argument, stating that “this passage in no way explains how or why” the numerical standard was set,65 and concluded on this basis that the EPA’s order was arbitrary and capricious.66

Second, the court found that the EPA did not have a rational basis for concluding that its chosen methodology of capturing the ammonia and removing it from the aquifer before it reached the wells was necessary to protect the public health.67 The court relied on evidence that the SATET team, before issuance of its final report, and disagreed as to whether the type of remediation (Approach 1) was necessary.68 Although the final report recommended Approach 1, the court stressed that this does not mean that Approach 1 is the “only way” to protect the Lansing’s public’s health as the EPA’s July 29 Order maintains. Moreover, we need more than a conclusory statement from SATET to determine that the EPA did not arbitrarily and capriciously settle on Approach 1 as the only method sufficient to protect the public health.69

The court also found that SATET adopted Approach 1 primarily due to the Lansing Board’s opposition to the other contemplated approaches, and it concluded that this reasoning did not constitute a rational basis.70

C. Judge Mansmann’s Dissent

One judge dissented from the majority opinion, stating that “[t]he high degree of deference we are to accord the EPA is a cornerstone to the EPA’s power, enshrined in SDWA, ‘to protect the public health, the environment, and public water supplies from the pernicious effects of toxic wastes.’”71 Judge Mansmann concluded that the EPA did in fact consider the “relevant factors” and “articulated a basic rational connection” in issuing its July 29 emergency order.72

Judge Mansmann noted that EPA’s July 29 order might have suffered from “poor draftsmanship,” but that it nonetheless contained sufficient evidence to support the agency’s decision.73 The judge stressed

64. Id.
65. Id.
66. Id. at 342.
67. Id. at 335, 342.
68. Id. at 342. See supra note 22 for a description of the SATET’s approaches.
69. Id.
70. W.R. Grace & Co., 261 F.3d at 344. See infra notes 97-99 and accompanying text.
71. Id. at 345 (Mansmann, J., dissenting) (quoting United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982)).
72. Id.
73. Id.
that the court must apply "a presumption of correctness to the EPA," especially since environmental toxicology data is within the special expertise of the agency and not the reviewing court.\textsuperscript{74} Listing the relevant evidence, she determined that SATET "examined and reviewed a substantial corpus of information" in a short period.\textsuperscript{75} Deferring to EPA's "expertise and experience," Judge Mansmann concluded that the EPA order was not arbitrary or capricious and that a generally supported standard, such as the 1.0 mg/l and 0.2 mg/l standard, need not have a "specific and identical source in the record."\textsuperscript{76}

IV. ANALYSIS OF THE W.R. GRACE DECISION

A. Necessary to Protect Public Health

SDWA Section 1431 states that the EPA Administrator may "take such actions as [s]he may deem necessary in order to protect" public health.\textsuperscript{77} In W.R. Grace, the court interpreted this language to mean that each of EPA's selected methods of remediation must be necessary to protect the public health.\textsuperscript{78} In other words, the court dubbed EPA's order arbitrary because its requirements were not the only possible solutions to the ammonia problem.

The EPA set the ammonia standard to 1.2 mg/l because concentrations of 1.0 mg/l could be tolerated by the Dye Plant's systems without upsetting chloramine levels, and the plant could process fluctuations of up to 0.2 mg/l.\textsuperscript{79} The court dismissed this explanation, stating that this "is not a finding that no greater ammonia concentration can be tolerated by the Dye Plant without endangering the public's

\textsuperscript{74} Id. Indeed, under the arbitrary and capricious review standard, there is a line of cases that stresses that a court must be especially deferential when examining decisions that are within an agency's area of special expertise. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87 (1983) (holding EPA's decision that permanent storage of nuclear wastes would have "no significant environmental impact" under NEPA was not arbitrary or capricious); Southwestern Pa. Growth Alliance v. Browner, 121 F.3d 106 (3d Cir. 1997); Tri-Bio Labs., Inc. v. United States, 836 F.2d 135 (3d Cir. 1987).

\textsuperscript{75} W.R. Grace & Co., 261 F.3d at 346.

\textsuperscript{76} Id. at 347.

\textsuperscript{77} SDWA, 42 U.S.C. § 300i(a) (2003).

\textsuperscript{78} 261 F.3d at 340 ("The EPA has failed to provide a rational basis for its determination that a cleanup standard of 1.2 mg/l is necessary to protect the [public health]...[or that] Approach 1 is necessary to protect the health of those persons.") In evaluating the 1.2 mg/l standard, the court stated that the EPA's evidence "fails to provide support for its conclusion that a 1.2 mg/l standard would be necessary to protect Lansing's public health." Id. at 341. Addressing Approach 1, the court again utilized the necessity test. "The EPA has also failed to articulate a rational basis for its conclusion that Approach 1 is necessary to protect the health of the Lansing Public." Id. at 342.

\textsuperscript{79} Id. at 341.
As for EPA's conclusion that the Dye Plant could handle 0.2 mg/l spikes, the court stated that this finding "in no way determines whether the Dye Plant could handle spikes greater than 0.2 mg/l." Thus, the court was not concerned that the 1.2 mg/l standard would in fact protect the public health or that EPA had sufficient reasons for setting this particular standard.

The EPA argued that it chose a combination of Approaches 1 and 2 after fully considering each approach in the SATET report and evaluating information from SATET presentations and relevant correspondence. The court determined that this explanation did not constitute a rational basis for choosing Approach 1 because it was "hardly clear from SATET's report that the only way to protect the public health is through the removal of excess ammonia," and "there was sharp disagreement among the members of SATET as to whether this form of remediation would be necessary." Again, the court was not concerned about whether or not the selected approaches would not accomplish the objective of public health protection.

The court's inquiry into whether EPA's choices were the only possible solutions was improper. Under SDWA, the Administrator "may take such actions as [s]he may deem necessary to protect" public health. In *W.R. Grace*, the court contorted the phrase "as [s]he may deem necessary" into the objective standard "that are necessary." Under this reading, the court required that every EPA action under the emergency provision be essential; it must be the only conceivable course of action.

Neither the arbitrary and capricious review standard nor SDWA Section 1431 require that an agency's decision be the only possible solution. Upon review of an agency decision, a court need only "determine whether [the agency] considered the relevant factors and articulated a rational connection between the facts found and the choice made." In many situations, including the case at hand, reasonable minds might choose different solutions after examining all the pertinent information. It is well established that a court should not substitute its opinion for that of the agency, yet this is precisely the role that the Third Circuit assumed by requiring that each of the EPA's selected methods of remediation be the only valid solution. The court's decision does not

80. *Id.*
81. *Id.*
82. See supra note 22.
83. Brief For Respondent with Joint Appendix Citations, supra note 5, at 42.
84. *W.R. Grace*, 261 F.3d at 342.
comport with notions of judicial deference to the agency or with EPA's expansive powers under SDWA's emergency provisions.

B. Why Wasn't the Record Good Enough?

The purpose of judicial review of agency decisions is to impose a "check" on agency decision-making. The Administrative Procedure Act and the common law aim to ensure that agencies employ proper procedures to ascertain all the relevant facts before they make decisions. When an agency order is challenged, a court reviews only the record that the agency had before it at the time it made the decision. 

It appears that the W.R. Grace court was simply looking for numbers and diagrams to support the 1.2 mg/l standard. The SATET team "conducted a technical study of the Dye [Plant] to determine how much influent ammonia, as nitrogen, the Dye [Plant] could handle and still maintain adequate protection of human health and comply with current and future drinking water regulations," and concluded that 1.2 mg/l was the appropriate standard. This technical study included "briefings from Dye engineering personnel." Because there was "no technical study" to correspond with this statement actually included in the report, however, the court was not satisfied. In dismissing an outside consultant's study that EPA and SATET both relied on, which concluded that ammonia concentrations over 1.0 mg/l would adversely affect Dye Plant operations, the court stated that the report "does not provide a rational basis" for the order because it "provides no technical data or research."

The court also held that EPA's employment of Approach 1 had no rational basis because SATET's draft report stated that both Approaches 1 and 2 would be effective, and there were "no additional findings of fact" to explain why one was chosen over the other. The final report did state that Approach 1 was preferable because Approach 2 would require "complex operational changes." However, the court determined that because the draft report also took note of these complicated changes and

88. AMAN, supra note 52, § 13.1.
90. W.R. Grace, 261 F.3d at 338.
91. Id. at 340.
92. Id. at 346 (Mansmann, J. dissenting).
93. Id. at 341.
94. Id. at 342 n.4.
95. W.R. Grace, 261 F.3d at 343. It is noteworthy that the court examined SATET's draft report, but declined to take into account a study made by an outside consultant, see id. at 342 n.4., because "neither the July 29 Order nor SATET's final report purports to rely upon the recommendation in that report." Id.
96. Id. at 343.
still proposed Approach 2 as an effective solution, "[t]he only explanation for SATET's change in recommendation . . . appears to be the Lansing Board's opposition." 97 Under Approach 2, contaminants would first enter the drinking water system before treatment. The Lansing Board thought that this was "unacceptable," perhaps for reasons of "adverse public perceptions about the quality of source water." 98 Thus, the court held that SATET's support of Approach 1 was "primarily based on the Lansing's Board opposition to any of the other approaches," 99 a basis that the court found inadequate to support SATET's or EPA's decision.

In order to determine whether an agency has acted arbitrarily, courts review the decision-making record, assessing the same information as the agency. In W.R. Grace, the court was not satisfied with the evidence that the EPA utilized to support its decision. The court was not satisfied with the recommendations of a technical study team, which included representatives from the Dye Plant as well as all other interested parties. The court was not satisfied with the EPA's statements about the relative complexity of the approaches, nor with its (inferred) dependence on the preferences of the drinking water plant's operator.

The court overstepped the boundaries of the "arbitrary and capricious" test in this case by scrutinizing EPA's reasoning too closely. Acting under its emergency authority, EPA should not have needed to show hard numbers on paper in order to make a decision; additional technical studies should not always be required where protection of public health requires immediate action. In this case, the tolerance of the Dye Plant systems was well known to the plant's engineers, and the technical study team spent several days reviewing data before it decided on its recommendations. 100 If faced with more than one effective solution to an emergency, it is not irrational for an agency to choose one option

97. Id.
98. Id. at 344. The Lansing Board actually made its statement about "adverse public perceptions about the quality of the source water" in objecting to Approaches 3 and 4, id., but this was likely one of the reasons for its objections to Approach 2.
99. Id.
100. Judge Mansmann's dissent noted that

'The SATET met in Lansing on April 8, 15, and 29, 1999. A technical workshop meeting which included the SATET and an additional technical representative from W.R. Grace & Co. was held in Lansing on May 5, 1999. In each of the meetings the SATET endeavored to understand the data available, recommend additional data . . . needed, and discuss alternative ways the mission could be met.' Moreover, '[t]o develop an understanding of Dye [plant] operations, the SATET received briefings from Dye [plant] engineering personnel. Key information gained through these briefings included an understanding of the order of operation of the [Dye Plant] wells.'

Id. at 346 (Mansmann, J. dissenting).
over another because it is less complex and has the strong support of the local entity in charge of protecting the public's drinking water.\textsuperscript{101}

Additionally, a court "must generally be at its most deferential when reviewing factual determinations within an agency's area of special expertise."\textsuperscript{102} The \textit{W.R. Grace} Court failed to apply this heightened deference to the EPA. As the dissent pointed out,

where the agency decision turns on issues requiring the exercise of scientific judgment, as it does here, the court "must look at the decision not as a chemist, biologist or statistician that we are qualified neither by training, nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality."\textsuperscript{103}

The court was far from giving EPA's decision the regular standard of deference for arbitrariness review, and even further from giving it the increased deference normally bestowed upon an agency's technical decisions.

\section*{V. RECOMMENDATIONS}

\subsection*{A. A Call for Greater Deference to Emergency Orders}

The \textit{W.R. Grace} case presents a situation where a reviewing court should be especially deferential. The agency was reacting to an emergency: a plume of ammonia steadily creeping toward a city's drinking water wells. Speaking to the emergency order, the Lansing Board's spokesman stated it was "time to bite the bullet and do what needs to be done now, before [the plume] spreads."\textsuperscript{104} In an emergency, a court should expect an agency to make a rational decision based on the relevant factors, but it should evaluate the agency's decision in light of the urgency of the circumstances. In this vein, organizing a technical

\textsuperscript{101} While this is the author's opinion, thanks to Professor Brad Karkkainen for pointing out that even if the EPA's decision was rational, the agency is still required to explain why it chose one option over another. In \textit{W.R. Grace}, the court was not satisfied with the evidence that the chosen methodologies were sound or with the evidence of why one method was chosen over another.


\textsuperscript{103} \textit{W.R. Grace}, 261 F.3d at 345 (Mansmann, J. dissenting) (citing Ethyl Corp v. EPA, 541 F.2d 1, 36-37 (D.C. Cir. 1976)). Whether this case fits well into the line of cases in which the agency's scientific decisions are afforded heightened deference is unclear. \textit{See, e.g.}, Thompson Medical Co., Inc. v. FTC, 791 F.2d 189, 197 (D.C. Cir. 1986) ("The factual nature of the FTC's findings with respect to the aspirin claims and the FTC's expertise and experience in this area make its opinion very difficult to challenge."); Tri-Bio Labs, Inc. v. US FDA, 836 F.2d 135, 142 (3d Cir. 1988) (in evaluating scientific evidence in the drug field, the FDA possesses an expertise entitled to respectful consideration by this court). \textit{See generally} Thomas O. McGarity, \textit{Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA}, 67 GEO. L. J. 729 (1979) (describing different types of technical questions and evaluating some court's approaches to review).

\textsuperscript{104} Tim Martin, \textit{W.R. Grace & Co. seeks relief from order on local site}, LANSING ST. J. (Sept. 24, 1999) at 5B.
study team to obtain information about a plant’s systems from its engineers, rather than conducting an independent agency investigation, is surely a rational method. Similarly, where two approaches would be effective, choosing a less complex, more widely accepted alternative is definitely reasonable.

W.R. Grace illustrates the need for courts to approach review of emergency orders with heightened deference. It proves that the arbitrary and capricious test, as currently misapplied, is not an appropriate level of review in situations where agencies must act quickly. In order to protect the public health from an imminent hazard, courts should understand that agencies have no time to collect reams of data. A court cannot expect an agency will generate a detailed decision-making record comparable to that generated in a normal rulemaking process. A court must consider agencies’ actions in light of their timeframe for development.

W.R. Grace & Co. is not the first instance of arbitrary review producing a poor result. The standard’s effect on agency behavior is greatly criticized, and there is ample academic discourse proposing changes to the current law. “[N]o matter how much care the agency believes it has given to a decision, the agency faces uncertainty about whether the reviewing court will find that the agency performed its decision-making task adequately.” This uncertainty may compel an agency to spend extraordinary amounts of time and resources ensuring that its decision-making process will survive judicial review. Studies show that, because of this uncertainty, agencies pass up on opportunities to enact important regulations.

The W.R. Grace decision will frustrate EPA’s ability to act quickly in emergencies, a result contrary to public health considerations as well as congressional intent. Looking at the big picture, the outcome is wrong on many levels. In response to the public health threats caused by the toxic chemicals that pollute our air, water, and soil, Congress delegated broad powers to EPA so it could prevent environmental disasters like Love Canal. Congress enacted the APA to impose an extremely limited

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105. By ‘misapplied,’ I mean that some courts apply the standard haphazardly. See supra Part IVA.
107. Seidenfeld, supra note 106, at 492.
108. Id. at 487 & n.25.
judicial check on agency discretion, but after forty-odd years, the judiciary has created a doctrine that can be used to justify a very strict level of review. In *W.R. Grace*, the court disregarded the distinct powers that Congress delegated to agencies and courts through emergency provisions and the APA, respectively. Because the current Congress is unlikely to enact a provision for heightened deference to emergency orders, hopefully a court will have the opportunity to restore the proper balance of power in the future.

B. A Practical Lesson: The EPA Should be Wary of Friendly Negotiations with Adverse Parties

EPA’s first emergency order, dated February 26, 1999, required Grace to meet a performance standard—i.e., to reduce ammonia concentrations in the aquifer to 0.5 mg/l—and to replace the drinking water lost due to the shutdown of ten of Lansing’s water wells. At Grace’s request, EPA agreed to withdraw this order and issue a new order after a cooperative team evaluated different remediation options. From Grace’s perspective, this was an extremely advantageous result. The July 29th order was significantly less burdensome than the February 26th order. It permitted a higher concentration of ammonia (1.2 mg/l). It addressed ammonia contamination only in the capture zone of the Dye Plant wells instead of the entire aquifer, and it did not require drinking water replacement. Even though EPA rescinded its first emergency order at Grace’s request, tolerated delay in order to seek a mutually agreeable solution, followed Grace’s team’s suggestions, and ultimately issued a second order more favorable to the company, Grace was still not happy and sought redress in federal court. By allowing generous concessions to Grace, a company with a notorious environmental record, EPA strayed from its mandate to protect the public from contaminated drinking water. EPA was proceeding under SDWA authorization and therefore should have been primarily concerned with protecting public health. From EPA’s position, Grace should have been considered an adverse party even before they filed suit because it was responsible for pollutants that posed

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111. Id.


a threat to public health. EPA should have been hesitant to enter into a deal with Grace that did not further protect public health.

Hopefully, this case will serve as a lesson to EPA and other administrative agencies to beware of entering into friendly arrangements with regulated industries. It is admirable for EPA to work with polluters to find mutually beneficial solutions, which will in turn lead to increased compliance, but such cooperation should always be undertaken at arm's length. For an agency to fulfill its statutory duties, it must avoid costly, time-consuming litigation. To prevent suits, EPA could bargain with parties that wish to enter into deals. In response to Grace's request to rescind the first emergency order and form a cooperative evaluation team, EPA could have conditioned its agreement on Grace's consent to forego a challenge to any subsequent emergency order based on the team's findings. By approaching adverse parties as such, EPA can better protect its constituency — the public.

EPILOGUE - LANSING'S DRINKING WATER IS SAFE

In an interesting addendum to the facts presented in the Third Circuit's opinion, Grace was actually cleaning up the ammonia from the Saginaw aquifer at the time it filed a claim against the SDWA order in federal court. Grace spokesman remarked that "we have an active cleanup under way in cooperation with the EPA. The current order is a little different from our understanding of the project, so we've asked for a review." The ammonia plume never contaminated Lansing's water treatment system, and Grace completed the interim cleanup measures in accordance with EPA's wishes. Goodyear, who bought the Motor Wheel Superfund site where the ammonia originated, is currently drilling the replacement wells, which should be completed in several years. This result is certainly perplexing. Why would Grace waste so

115. Martin, supra note 104, at 5B.
116. Id.
117. Telephone Interview with Susan Perdomo, EPA Region 5 Attorney (Dec. 4, 2002).
118. Martin, supra note 104, at 5B.
119. Telephone Interview with Susan Perdomo, supra note 117; Steven C. Nadeau, Court Declines to Resolve PRP Committee Meltdown, 12 MICH. ENVT'L. COMPLIANCE UPDATE 6 (Sept., 2001). When Goodyear bought Grace's old fertilizer site, the parties entered into a real estate agreement that allocated liability for cleanup of environmental contamination, and Goodyear and Grace litigated the allocation of costs associated with the SDWA emergency order against Grace. Telephone Interview with Susan Perdomo, EPA Region 5 attorney, supra note 117; Steven C. Nadeau, Court Declines to Resolve PRP Committee Meltdown, 12 MICH. ENVT'L. COMPLIANCE UPDATE 6 (Sept., 2001). Goodyear was held to be responsible for eighty percent of the cleanup costs. Steven C. Nadeau, Court Declines to Resolve PRP Committee Meltdown, 12 MICH. ENVT'L. COMPLIANCE UPDATE 6 (Sept., 2001). Goodyear has begun construction on the new extraction wells, and the final consent decree has recently been open for comment.
much time and money in litigation after Goodyear agreed to proceed with the order?

One possibility is that Grace was primarily concerned with EPA's power to order long-term measures under emergency provisions, a power that could affect Grace in the future. The issue was extensively briefed but not addressed in the opinion. The court may have used the arbitrary and capricious analysis to duck a more important question that it did not wish to address. In a suspicious footnote, the court stated:

We have carefully considered whether the EPA would ever have the authority to order long-term remediation of an aquifer pursuant to section 1431 of SDWA when alternative interim measures are sufficient to abate the immediate threat to the public. While there exists substantial support for the view that, under those circumstances, the EPA should order only interim measures under SDWA and pursue long-term remediation pursuant to CERCLA, we do not decide this issue here.

This troubling question lingers, but the Third Circuit's *W.R. Grace* opinion stands, illustrating that the "arbitrary and capricious" review standard does not provide meaningful restrictions on whether or not a court can overrule an agency and leaves agencies with little guidance on how to make their decisions. Providing courts with a more structured framework for review, such as this article's suggestion for heightened deference in emergencies, will ease administrative burdens and help agencies to serve the public that they are charged with protecting.

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121. *W.R. Grace*, 261 F.3d at 340 n.3.