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# Navigating Environmental Regulations

Helen Kang

Golden Gate University School of Law, hkang@ggu.edu

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## Navigating Environmental Regulations

When compliance with federal and local laws is at issue, knowing where to look is key to ensuring not running afoul of either, explains Helen Kang of Golden Gate University School of Law.

2011-06-22 04:45:58 PM

### THE FEDERAL CLEAN AIR ACT

As it is with many statutory schemes, the obvious primary sources to consult are the act itself at 42 U.S.C. §7401 *et seq.* and the Code of Federal Regulations. Much of the needed detail is contained in the CFR. Examples include 40 CFR Parts 51-52 (regulations governing major new sources and significant modifications, known as "new source review" regulations), Part 60 (new source performance standards) and Part 63 (maximum achievable control standards for hazardous air pollutants). Some of these regulations not only specify what polluters must do to comply with the act, but also how the federal government and states should interact to control air pollution. The CFR also contain procedures and standards that permitting agencies should follow in issuing permits.

### STATE IMPLEMENTATION PLANS

In addition to the regulations found in the CFR, practitioners must consult another set of regulations, called the State Implementation Plan. SIPs implement an important part of the act that is designed to achieve the federal air quality standards for the most common components of air pollution. Those pollutants include soot (known as PM10 and PM2.5, with the numbers referring to the size of the soot particles in microns), ground-level ozone (smog), nitrogen dioxide, sulfur dioxide, carbon monoxide and lead. SIPs regulate ozone not through limits on the amount of that substance but as limits on chemicals that combine with sunlight to form smog, including oxides of nitrogen, which are produced in combustion, and volatile organic substances, including those in paint, gasoline and solvents.

Both the terms "state" and "plan" in "SIP" are somewhat misleading. Even with the term "state" as part of the name, the plan is federal law. The term is there because states devise the plans and submit them to the U.S. Environmental Protection Agency for approval. The term "plan" is similarly misleading because it is not merely aspirational, but is enforceable. The rules in the plan mandate procedure as well as limit the amount of air pollution that companies can emit. Breaking these rules subject polluters to government and citizen enforcement.

SIPs contain rules for existing facilities to follow; and where EPA has "approved" the state or local laws, SIPs also contain new source review regulations. Unlike other federal regulations and despite their central role in the act, however, SIPs are not published in the CFR, but they are readily available on EPA's website. The SIPs for the jurisdictions in EPA Region 9, including California's 35 SIPs, are available at <http://www.epa.gov/region9/air/sips/>. The website takes some getting used to, but it is not that difficult to navigate.

Don't confuse air district rules with SIP rules. Rules that are similar in appearance (e.g., typeface, formatting and numbering convention), but are not accessible from the EPA website, are not SIPs. They are the air district's rules, and complying with them is not equivalent to complying with the SIP unless they are exactly the same — in definition, procedure, applicability and substance.

Once you find a SIP rule that may apply, make sure to check the federal register notice announcing EPA's approval of the rule to determine whether (1) it is applicable to the period you are interested in; and (2) the approval was in whole or part. In other words, be sure that the rule that you have accessed is indeed EPA-approved. Proposed SIPs that are pending EPA approval will not do. The importance of EPA-approved rules, however, does not mean that you can ignore the state or local rules. For example, California has more stringent requirements, and those rules are typically contained in the rules of the 35 air districts around California. These air district rules are available through the California Air Resources Board website (<http://www.arb.ca.gov/drdb/drdbltxt.htm>).

It is important to know how clean the air is in the region at issue: attainment and nonattainment areas. The nonattainment/attainment/unclassified status of your air quality region is identified in 40 CFR Part 81. California designations can be found in 40 CFR §81.305. Another useful place to look is EPA's website, which has up-to-date information about recent designations: <http://www.epa.gov/air/oaqps/greenbk/index.html>. This designation is important for determining whether prevention of significant deterioration (for attainment areas) or nonattainment new-source review rules apply.

It is likewise helpful to know what kind of cooperative federalism is in play for new source review: approvals and delegations. If EPA has approved the state's new source review program, SIPs, in addition to the CFR, will govern. Approval means that EPA has allowed the state or local agency to issue the permits. Companies attempting to comply with the SIPs should read both the new source review regulations in the CFR, the SIP rules, and the Federal Register publishing notice of EPA's approval to examine the details. EPA's SIP website will often contain the references to the Federal Register notice.

If the SIP and the C.F.R., read together, create ambiguities, particularly those that favor the company, the company should address the question to EPA as well as to the state or local regulator to prevent future problems that may arise if the players (federal government; state or local agency, which is typically an air district; and the regulated party) do not interpret the regulations in the same way.

Referring the matter to EPA in addition to the air district (such as the Bay Area Air Quality Management District) is prudent because, in federal enforcement cases, EPA and citizens will likely assert that EPA's interpretation — the federal interpretation — governs because SIPs are federal laws. This prudence is warranted — the weight of the authority supports the assertion that EPA's interpretation wins over the air district's.

If EPA has delegated implementation of the new source review provisions to a state or local agency (again, typically an air district), check the CFR, Federal Register notices regarding the delegation, and the delegation agreements between EPA and the air district. In EPA Region 9, these delegation agreements are available at <http://yosemite.epa.gov/r9/r9nsps.nsf>. Many, if not all, of these delegation agreements refer to permits issued under the air district SIPs as meeting EPA's standards. In that case, the CFR provision containing EPA's new source review rules and the SIPs referred to in the delegation agreement must be reviewed. Again, if there are ambiguities, EPA should be contacted to prevent future enforcement issues.

#### **IMPACT OF STATE VARIANCES ON FEDERAL ENFORCEMENT**

California law allows a company admitting to violations of air pollution laws to obtain a variance from an air district under Cal. Health & Safety Code §§42350-42364. These variances are creatures of state law, and therefore they do not excuse violations of federal law. Thus, companies with state variances have been subject to federal suit for violations of federal law. Environmental lawyers should not advise their clients that state variances shield their clients against federal enforcement.

#### **IMPACT OF TITLE V**

If Title V permits contain incorrect federal requirements, the permit holder can still be sued under federal law for violations of the correct requirements. The only exception is where the Title V permit contains specific "permit shield" language. Permits in the jurisdiction of the Bay Area Air Quality Management District, for example, do not contain this shield. Companies with permits from the district cannot claim that compliance with the permit is compliance with the act if the permit contains incorrect requirements.

#### **CONCLUSION**

Many companies have been subject to government and citizen enforcement for complying only with the air district's rules or SIPs pending EPA approval and not the EPA-approved SIP. Knowing where to look, checking all of the applicable laws, and making appropriate inquiries to government enforcers are all basic practices for prudent lawyers advising responsible companies. Without such practices, cooperative federalism will lead to a race to the bottom and encourage companies to shop between federal and state laws for the most economically beneficial laws.

*Helen Kang is an associate professor of law and the director of the Environmental Law and Justice Clinic at Golden Gate University School of Law.*

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