

September 1996

New York and the 1990 Clean Air Act Amendments

Thomas M. Allen

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>

Recommended Citation

Thomas M. Allen, *New York and the 1990 Clean Air Act Amendments*, 14 Pace Envtl. L. Rev. 99 (1996)

DOI: <https://doi.org/10.58948/0738-6206.1370>

Available at: <https://digitalcommons.pace.edu/pelr/vol14/iss1/11>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

New York and the 1990 Clean Air Act Amendments

THOMAS M. ALLEN*

I have been involved with the Clean Air Act (CAA)¹ amendments, negotiations, implementations, and trials and tribulations since 1988. I'm a veteran, I guess you could say. What I have found out is that I think we tried to do too much too soon.

In the past, we were overwhelmed by questions that we really did not have good answers to and requirements for rules and regulations which the Environmental Protection Agency (EPA) had not published, or was in the process of publishing but could not get through the Office of Management and Budget (OMB). As a result, we had to sue to get some of the regulations out. I think there was a general lack of understanding about the detail and the complexity of the Clean Air Act Amendments of 1990 (CAAA).²

The CAA was intended to improve air quality. In the Northeast, we think primarily about Title V and ozone. But in New York, we were required to develop three ozone State Implementation Plans (SIPS), two carbon-monoxide SIPS, a particulate matter (PM-10) SIP, Title V regulations, and to improve our enforcement.

* Thomas M. Allen was serving as the Associate Director for the Division of Air Resources of the New York State Department of Environmental Conservation (DEC) at the time of the colloquium. He had previously worked at the DEC in a number of capacities including Director of Bureau of Source Control, Chief of the Source Technology Section, and Regional Air Pollution Control Engineer. He received his Master of Science in Environmental Engineering from the Rensselaer Polytechnic Institute, and his Bachelor of Science in Civil Engineering from the University of Vermont.

1. Clean Air Act (CAA) §§ 101-618, 42 U.S.C. §§ 7401-7671q (1994).

2. Clean Air Act Amendments of 1990 (CAAA), Pub.L. No. 104-549, 104 Stat. 2399 (1990).

There was a large effort to provide uniformity among the states, especially from the ozone perspective. This resulted in the formation of the Ozone Transport Commission (OTC) and the Ozone Transport Region (OTR).

Title V fees were a great idea because they provided a secure source income to operate the Title V program. Originally, that was seen as a great opportunity. I think that the Title V fees will replace state general funds, resulting in a zero net gain or maybe a minimal loss. However, Title V will improve air quality, provide uniformity among the states and authorize the use of fees.

With regard to the Title V program, there was much talk, but very little action. Moreover, there was a slow development on the part of the EPA which led to a slow learning curve on the part of the states. In fact, we actually had to sue the EPA to get the inspection and maintenance (I&M) regulations published.

In addition, there was confusion between Title IV NO_x requirements and Title I NO_x requirements. I do not think that the drafters who amended the CAA communicated with each other and, accordingly, the Title IV Acid Rain NO_x requirements are a little less than desirable, from a Title I point of view. While federal funds covered the initial years, they have begun to decrease, and right now we are looking at big decreases for the upcoming year, if we get a federal budget at all.

Last January, the states and the National Governors' Association met with the EPA to discuss the need for flexibility. DEC has many new regulations to implement, which in effect are too rigid. For example, what will work in California will not work in Connecticut; what will work in New York will not work in Alabama.

During that meeting, DEC submitted a list of approximately sixty items to Mary Nichols, EPA's top Administrator for air quality, that called for greater flexibility. The EPA agreed to implement nearly all of these changes with regard to flexibility, but would not move on the sanctions issue. The EPA has provided much more flexibility, but I think they pro-

vided so much flexibility that they have confused the issue. Basically, for inspection and maintenance, the EPA has put together a cookbook or recipe that says if you do this, you get this much credit. If you do that, you get that much credit. A polluter can add their credits together, thus meeting the performance standard.

Recently, the EPA has sought to simplify the understanding and implementation of Title V. However, this morning we have heard two or three references that the monitoring requirements of Part 64 are still unfinished. Furthermore, when the EPA implemented the enhanced monitoring requirements, it was a nightmare. One thing I have learned about monitoring, especially if you put Continuous Emission Monitoring Systems (CEMS)³ in a statute, more violations occur than predicted. Subsequently, the DEC is forced to address the violations when, in fact, the violations may be an operating fluctuation, which could not have been prevented in any way.

Monitoring and reporting emissions created an increased workload. These regulations are overly burdensome to industry because they do not have adequate staff to sit down and fill out the reports. In addition, the states did not want it because they did not have the staff to sit down and review the reports. The EPA is still struggling with this issue. The solution should be systematic, simple and should require the important concepts while ignoring the details.

Title III addresses air toxins. Under the previous CAA Amendments, the EPA had a terrible track record, however, they were going to greatly improve Title III. While they did get off to a good start, some problems have arisen and they are beginning to, once again, get bogged down in the same old issue. The EPA cannot work out the details, nor reach an agreement. What is good for Georgia is still not good for New York. In many cases, the states will have to perform their own toxins assessments. Presently, New York is revising its toxins regulation and the DEC hopes to have the new regula-

3. Continuous measuring devices determine fuel usage and other applicable data.

tions published in about a year.⁴ Title V, which will embody the toxic requirements for large major sources, will hopefully be approved by the fifteenth of this November.

In 1995, there was a significant effort to either kill or prevent the implementation of certain CAA sections. One solution, which failed, was to withhold funds from particular programs, so nothing would happen. Some amendments to the national highway system were contained in the I&M program. New York took advantage of this restructuring program, implementing a decentralized repair program. The DEC was able to take the Utah demonstration (and some other things which our staff had done with regard to enforcement) and revise our assessment, thus demonstrating that New York can meet the national standard.

The Environmental Commute Option (ECO) was disappointing to me. The New York Department of Transportation (DOT) implemented a good program. While there were very few complaints in New York State, unfortunately, the program is now voluntary. In essence, New York will lose about four tons per day in our ozone 15% plan. Although this is not tragic, we will have to find four tons per day elsewhere.

I do not think the prospects for congressional action this year are very good. Everyone is concerned with the budget. It is a presidential election year and this is a low priority. I think the Clean Water Act (CWA)⁵ and other pieces of environmental programs are more important. The DEC's position now calls for flexibility. We want equity and that sounds like it is almost double talk. This morning, we heard that the emissions from the Midwest are a significant problem. I will talk about that more later.

The DEC is very interested in the acid rain proposal, and the Solomon bill⁶ will help New York State. I would like to talk, for just a minute, about the way ozone non-attainment affects the Northeast. At this time, the Adirondacks are inadequately protected by the federal programs. You see in the

4. This speech was given in April 1996.

5. Clean Water Act (CWA) §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994).

6. See H.R. 2682, 104th Cong. § 1 (1995).

upper right hand corner (pointing to a slide on the screen)⁷ the Ozone Transport Region (OTR), Maine through Richmond, Virginia. The crossed area is in attainment. Large portions of Maine, New Hampshire, Vermont, New York, and Pennsylvania are in attainment. However, they are treated as moderate non-attainment. This means that they have had to obtain stationary source reasonably available control technology (RACT). They have had to do an I&M and have emissions offsets for new source review.

If you look in the Midwest (referring to a slide on the screen),⁸ you see smaller non-attainment areas. The Midwestern states were only required to do RACT for NO_x in the small non-attainment areas which created an inequity. The problem was that when the drafters looked at leveling the playing field they did not go far enough.

The EPA went from the Ozone Transport Commission (OTC) to the Ozone Assessment Group (OTAG) by realizing that New York, New Jersey, Connecticut, and Pennsylvania could submit complying SIPS in 1994. They said we will look at the 1994 SIPS process and if the states do a regional NO_x strategy and regional mobile source strategy, which was the low emission vehicle program, and agree to the OTAG process, which was to get the states in the Midwest involved in the voluntary process, we will approve your application for an attainment demonstration until June of 1997. So, right now we are actively working with OTAG. New York has a low emission vehicle program which is on the books and being implemented; we are co-signers to the OTC-NO_x agreement.

The point I would like to make (pointing to slide),⁹ is that probably five hundred different people are now interested or involved in OTC-NO_x, including thirty-seven states. Indeed, there is an awful lot happening.

Mary Nichols, an EPA representative from Illinois, chairs the policy group and I sit on the Strategies and Controls Committee. Individuals interact with the committee at

7. On file with speaker.

8. On file with speaker.

9. On file with speaker.

every level. While the issues are almost too big to track, hopefully this September regional strategies will be published. These will include NO_x reductions from the major power plants, a good national mobile source program, a fuel program, and EPA control of on and off-road vehicles for NO_x.

The next slide (pointing to screen)¹⁰ is a graphic of the area covered by the OTC. Two days ago, in Washington, I spoke to representatives from Oklahoma and Texas regarding the OTC. They said, "yeah, maybe there is something to this transport," and they are beginning to believe it.

The next slide (pointing to screen)¹¹ illustrates where the large emission sources are located - the tall stacks. Your packet (referring to an information packet that was distributed)¹² contains an EPA acid rain report documenting the NO_x, SO₂, and CO emissions.

Comparing emissions between New York and Ohio, it is clear that a plant in Ohio emits more than all the plants in New York in terms of NO_x. The answer to New York's non-attainment for ozone is dead without controls in the Midwest. We could shut New York down, stop the cars, stop the industries, and stop the hair sprays, but it would still be in non-attainment. This is true for northern New Jersey and Connecticut, as well.

While this next slide is cluttered (pointing to a slide),¹³ it demonstrates what is on the horizon for utilities. We are considering approximately five different controls, including a new ozone standard and improved SO₂ control. Now, there is a lot of activity and it is primarily focused on utilities, in terms of ozone and NO_x removal. We were talking about controlling NO_x emissions from the Midwest from the 1990 levels, but if the Federal Energy Regulatory Commission (FERC) process moves in the way predicted, the gains will be

10. On file with speaker.

11. On file with speaker.

12. On file with the *Pace Environmental Law Review*.

13. On file with speaker.

lost immediately. Therefore, we must reduce the FERC level of emissions down to a reasonable position.

Dr. S.T. Rao,¹⁴ who works with the Division of Air Resources, has basically set the research of the American community on its ear. He advocates looking at national air quality data. Dr. Rao has examined the monitoring of ozone and air quality concentrations for the last decade. He developed a method, eliminating the effects of meteorology, which demonstrates quite conclusively that we are making progress in the Northeast, while the Midwest is losing ground. In the Midwest, both the ozone and NOx emissions are increasing at a steady pace. In contrast, in the Northeast both NOx and ozone emissions are going steadily decreasing. Thank you.

14. Director of the Bureau of Air Research, Division of Air Resources, New York State Dep't of Env'tl. Conservation.