June 2003

Instructing the EPA How to Regulate Vehicle Emmissions

Reda M. Dennis-Parks

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z388R8F

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcerq@law.berkeley.edu.
Instructing the EPA How to Regulate Vehicle Emissions

In *Ethyl Corp. v. Environmental Protection Agency*, the Court of Appeals for the District of Columbia considered whether the Environmental Protection Agency (EPA) can assign its power to establish tests for new automobiles' emissions to the individual automobile manufacturers. Ethyl Corporation (Ethyl) claimed that this violated the Clean Air Act. The court agreed, finding that such delegation does not comply with the statutory directive to establish such tests through agency regulation, and required the EPA to establish new testing methods in compliance with that directive.

Title II of the Clean Air Act sets up a program to regulate automobiles and their fuels in order to reduce harmful emissions. Section 206 of the Act provides that, before a manufacturer may introduce a new vehicle into the market, it must apply for and obtain a certificate from the EPA indicating that the vehicle complies with the requirements of the Act including applicable regulations. The EPA must “test, or require to be tested in such manner as it deems appropriate, any new motor vehicle or new motor vehicle engine submitted by a manufacturer to determine whether such vehicle or engine conforms to the regulations.” The statute further provides that the EPA must “by regulation establish methods and procedures for making tests under this section.”

Under the EPA’s regulations, in order to obtain a certificate of approval for a new vehicle, an automobile manufacturer must show that the vehicle’s emissions control system will continue to comply with emissions standards for the length of the vehicle’s useful life. This is essentially a measure of the durability of emissions control systems. Before 1993, the EPA had one standardized test for durability, known as

---

Copyright © 2003 by the Regents of the University of California

1. 306 F.3d 1144 (D.C. Cir. 2002).
2. Id. at 1146.
3. Id. at 1150.
5. Id. § 7525(a).
6. Id. § 7525(a)(1).
7. Id. §7525(d).
8. Ethyl Corp., 306 F.3d at 1146 (citing 40 C.F.R. § 86.1848-01 (2000)).
the Automobile Manufacturer's Association (AMA) driving cycle. The AMA driving cycle involved driving the prototype vehicle over a fifty-thousand mile course in order to ensure that the vehicle would still comply with emission standards even after undergoing considerable use. In 1993, the EPA adopted the Revised Durability Program (RDP). Under the RDP, the EPA retained the AMA driving cycle as the standard procedure, but permitted individual manufacturers to develop their own alternate tests, provided that the manufacturer: a) obtained EPA approval for each test, and b) performed tests to check the accuracy of the test's emissions deterioration predictions. The EPA approved these alternative tests on a case-by-case basis.

In May of 1999, the EPA adopted the Compliance Assurance Program (CAP 2000). Under this program, the EPA eliminated the AMA driving cycle as the standard emissions test. Instead, manufacturer tests replaced the driving cycle entirely. The EPA did require however that the manufacturer-proposed test be able to "effectively predict the expected deterioration of candidate in-use vehicles over their full and intermediate useful life," and be "consistent with good engineering judgment."

The petitioner, Ethyl, is a manufacturer of fuel additives for motor vehicles. Ethyl brought suit in response to the adoption of the CAP 2000, claiming that it does not fulfill the Clean Air Act's requirement that the EPA "by regulation establish methods and procedures for making tests." The EPA, argued that the merits of the case should not be considered because Ethyl lacked both constitutional and prudential standing.

The court first addressed the parties' arguments regarding constitutional standing. Under Article III, a party seeking judicial relief must show: 1) that it has suffered an "injury in fact;" 2) that the injury is caused by or may reasonably be traced to the action of the defendant; and 3) that a favorable decision will likely remedy the injury. Ethyl
claimed that, as a maker of fuel additives, it had Article III standing because it had an interest in understanding the test methods and procedures by which the EPA certified new motor vehicles’ emissions.\textsuperscript{23} With previous EPA programs, information concerning vehicle durability tests was available to the public, and Ethyl used this information in order to improve its products.\textsuperscript{24} Under CAP 2000 such information was not available because individual manufacturers developed the tests and the EPA adopted them in closed-door procedures.\textsuperscript{25}

In addition, the Clean Air Act prohibits the use of any fuel or fuel additive that is not “substantially similar” to those used in testing unless a Section 211(f) waiver is obtained.\textsuperscript{26} Ethyl argued that if tests are not publicized, then it is impossible to comply with this mandate, since only the automobile manufacturers, and not the fuel manufacturers, would know what fuels were being used in the tests.\textsuperscript{27}

The EPA’s arguments focused primarily on Ethyl’s ability to obtain a Section 211(f) waiver, claiming that the waiver itself precludes harm to the petitioner.\textsuperscript{28} The EPA did not address the importance of obtaining testing information for research purposes. The court only addressed the importance of obtaining testing information for research purposes, and did not address Ethyl’s ability to obtain a Section 211(f) waiver.\textsuperscript{29} The court relied on the Supreme Court’s decision in \textit{Federal Elections Commission v. Akins}.\textsuperscript{30} According to \textit{Federal Elections Commission}, denial of access to information can work an “injury in fact” when a statute requires public disclosure and when there is no reason to doubt that the information would be useful to the injured party.\textsuperscript{31} The court held that based on Ethyl’s informational and market interests in the vehicle-testing program, the corporation’s Article III standing was clear.\textsuperscript{32}

In order to show “prudential standing,” Ethyl had to show that it fell within the “zone of interests” protected by the Act.\textsuperscript{33} According to the court, all challengers mentioned by the statute and any potential challengers Congress would have thought useful for the purposes of the Act fall within this test.\textsuperscript{34} As a manufacturer of fuel additives, Ethyl was

\begin{itemize}
\item \textsuperscript{23} Ethyl Corp., 306 F.3d at 1147.
\item \textsuperscript{24} \textit{Id.} at 1148.
\item \textsuperscript{25} \textit{Id.} at 1147.
\item \textsuperscript{26} \textit{See} 42 U.S.C. § 7545(f)(1)(A) (2003).
\item \textsuperscript{27} Ethyl Corp., 306 F.3d at 1148.
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.} (citing 524 U.S. 11 (1998)).
\item \textsuperscript{31} 524 U.S. 11, 21 (1998).
\item \textsuperscript{32} Ethyl Corp., 306 F.3d at 1148.
\item \textsuperscript{33} \textit{Id.} (citing Bennett v. Spear, 520 U.S. 154, 162 (1997)).
\end{itemize}
involved in the development of products that will reduce harmful emissions, an activity which, according to the court, clearly falls within the interests of the statute. In addition, the relationship between motor vehicles and their fuels has long been recognized as interdependent. The court stated that Ethyl's interests and the interests protected by the Act were "two sides of the same coin." Accordingly, the court found that Ethyl had standing and went on to discuss the merits of the claim.

The court held that the CAP 2000 did not establish methods and procedures for making tests, but rather delegated the authority to manufacturers to do so without a rulemaking process. The court found that although the language may be construed to allow the EPA some leverage in determining its testing protocol, it does not have the authority to make its decision-making "so remote" from the tests.

The EPA cited numerous cases in which courts held that broad deference in rulemaking should be given to the acting agency. However, the court pointed out that Ethyl was not challenging the breadth of the regulations set by the EPA, but the absence of regulations. The court therefore looked to MST Express v. Department of Transportation, a case in which the agency likewise delegated authority to the individuals to test for their own compliance. In that case, the court had held that by doing so, the agency "failed to carry out its statutory obligation to establish by regulation a means of determining" whether compliance had been met. The court held that the EPA had similarly failed to carry out its obligation under the Clean Air Act to establish regulations in this case.

Finally, the court addressed the EPA's argument that the involvement of the public would make the process too burdensome. The court held that this argument flouts the congressional purpose of the mandate. First, the court reasoned that the burden of the requirement that the agency create regulations does not outweigh the congressional

35. See Ethyl Corp., 306 F.3d at 1148.
38. Ethyl Corp., 306 F.3d at 1148.
39. Id. at 1149.
40. Id.
41. Id. (citing American Trucking Ass'ns v. Dep't of Transp., 166 F.3d 374 (D.C. Cir. 1999) and New Mexico v. E.P.A., 114 F.3d 290, 294 (D.C. Cir. 1997)).
42. Ethyl Corp., 306 F.3d at 1149.
43. Id.
44. MST Express v. Dep't of Transp., 108 F.3d 401, 406 (D.C. Cir. 1997).
45. Ethyl Corp., 306 F.3d at 1149.
46. Id. at 1150.
47. Id.
command to create those regulations. Second, the court reasoned that, while it may be the case that an open procedure is more burdensome than a closed one, the Act requires an open procedure specifically because the information should be made widely available. Because CAP 2000 was not a set of procedures set by regulation, but rather a delegation to automobile manufacturers to make individual procedures, the court vacated the program and required that the EPA develop a new program in compliance with statutory mandate.

The D.C. Circuit ruled correctly in this case, by emphasizing that the availability of information is the first step in fulfilling the purpose of the Clean Air Act. Notice and comment rulemaking may be somewhat burdensome in terms of establishing new regulations each year, as the EPA planned to do in this case. However, the statute mandates public involvement specifically because the environment is a public responsibility. The long-term benefit of improving air quality is not something that can be accomplished in private business meetings behind closed doors.

Reda M. Dennis-Parks

48. Id.
49. Id. at 1149.
50. Id. at 1150.
51. Id.