

BOOK REVIEW

A PRACTICAL GUIDE TO AIR QUALITY COMPLIANCE. By **Russell E. Erbes.** New York: John Wiley & Sons, Inc. (2d ed. 1996). Pp. 434, 79.95.

*Reviewed by Thomas Lundmark**

In *A Practical Guide to Air Quality Compliance*, Russell E. Erbes, Senior Vice President of a major environmental and engineering consulting firm,¹ has written probably the most useful and comprehensive² practice-oriented book on the market on the subject of compliance with air quality controls.

The introduction is followed by an informative second chapter detailing the history of air quality legislation. Erbes summarizes the main provisions of federal air quality legislation and concludes with what he terms the “fundamental concepts” of the 1990 Clean Air Act Amendments, specifically, market-based incentives, facility bubbles, compliance certification, intergovernmental requirements, and regulatory negotiation. Market-based incentives include emission trading between different companies. Facility “bubbling” refers to the practice of shifting emissions of air toxins from one device to another within the overall facility to encourage the operator to determine the most cost-effective way to reduce or control emissions levels.³ For the first time in United States air quality regulation, the Clean Air Act Amendments⁴ require a responsible corporate official⁵ to certify annually that his plant complies with a permit.⁶ In the second chapter, Erbes also introduces regulatory negotiation (reg-neg), an attempt by the Environmental Protection

* Professor of Law, University of Münster, Germany; Dr. jur., University of Bonn, Germany; J.D., University of California.

1. RUSSELL E. ERBES, *A PRACTICAL GUIDE TO AIR QUALITY COMPLIANCE* (2d ed. 1996).

2. J. WRAY BLATTNER, an Ohio attorney, has written another practice-oriented book, *THE CLEAN AIR ACT COMPLIANCE HANDBOOK* (2d ed. 1994), which is only 136 pages in length.

3. ERBES, *supra* note 1, at 12.

4. Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. §§ 7401-7671(q) (1994)).

5. ERBES, *supra* note 1, at 181. A responsible corporate official is defined as a corporate officer, a person in charge of a principal business function, or a plant manager, provided that the plant manager supervises at least 250 employees, the plant has at least \$25 million in annual sales, and delegation of authority is approved in advance. *Id.*

6. 42 U.S.C. § 7661c(c) (1994).

Agency (EPA) to avoid litigation in the rulemaking process. While the private legal practitioner might never be personally involved in regulatory negotiation, the process, unlike attorneys for environmental groups and industry, if successful, promotes certainty in environmental compliance for all concerned. Under the reg-neg procedure,⁷ the EPA forms an advisory committee representing industry, environmental groups, EPA staff, state and local officials, and the general public.⁸ The advisory committee develops a consensus on a proposed rule that is then published in the Federal Register for review and comment, just as in traditional rulemaking.⁹ The difference with regulatory negotiation is that the members of the advisory committee agree that they will support and not litigate any rule upon which consensus is reached.¹⁰

Chapter 3, "Legislative and Regulatory Concepts," explains how the federal requirements of the Clean Air Act are implemented at the state and local levels and discusses the interrelationships of legislation, regulation, and permits. This discussion is written, as is the remainder of the book, for environmental managers, not lawyers. Thus, there is no mention of the difficult issue of federal legislative jurisdiction over the environment. Although the author implies that all state and local legislation other than the intricate and far-reaching standards in California¹¹ are absolutely required by federal law,¹² in fact, Congress cannot commandeer the state and local officials to do its bidding.¹³

7. This process is specifically authorized and encouraged by the Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-570 (1994).

8. ERBES, *supra* note 1, at 13.

9. *See id.*

10. *Id.* at 14. The EPA has successfully used the reg-neg process for rules regulating leaks of volatile organic compounds from equipment, reformulated gasoline, limiting air toxics emissions from coke ovens, development of the core acid rain rules, and reducing the emissions of sulfur dioxide by 90% for the Navajo Generating Station.

11. The author writes: "A second example illustrates how the state Clean Air Act can be more stringent than the federal: In California . . . [the law] is much more stringent than the federal CAA in many areas . . ." *Id.* at 18. California was among the states that refused to file a state implementation plan required by the 1970 Clean Air Act Amendments until the federal government reimbursed the costs involved. *See* Thomas Lundmark, *The Federal Clean Air Act Today*, 28 AM. STUDIES NEWSL. iii, iv (1992).

12. "[T]he EPA is charged with developing and promulgating federal regulations that require the states and local agencies to develop and promulgate state and local regulations." ERBES, *supra* note 1, at 15. "To ensure that the federal CAA is implemented at the state and local level, the federal CAA requires each state to develop and submit for approval to EPA a State Implementation Plan (SIP)." *Id.* at 19.

13. Congress may not simply "commandeer[r] . . . the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

Instead, Congress employs what has been termed “cooperative federalism.”¹⁴ When it comes to federal air quality initiatives, this means that Congress, relying on the Spending Clause of the Constitution,¹⁵ offers financial incentives to the states to “buy” their cooperation.¹⁶ Also, Congress coerces the states to legislate by threatening to regulate air pollution¹⁷ under its power to regulate interstate commerce.¹⁸

In Chapter 3, as in other chapters, the author gives the environmental manager solid advice on complying with air quality controls, although at times the advice seems onerous.¹⁹ In addition, since the book is written for environmental managers and not for lawyers, Erbes addresses issues that are more likely to confront people who, for the most part, are not law school graduates. For example, Erbes devotes three pages to explaining the differences between permits and regulations, which would probably be excessive, if not superfluous, in a text for attorneys. In this discussion Erbes carefully illustrates the problem that results when a permit is not consistent with regulations promulgated after issuance of the permit. He concludes the discussion with excellent advice: “It is important for environmental managers to actively track and evaluate new regulatory developments. One cannot rely only on mailing lists and existing, outdated permits. Personal contact with the Agency on a regular basis is important.”²⁰

The Clean Air Act is intended to protect and enhance the nation’s air quality, as measured by the national ambient air quality standards (NAAQS). What these standards are, how they are established, and how

14. *E.g.*, *Virginia Surface Mining*, 452 U.S. at 289 (using the term to describe provisions of the Surface Mining and Reclamation Act found constitutional).

15. U.S. CONST. art. I, § 8 cl. 1.

16. Sanctions that can be imposed for state noncompliance include withholding air pollution planning and control program grants under § 105 of the Clean Air Act and withholding highway grants under title 23 of the United States Code. Clean Air Act § 179(b)(1)-(2), 42 U.S.C. § 2509(b)(1)-(2) (1994); *see* THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 557-58 (2d ed. 1991).

17. *See* SCHOENBAUM & ROSENBERG, *supra* note 16, at 538.

18. The Commerce Clause authorizes Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has written, “Congress reacted [to the lack of clean air initiatives] by taking a stick to the States in the form of the Clean Air Act Amendments of 1970.” *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975).

19. An example of such advice is the exhortation that the environmental manager review the Federal Register “on a daily basis.” ERBES, *supra* note 1, at 17. Mr. Erbes advises against the use of commercial reporting services that do not include all of the preambles found in the Federal Register for both proposed and final regulations. *Id.* Mr. Erbes goes so far as to give instructions (including modem settings!) for modem access to the bulletin board maintained by the EPA Office of Air Quality Planning and Standards. *Id.* at 234.

20. *Id.* at 31.

they are evaluated (atmospheric dispersion modeling) is presented in Chapter 4, "Ambient Air Quality Standards and Atmospheric Dispersion." Chapter 5 discusses another aspect of protecting the air resource: risk assessment and management. Risk assessment and management are used in situations when it is generally considered that there is no "safe" level of a pollutant, such as a suspected carcinogen, so that no "bright-line" standard can be set.²¹ Once again, the discussion is concrete and practical. The problem, as the author identifies it, is not technical or scientific, but political: Who should decide exactly how much risk we as a society should accept? The author observes:

In practice, risk assessment is often combined and confused with risk management. The regulatory agencies generally rely on the risk assessment results without much consideration of other factors. This is generally overly conservative and usually results in more stringent decisions than necessary. The agencies do this, however, because of lack of resources and legislative authority to make alternative risk management decisions. This is especially the case at the local level.²²

Chapters 6, "Emissions Standards for Criteria Pollutants," and 7, "Hazardous Air Pollutants," discuss how the Clean Air Act establishes emission limits for sources of air pollution in order to help ensure that the NAAQS can be met. Chapter 8 presents the concepts of New Source Review, also aimed at protection of the NAAQS, while Chapter 9, "Nonattainment," discusses the Clean Air Act's nonattainment requirements for the areas of the United States that do not currently meet the NAAQS. The author discusses the designation of nonattainment areas, the impacts of nonattainment designation on existing sources, and new source review in nonattainment areas.

Chapter 10, "Permits and the New National Operating Permits Program," contains a superb description of the new major permitting program, termed the national operating permit, that is estimated to affect approximately 34,000 major sources and 350,000 nonmajor sources nationwide.²³ Erbes begins with an explanation of the permitting procedure that existed prior to the 1990 Clean Air Act Amendments.

21. See generally John S. Applegate, *A Beginning And Not an End In Itself: The Role of Risk Assessment in Environmental Decisionmaking*, 63 U. CIN. L. REV. 1643 (1995) (discussing the role of risk assessment in recent legislative reform proposals).

22. ERBES, *supra* note 1, at 68.

23. *Id.* at 163.

These procedures resulted in the issuance of either a permit to construct or a permit to operate. These permits were generally issued for individual devices at a facility, not for the facility as a whole, and they typically contained no more than fifteen different conditions.²⁴ The new procedure is expected to “extend the concept of permit conditions to a new and severe level of complexity.”²⁵

Erbes brings his years of experience to bear in pointing out common errors in permit applications. Anyone going through the permitting process should read this chapter for explicit advice on how to avoid common pitfalls. This chapter even includes practical advice on buying equipment:

Equipment vendors usually have an engineering and operational focus, not a compliance focus. Therefore, when purchasing a new piece of equipment, it is critical to include in the contract for the equipment terms that force the vendor to meet not only its normal operational and engineering performance specifications, but also the compliance requirements of the local permitting authority.²⁶

Chapters 11, “Acid Rain Provisions of the 1990 CAA,” and 12, “Stratospheric Ozone Protection,” discuss two major new programs addressed by the 1990 Clean Air Act Amendments: acid rain and stratospheric ozone protection. These two programs are singled out for discussion because they contain, respectively, a new nationwide emissions trading concept and a global protection element not included prior to the 1990 Amendments.²⁷

The 1990 Clean Air Act Amendments contain new and very significant penalty provisions, including criminal and civil penalties for noncompliance.²⁸ The enforcement aspects of the Clean Air Act are discussed in Chapter 13. Chapter 14, “Transportation and General Conformity,” discusses the newly strengthened transportation and general conformity program.

Chapters 15, “Future Implementation of the 1990 CAA,” and 16 summarize *Air Quality Compliance* by presenting the overall implementation schedule for the new 1990 Clean Air Act programs and

24. *Id.* at 163-64.

25. *Id.* at 164.

26. *Id.* at 165.

27. See 42 U.S.C. §§ 7651b(b)(c), 7671b (1994).

28. See *id.* § 7420.

by discussing some practical suggestions for enhancing compliance. These include a seven-step process for environmental managers:

1. Using this *Guide* and other reference documents, understand what the Act is attempting to accomplish with respect to a certain regulatory program . . . that could affect the facility.
2. Understand how the requirements could potentially affect the facility by comparing facility operations to the overall goals of the regulatory programs.
3. Research the specific details of the requirements, and determine precisely the applicability and specific regulatory details of the program.
4. Match the specific demands of the requirements to the specific operational needs of the facility, both current and future.
5. Repackage the regulatory and operational information into a format that is understandable to upper management, and impress upon them the seriousness of complying with the requirements.
6. Develop an operational and regulatory strategy to achieve compliance.
7. Implement the strategy with adequate follow-up and review.²⁹

The final 195 pages of the book are devoted to appendices containing various lists and other detailed reference information of use to environmental managers and lawyers: Appendix A is a very useful list of acronyms;³⁰ Appendix B contains a succinct glossary of terms;³¹ Appendix C contains a description, published by EPA, of the major new requirements of the 1990 Clean Air Act Amendments for specific source types;³² Appendix D contains two figures illustrating atmospheric dispersion coefficients;³³ Appendix E lists dose-response values for selected air toxics;³⁴ Appendix F (also called "Table F-1") lists new source performance standards (NSPS) sources by citation to the Code of Federal Regulations;³⁵ Appendix G lists federal hazardous air

29. ERBES, *supra* note 1, at 235-36.

30. *Id.* at 241-46.

31. *Id.* at 247-58.

32. *Id.* at 259-76.

33. *Id.* at 277-80.

34. *Id.* at 281-92.

35. *Id.* at 293-302.

pollutants;³⁶ Appendix H lists categories of sources of hazardous air pollutants;³⁷ Appendix I contains schedules for regulating categories of sources of hazardous air pollutants;³⁸ Appendix J lists chemicals and threshold quantities for accidental release prevention;³⁹ Appendix K is a table of major groups of standard industrial classifications (SICs);⁴⁰ Appendix L contains tables of nonattainment areas and their classifications as of July 9, 1994;⁴¹ Appendix M is an EPA memorandum on requests for nonattainment redesignation;⁴² Appendix N is a draft model Title V permit for graphic arts;⁴³ and Appendix O is a draft model Title V permit for emissions of particulates from lime manufacturing plants.⁴⁴ Finally, the author provides a good index.⁴⁵

A Practical Guide to Air Quality Compliance is a well-written and balanced book. It belongs on the shelf of every law library and of every lawyer representing industry, environmental groups, and air quality enforcement agencies.

36. *Id.* at 303-18.

37. *Id.* at 319-28.

38. *Id.* at 329-36.

39. *Id.* at 337-50.

40. *Id.* at 351-56.

41. *Id.* at 357-70.

42. *Id.* at 371-86.

43. *Id.* at 387-98.

44. *Id.* at 399-421.

45. *Id.* at 423-34.