

NOTE

DAYTON POWER v. BROWNER

I. INTRODUCTION

As a result of *Dayton Power & Light and Entergy Services, Inc. v. Browner*,¹ public utilities and other fossil fuel electric generators must now submit public information reports to the Environmental Protection Agency (EPA) regarding specifically listed toxic chemicals resulting from their burning of fossil fuels, even if such emissions are minimal. This note will discuss the background of this reporting requirement, the *Dayton Power* decision, and the implications of the decision on public perceptions of the safety of fossil fuel generation, resulting pressure for increased studies, and precautions regarding any health-related concerns such generation poses.

A. *Facts of the Case*

Congress enacted the Emergency Planning and Community Right-To-Know Act (EPCRA) in 1986 as freestanding legislation in connection with the 1986 amendments to existing Superfund legislation.² Acting pursuant to sections 313 (b) and 328 of the EPCRA, the EPA promulgated a final rule that expanded the list of industries subject to these reporting requirements so as to include utilities.

In advance of the reporting deadline, Dayton Power & Light and Entergy Services, Inc. (the Plaintiffs) sought judicial review of the final rule under the Administrative Procedure Act (APA).³ Ruling on cross motions for summary judgment, the District Court for the District of Columbia upheld the EPA's new regulations against the Plaintiffs' claim that Congress intended to apply these reporting requirements only to manufacturing industries. The court also rejected, as not ripe for judicial review, the Plaintiffs' argument that they should not be subject to the reporting requirements because any quantities of listed toxic agents would fall within the "*de minimis*" exception previously recognized by the EPA.

This note will analyze the D.C. District Court's decision in *Dayton Power*⁴ in light of the purpose of the EPCRA, which requires listed industry groups to submit an annual report pertaining to the amount of toxic chemicals that are "manufactured, processed, or otherwise used" by the facilities. Part II provides background information on the purpose and procedures of the EPCRA, the Toxic Release Inventory (TRI) reporting requirement, and several of the objections the EPA addressed from commenters concerned about the addition of electric utilities. Part III discusses the EPA's decision to require electric utility companies to report emissions rates and the district court's holding in *Dayton Power*.⁵ Part IV analyzes the court's interpretation of precedent and discusses how the court reached its decision. Finally, Part V identifies some future implications of this case, including the impact the decision is expected to have on the industry and problems that may arise due to this decision.

1. *Dayton Power & Light & Entergy Servs., Inc. v. Browner*, 44 F. Supp.2d 356 (D.D.C. 1999).

2. 42 U.S.C. § 11023 (1999).

3. 5 U.S.C. § 706 (1999).

4. *Dayton Power*, 44 F. Supp.2d 356.

5. *Id.*

II. REGULATORY BACKGROUND

A. *The Emergency Planning and Community-Right-To-Know-Act, Section 313*

The regulatory background of this decision is complicated. In 1986, President Ronald Reagan signed into law the Superfund Amendments and Reauthorization Act of 1986 (SARA)⁶ in order to amend and reauthorize provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).⁷ Title III of SARA is a freestanding statute⁸ entitled "The Emergency Planning And Community Right-To-Know Act of 1986." The primary goal of the EPCRA program is to provide the public with information on section 313 toxic chemicals⁹ that are being released into their communities by nearby utilities. To fulfill this goal, EPCRA section 313 requires owners and operators of the covered facilities annually to report their release of listed chemicals when certain "activity thresholds" are met.¹⁰ Section 313 specifies that these facilities submit reporting information on the TRI reporting form.¹¹ The EPA is then required to maintain a national database in order to keep abreast of guidelines and standards of chemicals on the TRI list and to keep the public informed of toxic chemicals being emitted by nearby facilities.¹² To carry out the purposes of Title III, Congress gave the EPA authority to promulgate such regulations in section 328.¹³

Originally, the TRI reporting requirement only applied to facilities in Standard Industrial Classification (SIC) Codes 20-39,¹⁴ covering manufacturing industries. However, under the authority of Congress,¹⁵ the EPA extended the reporting obligation to facilities in other SIC Codes. Facilities that are subject to the reporting requirements for section 313 chemicals must meet three criteria.

6. 42 U.S.C. § 11023.

7. 42 U.S.C. §§ 9601-9675 (1999).

8. This means that it is not part of CERCLA. *Rules and Regulations: Environmental Protection Agency*, 53 Fed. Reg. 4500 (1988) (to be codified at 40 C.F.R. pt. 372).

9. Section 313 lists over 650 chemicals and chemical categories. Included in the list is a table of TRI chemicals that meet the Occupational Safety and Health Administration (OSHA) carcinogen standard. The table defines the chemical as being: carcinogenic to humans; probably carcinogenic to humans; known to be carcinogenic; and may reasonably be anticipated to be carcinogenic. EPA, *Toxic Release Inventory: OSHA Carcinogens* (last modified June 25, 1999) <<http://www.epa.gov/opptintr/tri/oshacarc.htm>>.

10. An activity threshold is exceeded when a section 313 chemical or chemical compound is manufactured in annual quantities greater than 25,000-pounds, processed in annual quantities greater than 25,000 pounds, or otherwise used in annual quantities greater than 10,000 pounds. 53 Fed. Reg. 4500.

11. The TRI release reporting form is referred to as Form R. EPA, EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT SECTION 313, GUIDANCE FOR PETROLEUM BULK STORAGE FACILITIES, SECTION 1-5 (1997) [hereinafter EPCRA SECTION 313, GUIDANCE]

12. The information published informs individuals of the chemical name being manufactured and the approximate amounts of chemicals that were brought into or taken from the facilities for treatment and disposal.

13. 42 U.S.C. § 11023.

14. 42 U.S.C. § 11023 (b)(1)(A).

15. The statute states: "The Administrator may add or delete Standard Industrial Classification Codes for purposes [of TRI coverage], but only to the extent necessary to provide that each Standard Industrial Code to which this section applies is relevant to the purposes of this section." 42 U.S.C. § 11023 (b)(1)(B).

First, the facility must be listed within SIC Code¹⁶ 10 (except 1011, 1081, and 1094), 12 (except 1241), 20-39, 4911 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce), 4953 (limited to facilities regulated under Resource Conservation Recovery Act (RCRA) subtitle C), 5169, 5171, or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis).¹⁷ Second, the facility must have ten or more full-time employees.¹⁸ Third, the facility must “manufacture,”¹⁹ “process,”²⁰ or “otherwise use”²¹ a toxic chemical in excess of specific threshold quantities.²²

If a facility meets the above criteria, it is required to report the total annual releases,²³ whether routine or accidental, to the EPA before July 1 of each year. In addition, the TRI reporting requirement mandates that on-site waste management activity and off-site transfer for “disposal, waste treatment, energy recovery and recycling” be reported. It is irrelevant to the reporting requirement that a listed section 313 chemical is not released into the environment if the three established criteria are met.²⁴ Nor does the amount of the chemical released into the environment affect the need to report.²⁵ When a facility violates section 313, the EPA can impose civil penalties of up to \$25,000 per day for each violation; applicable state enforcement provisions may also apply.²⁶

16. SIC codes divide industries into different groups. For instance SIC Code 10 pertains to the metal mining industry; SIC Code 12 covers the coal mining industry group; SIC Codes 20-39 include tobacco, textiles, apparel, lumber and wood, furniture paper, printing and publishing, chemicals, petroleum and coal, rubber and plastics, leather, stone, clay, and glass, primary metals, fabricated metals, machinery, electrical and electronic equipment, transportation equipment, instruments, and miscellaneous manufacturing; SIC Code 491 includes electric utilities; 4953 covers the industry group of commercial hazardous waste treatment; 5169 includes the chemical and allied products wholesale industry group; 5171 includes the petroleum bulk terminals and plants; and 7389 covers the petroleum bulk terminals and plants solvent recovery services. EPA, EPCRA SECTION 313 QUESTIONS AND ANSWERS, Introduction (1998).

17. EPCRA SECTION 313, GUIDANCE, *supra* note 11, Section 1-1.

18. 42 U.S.C. § 11023(b)(1)(A). The EPA established that this requirement might be met if the total hours worked by all employees, even if less than 10, equal 20,000 hours or more. EPCRA SECTION 313, GUIDANCE, *supra* note 11, Section 2-4.

19. “‘Manufacture’ means to produce, prepare, compound, or import a listed” toxic chemical. The by-products or impurities that result from the manufacture, processing, otherwise use, of a section 313 chemical is also included in the definition of manufacture. EPCRA SECTION 313, GUIDANCE, *supra* note 11, Section 2-5.

20. Process is defined as the preparation of the toxic chemical for distribution in commerce, after it has been manufactured. “The term also applies to the processing of a mixture of other trade name product that contains a listed section 313 chemical as one component. . . . Processing may also include the recycling of a [s]ection 313 chemical for distribution in commerce.” EPCRA SECTION 313, GUIDANCE, *supra* note 11, Section 2-6.

21. The “otherwise use” category includes any section 313 chemical that is not encompassed under the definitions of manufacture or process. EPCRA SECTION 313, GUIDANCE, *supra* note 11, Section 2-7.

22. 42 U.S.C. § 11023 (b)(1)(A), (F).

23. The EPCRA defines releases to mean “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers and other closed receptacles) of any hazardous chemical, extremely hazardous substance, or toxic chemical.” 42 U.S.C. § 11049(8).

24. EPCRA SECTION 313, GUIDANCE, *supra* note 11, Section 2-2.

25. *Id.*

26. EPCRA SECTION 313, GUIDANCE, *supra* note 11, Section 1-2.

B. *The De Minimis Exemption*

Part of the Plaintiffs' argument in *Dayton Power* was that TRI chemicals contained in fossil fuels should be within the recognized *de minimis* exception. Facilities that are subject to the TRI reporting obligation may be allowed to disregard small levels of toxic chemicals in mixtures²⁷ or other trade-name products.²⁸ Although the exemption is not applicable to the "manufacture" of toxic chemicals found in section 313, the exemption can be preserved if the chemical is "manufactured" as an impurity and is below the *de minimis* level. However, a byproduct that is "'manufactured' coincidentally as a result of 'manufacturing,' 'processing,' 'otherwise use,' or any waste management activities," is not eligible for the exemption.²⁹

To determine if a facility is exempt, the *de minimis* concentration of toxic chemicals must be below 1%, unless the chemicals are defined as carcinogens, in which case the concentration level must be less than 0.1%.³⁰ Thus, an owner or operator can ascertain if the exemption is applicable to the facility by examining the concentration of the section 313 chemicals in mixtures and trade-name products while they are undergoing a reportable activity in process streams.³¹ Additionally, when there is more than one of the listed section 313 chemicals in a mixture, the *de minimis* level applies to the aggregate concentration of chemicals rather than to each chemical individually.³²

C. *The EPA's Recently Promulgated Rule Adding Seven New Industry Groups*

The EPA's most recent addition to the reporting requirements of EPCRA section 313 (and the action challenged by the two Plaintiffs) included seven new industry groups.³³ The addition came about as a result of the EPA's belief that the public should be made aware of the release, transfers, and other waste management of the toxic chemicals emitted by these industry groups.³⁴ The EPA added the seven industries pursuant to its statutory authority granted by Congress, which allows the EPA to add to the list facilities consistent with the purposes of the EPCRA.³⁵ The addition of these industry groups marked the first

27. The EPA's interpretation of mixture does not apply to waste; even when the waste is "processed" or "otherwise used," the exemption is not applicable.

28. EPCRA SECTION 313, GUIDANCE, *supra* note 11, Section 2-11.

29. *Id.*

30. The *de minimis* concentration level is consistent with the OSHA Hazard Communications Standard (HCS). EPCRA SECTION 313, GUIDANCE, *supra* note 11, Section 2-12.

31. The quantity of a chemical in the process does not have to be applied to threshold determinations when the chemical is "manufactured" as an impurity, "processed," or "otherwise used" and is below the *de minimis* concentration level. EPCRA SECTION 313, GUIDANCE, *supra* note 11, Section 2-11.

32. *Id.* at 2-12.

33. Those groups include: metal mining, coal mining, electric utilities, commercial hazardous waste treatment, chemicals and allied products-wholesale, petroleum bulk terminals and plants-wholesale, and solvent recovery services.

34. The EPA designed a screening process to assist in identifying the industry groups that would be most relevant to the purposes of the EPCRA section 313. *Rules and Regulations*, 62 Fed. Reg. 23,834, at 23,834 (1997) (to be codified as 40 C.F.R. pt. 372).

35. The information published by the EPA is intended to inform persons about the toxic chemicals emitted to the environment so that it may assist governmental agencies, and researchers to aid in the develop-

time the EPA has used its statutory authority to add facilities to the list under section 313(b)(1)(B).³⁶ Based on its regulatory preamble, the EPA considered three factors in determining whether the purpose of the EPCRA would be met by the addition of these proposed industry groups under section 313(b)(1)(B):

(1) [w]hether one or more toxic chemicals are reasonably anticipated to be present at facilities within the candidate industry group ("chemical" factor); (2) whether facilities within the candidate industry group 'manufacture,' 'process,' or 'otherwise use' these toxic chemicals ("activity" factor); and (3) whether facilities within the candidate industry group can reasonably be anticipated to increase the information made available pursuant to EPCRA section 313, or otherwise further the purposes of EPCRA section 313 ("information" factor).³⁷

The EPA conducted an extensive assessment for each of the proposed industry groups and relied on the information in making its determination that the industry groups would further the goals of EPCRA section 313.³⁸

The seven new industry groups were selected after the EPA implemented a three-phase screening process designed to select the industry groups most relevant in furthering the purposes of EPCRA section 313.³⁹ The first phase of the screening process included analyzing the information already available on the "chemical use, release and waste management" of the industries⁴⁰ and creating "industry profiles" from the information gathered. The second phase compared the activities of the industries to the threshold activities and services provided to the manufacturing sector set out in EPCRA section 313.⁴¹ Finally, the regulatory definitions of the industry groups were reviewed, along with any guidance programs already in existence and any exemptions that might be applicable to the potential industry applicants.⁴²

Before the EPA promulgated the final rule on May 1, 1997, the EPA followed appropriate administrative procedures as required by the APA.⁴³ Notice was published in the Federal Register,⁴⁴ and formal public meetings were timely held.⁴⁵ Additional public meetings were held during the comment period.⁴⁶

Many comments were received.⁴⁷ Although many comments supported the

ment of appropriate regulations, guidelines, standards, and the like. 42 U.S.C. § 11023 (h).

36. 62 Fed. Reg. 23,834, at 23,836.

37. *Id.*

38. 62 Fed. Reg. 23,834, at 23,836.

39. *Id.* at 23,834.

40. 62 Fed. Reg. 23,834, at 23,834.

41. *Id.*

42. Some industry groups that were being considered were excluded from the final rule, because of issues that had not been resolved in the proposal. 62 Fed. Reg. 23,834, at 23,834.

43. Public Information; agency rules opinions, orders, records, and proceedings, 5 U.S.C. § 552 (1999).

44. The EPA has published its notice in the Federal Register; EPA officials have made public statements; there was media coverage; and most significantly, notice was given during a Presidential address on August 8, 1995. *Proposed Rules: Environmental Protection Agency*, 61 Fed. Reg. 33,588, 33,590 (1996) (to be codified at 40 C.F.R. pt. 372). In addition to these public meetings, the EPA also held public discussions at the scheduled meetings of the Forum on State and Tribal Toxics Action.

45. 62 Fed. Reg. 23,834, at 23,834.

46. *Id.*

47. 62 Fed. Reg. 23,834, at 23,834.

EPA's exercise of its authority, some commenters believed the EPA's authority to add industry groups to the TRI program was more restricted. Some comments stated that the EPA should only add industries to the extent "necessary" under the provision. Others commented that the EPA's authority is strictly limited to adding industries that are "like" or "akin" to the manufacturing facilities already included.⁴⁸ The EPA responded to these comments by alluding to the legislative history of section 313(b)(1)(B) for support that the EPA may add industry groups to the TRI reporting program when relevant for the purposes of that program.⁴⁹ Additionally, the EPA adopted the position that the facilities do not have to be "like" or "akin" to facilities in the manufacturing sector; instead, the information reported from the facilities must be similar in nature to the data obtained on toxic chemical use, management, and disposition from the manufacturing sector.⁵⁰

D. Standard Industrial Classification Code 49: Electric Utilities

Fossil fuel electric power utilities are classified under SIC Code 49.⁵¹ Coal,⁵² oil, and gas represent the types of fossil fuels typically used for electricity generation in the United States.⁵³ Electric utility facilities were considered in the expansion since the combustion of these fuels may release section 313 chemicals.⁵⁴ Additionally, the ash waste, which constitutes most of the combustion waste, is comprised of silicon, aluminum, iron, and calcium in their oxide forms, as well as potassium, sodium, and magnesium.⁵⁵

During the comment period, numerous comments were received from the electric utility industry. Most questioned whether adding electric utility facilities to the EPCRA was consistent with the purposes of EPCRA section 313. Others sought clarification as to whether the definitions included in section 313 would be applicable to electric utilities, and whether the scant data that would be obtained from these facilities justified the burden that would be placed on the industry to report.⁵⁶

Utilities argued that the definitional framework of EPCRA section 313 did not fit the activities of non-manufacturing industries such as electric utilities, be-

48. *Id.* at 23,838.

49. 62 Fed. Reg. 23,834, at 23,838.

50. The statute and the Conference Report affirms Congress' intent that the EPA may add facilities if the facilities will contribute to the TRI data base information of toxic chemicals.

51. SIC Code 49 includes facilities that participate in electric, gas, and sanitary services. The facilities can be further classified under the three and four-digit SIC codes; facilities classified under SIC Code 4911 are engaged in the generation, transmission, and/or distribution of electric energy for commerce. EPA, PROFILE OF THE FOSSIL FUEL ELECTRIC POWER GENERATION INDUSTRY, at 3 (1997) [hereinafter INDUSTRY PROFILE].

52. Coal is the most abundant fossil fuel in the United States and more than one-half of all electricity generated comes from this resource. INDUSTRY PROFILE, *supra* note 51, at 38.

53. *Id.*

54. The toxins are generated as byproducts from the burning of the coal or oil. The combustion process releases pollutants such as sulfur, minerals, carbon monoxide, organic hydrocarbons, and trace metals. INDUSTRY PROFILE, *supra* note 51, at 40.

55. Ash also may have trace components of arsenic, barium, lead, mercury, and other metals. INDUSTRY PROFILE, *supra* note 51, at 41.

56. 62 Fed. Reg. 23,834, at 23,862.

cause the “substances present or incidentally formed during combustion (e.g. stack gases, fly ash, and bottom ash) are not ‘manufactured’ or ‘otherwise used,’ and that ‘coincidental manufacture’ during combustion should not apply because the primary function of an electric generation facility is not the manufacturing of any chemical or mixture of chemicals.”⁵⁷ The EPA countered that the combustion from coal and oil-fired electric utilities constitutes “otherwise use” within EPCRA section 313 and results in the manufacture of EPCRA section 313 toxic chemicals.⁵⁸ The fact that the toxins are coincidentally manufactured does not absolve the industry from reporting. Moreover, electric utilities are like manufacturing facilities in that they “otherwise use” some of the listed toxic chemicals in cleaning, maintenance, and purification activities.⁵⁹ As in the manufacturing sector, the electricity produced from the combustion of fossil fuels is distributed in commerce. Based upon all of these reasons, reporting from the electric utility industry is relevant in furthering the purpose of the EPCRA.

Another complaint raised by the industry was that the EPA’s conclusion that combustion byproducts were “manufactured” was inconsistent with the logic used for excluding nuclear, hydroelectric, and gas plants from the expansion.⁶⁰ The industry also argued that the *de minimis* exemption should apply to electric utilities, since the trace metals and impurities would be below the concentration level. The utilities’ comments challenged the EPA’s application of the manufacture definition to combustion, characterizing it as an attempt on behalf of the EPA to prevent the industry from using the *de minimis* exemption for metals that exist as impurities in fuels.⁶¹ The EPA defended against this allegation by stating that the combustion of coal and oil leaves no chemicals in the end product, which is electricity.⁶² Therefore, the chemicals that are produced are byproducts of the product and will not be eligible for the *de minimis* exemption, despite the fact that the byproducts are coincidentally manufactured.⁶³

The other noteworthy argument raised in comments in opposition to the proposed expansion was that there is little information as to what metal compounds are present in coal and oil prior to combustion and what metal compounds exist in the ash byproducts. Relying on this assumption, the commenters asserted that the data reported would be of minimal importance to the public and should be exempted. The EPA responded that what is important is whether a

57. *Id.* “‘Coincidental manufacture’ of EPCRA section 313 chemicals directly results from the combustion of coal or oil to generate electricity, which is the primary purposes of the facility.” *Id.* at 23,863.

58. 62 Fed. Reg. 23,834, at 23,862.

59. Similar to existing manufacturing facilities that are subject to the reporting requirement, the facilities will have to factor into their threshold determinations and reporting calculations the quantities of EPCRA section 313 chemicals used in these activities. *Id.* at 23,836.

60. The commenters state that the presence/formation of byproducts is ancillary to the production of electricity and not the primary purpose for burning coal and oil. However, this argument is rejected by the fact the proposal to expand the reporting requirement to electric generating facilities was that the burning of fuels and production during combustion involves section 313 toxic chemicals. 62 Fed. Reg. 23,834, at 23,862.

61. *Id.*

62. EPCRA section 313 states that “manufactured” impurities that remain with a product are subject to the *de minimis* exemption, but “manufactured” byproducts that do not remain with the product cannot claim to be exempt.

63. 62 Fed. Reg. 23,834, at 23,866.

new metal compound has been created, rather than whether there has been a change in a metal's chemical state. Moreover, although the EPA did not believe it difficult to accurately determine threshold quantities, it explained that a facility that finds difficulties can still report estimates, which will provide the public with information it presently lacks.⁶⁴

E. *The Dayton Power Decision*

*Dayton Power*⁶⁵ represents the utilities' challenge to the newly expanded rules. The Plaintiffs, both electric generators, argued that the EPA lacked the authority to add electric utilities pursuant to the EPCRA, and challenged the EPA action under the APA,⁶⁶ "claiming that the modification of EPCRA is agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁶⁷

The Plaintiffs challenged the EPA's addition of their facilities to the TRI reporting program on three grounds, arguing: (1) that the EPA could only add facilities engaged in activities "operationally similar" to facilities in the already-included manufacturing sector, and, the Plaintiffs contend, "their facilities do not 'manufacture or otherwise use' toxic chemicals for the purposes of EPCRA, as manufacturing facilities do";⁶⁸ (2) that the application of the term "release" and the EPA's definition of "facility" was arbitrary, capricious, and was an abuse of discretion, given their extensive measures to minimize or prevent ash and other materials from contact with the environment;⁶⁹ and (3) that the *de minimis* exception should apply. As to this third argument, the Plaintiffs specifically noted the limited information pertaining to the amount of TRI chemicals in coal, oil, and combustion byproducts, that the exemption is part of the EPCRA and covers those facilities that are required to report toxic chemicals, and that there have been numerous analogous instances in which the EPA has applied the exemption.⁷⁰

III. ANALYSIS

The court held that the EPA was within its statutory authority and had not acted capriciously nor contrary to applicable law in adding electricity generating utilities to the EPCRA reporting requirements.⁷¹ In reaching its decision, the court relied on two U.S. Supreme Court precedents, *Ardestani*⁷² and *Chevron*,⁷³

64. The EPA believes that the reporting of some information is better than none when it comes to reporting the release of toxic chemicals.

65. *Dayton Power*, 44 F. Supp.2d 356.

66. Scope of Review, 5 U.S.C. § 706(2)(A).

67. *Dayton Power*, 44 F. Supp.2d at 358.

68. Rather, the plaintiffs state, electricity generating facilities utilize coal and oil for reasons that have nothing to do with the trace concentrations of section 313 chemicals that may be found in the fuels; the TRI chemicals are meaningless for the production of electricity. *Dayton Power*, 44 F. Supp.2d at 359.

69. *Dayton Power*, 44 F. Supp.2d at 361.

70. *Id.* at 360.

71. *Dayton Power*, 44 F. Supp.2d at 360.

72. "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' . . . when a contrary legislative intent is clearly ex-

and reasoned that the addition of electricity generating facilities serves the informational purpose of the EPCRA. In *Ardestani*, an alien who feared persecution on return to her home country, Iran, sought asylum in the United States. The Immigration and Naturalization Service (INS) denied the asylum application and issued an order to show cause why the alien should not be deported. The alien prevailed at the show cause hearing, and the immigration judge granted the alien's application for attorneys' fees under the Equal Access to Justice Act (EAJA). The INS appealed the fees, and the case reached the Supreme Court. In deciding whether the EAJA applied to deportation hearings, the Court looked at the plain language of the statute to determine Congress' intent and concluded that the EAJA did not apply to deportation hearings. In *Chevron*, the court reviewed a policy of the EPA which interpreted a phrase in the Clean Air Act (CAA), which some environmental groups challenged. The Court, in reaching its holding, articulated a two-step process to determine if the agency has exceeded its authority in interpreting a statute.⁷⁴

A. *The EPA's Authority Under Chevron*

The Plaintiffs in the case argued that the EPA lacked authority to expand the EPCRA to fossil fuel generating facilities. The court noted its scope of review of agency action is limited to decisions that are arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with law; deference is afforded to the agency decision according to *Chevron*.⁷⁵ Applying the first step of *Chevron*, the court found that Congress expressly gave the EPA the authority to add facilities to the TRI reporting program to the extent necessary to further the purposes of the program.⁷⁶ Additionally, the court found that the plain language⁷⁷ of the EPCRA does not limit the expansion to only those facilities that are engaged in activities "operationally similar" to other facilities in the manufacturing sector and that inclusion of electricity generating facilities serves the informational purpose of the EPCRA.⁷⁸

Plaintiffs had submitted a quote from a Conference Report on EPCRA (the Conference Report), which read:

Subparagraph 313(b)(1)(B) of the conference substitute provides that the Administrator of the EPA may add or delete SIC Codes specified for coverage in the legislation. This authority is limited, however, to adding SIC Codes for facilities which, like facilities within the manufacturing sector SIC codes 20 through 39, manufacture, process, or use toxic chemicals in a manner such that reporting by these facili-

pressed." *Dayton Power*, 44 F. Supp.2d at 359 (quoting *Ardestani v. INS*, 502 U.S. 129, 130 (1991)).

73. *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984).

74. The matter cannot be addressed if Congress' intent on the matter is clear. *Chevron*, 467 U.S. at 843.

75. Except in *de novo* review proceedings, section 706 "does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties." Attorney General's Manual on the Administrative Procedure Act, 93, 108 (1947).

76. The court cited 42 U.S.C. § 11023 (b)(1)(B).

77. Except when Congress' intent is expressed to the contrary, there is a "strong presumption" that the plain language of the statute expresses congressional intent. . . ." *Ardestani*, 502 U.S. at 135-136.

78. The only limitation is that the facilities will further the informational purpose of the TRI program authority.

ties is relevant to the purposes of this section.⁷⁹

The court reviewed the Conference Report as required under the APA.⁸⁰ The court likewise considered Plaintiffs' arguments that their facilities did not "manufacture or otherwise use" toxic chemicals for the purposes of the EPCRA, as manufacturing facilities do⁸¹ and that their combustion of coal and oil has "nothing to do with the trace concentrations of TRI chemicals that may be found in the fuels."⁸² However, after considering the Conference Report, the court found the EPA's interpretation, as well as its own, to be in accordance with the plain language of the statute. Thus, the court determined it was unnecessary to move to the second *Chevron* step and determine if the agency's action was reasonable.⁸³ Although stating Congress' intent was clear, the court nevertheless addressed the second *Chevron* test and stated in dictum that the EPA's interpretation was reasonable since section 313 chemicals were being emitted into the environment, and public awareness was desirable.⁸⁴

B. The *De Minimis* Issue

Plaintiffs also argued that they were entitled to the *de minimis* exemption; however, the court concluded that this issue was not ripe⁸⁵ and denied review of the issue since the *de minimis* exemption is only applicable to industries who are subject to the EPCRA TRI reporting requirements.⁸⁶ The plaintiffs in this case were contending that they should not be subject to the TRI, because the EPA lacked the authority to add electric utilities to the list of industries subject to the requirements of the EPCRA.⁸⁷ Thus, the fact that the EPA denied the facilities the benefit of the *de minimis* exemption is not presented until plaintiffs are actually impacted by the EPA's expansion and are denied the exemption. Moreover, the court noted that Plaintiffs had not raised the issue during the comment period of the rulemaking.⁸⁸ Citing *Linemaster*⁸⁹ for the proposition that issues cannot

79. *Dayton Power*, 44 F. Supp.2d at 359 (citing H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 281, 292 (1981)).

80. 5 U.S.C. § 706.

81. The Plaintiff states that the "listed manufacturing facilities purchase or make the TRI chemicals for the chemical properties of those chemicals. The chemicals are either incorporated into the products, used to make the products, or are transformed into other TRI chemicals for resale or further processing." *Dayton Power*, 44 F. Supp.2d at 359.

82. *Id.*

83. If Congress has not expressly made its intent clear on the matter, then the reviewing court analyzes the agency's construction of its statutory mandate. The court must defer to the agency's position if the court concludes that the agency's action is reasonable. *Chevron*, 467 U.S. at 843.

84. *Dayton Power*, 44 F. Supp.2d at 359.

85. An issue is ripe for judicial review when it is mature, which means there is an actual controversy that a court can address.

86. *Dayton Power*, 44 F. Supp.2d at 360.

87. *Id.*

88. The Federal Register indicates the *de minimis* issue was raised by commenters during the comment period. 62 Fed. Reg. 23,834, at 23,866. It is possible that the record submitted to the district court did not indicate this issue, and since the court only reviews the record before it, the issue could not be addressed.

89. "Claims not presented to an agency may not be raised for the first time before a review court" *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1308 (D.C. Cir. 1991).

be raised for the first time before the reviewing court, the court declined review.

C. The EPA's Interpretation: The Definition of "Release" and "Facility"

In a supplemental memorandum released roughly one week after its initial decision, the court focused on the issue of the proper definition of "release"⁹⁰ and "facility"⁹¹ according to the EPCRA and whether the EPA's use of the definitions was arbitrary, capricious, and an abuse of discretion.⁹² Plaintiffs challenged the use of "release" because they carefully managed the ash and other waste materials produced to prevent or decrease the chance of accidental releases into the environment.⁹³ Plaintiffs argued that the ash and other materials are not hazardous and contain minimal concentrations of section 313 chemicals.⁹⁴ The court concluded that the statute supports the EPA's interpretation⁹⁵ of release used in conjunction with "environment."

With respect to the EPA's definition of "facility," the court did not elaborate on its finding, but stated that the EPA was within its authority and was neither arbitrary, capricious, nor acting contrary to applicable law in extending the reporting obligation to electricity generating facilities.⁹⁶ However, it appeared that the court was *sub silentio* suggesting that the Plaintiffs' argument that the EPA's definition of "facility" allows the agency to arbitrarily require non-coal/oil units that are contiguous to coal or oil fired facilities to be subject to the TRI reporting requirements, is also not ripe for review. This can be interpreted from the court's statement: "[a]s with the de minimis exemption, the court is loathe to carve out a specific rule or portion of a rule to be applicable only to utility companies after ruling that the expansion of EPCRA to these companies is reasonable."⁹⁷ If, however, a challenge comes before the court when the EPA cites a utility for not reporting its non-coal/oil facility located on contiguous property, then the issue may be addressed.

IV. IMPACT

A. The Impact the Reporting Requirement Will Have on the Industry

1. The Risk of the Public's Misperception from "Raw" Data

Upholding the EPA's authority to expand the TRI reporting requirement presents many concerns to the electric utility industry. This holding will likely

90. The EPCRA defines releases to mean "any spilling, leaking, pumping, pouring, emitting, emptying, discharging injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers and other closed receptacles)." 42 U.S.C. § 11049(8).

91. Under the EPCRA, a facility is defined as "all buildings, equipment, structures, and other stationary items which are located on a single site or contiguous or adjacent sites and which are owned or operated by the same person. . . ." *Id.* § 11049(4).

92. *Dayton Power*, 44 F. Supp.2d at 361.

93. The Plaintiffs only challenged the portion of the EPCRA, which applies release to include the disposal of toxic chemicals into on-site landfills and surface impoundments. *Id.*

94. *Dayton Power*, 44 F. Supp.2d at 361.

95. 62 Fed. Reg. 23,834, at 23,853.

96. *Dayton Power*, 44 F. Supp.2d at 361.

97. *Dayton Power*, 44 F. Supp.2d at 361.

have an impact on the public's perception of the amount of toxins being emitted by electric utilities into their communities. TRI reporting does not take into consideration that most, if not all, "releases" are carefully controlled to ensure that health risks are removed.

The data from the TRI represents the annual volume release of toxic chemicals. The raw numbers reported from the electric utilities may appear high, and there may be misinterpretations regarding the significance of these numbers absent guidance from the agency and greater public understanding of other factors which are more risk determinative.⁹⁸ In its rulemaking, the EPA sympathized with the industry, but stated that Congress intended for the public to be aware of the toxic chemical volumes being released into the environment.⁹⁹

Another potential impact may be that the public will be diverted by a large raw number reported by the electric utility industry, thus directing attention from more significant exposures from other industries that report lower numbers.¹⁰⁰ While the EPA discounted this concern, it did recognize its potential.¹⁰¹ In anticipation that the high numbers will mislead communities near electric utilities, the electric generators have begun to educate the citizens.¹⁰² This approach allows the utility to be the first to explain the significance of the reported numbers, provide explanatory factors, and develop plans to implement ways to reduce these numbers.

2. Overcoming the Misperceptions Caused by the TRI Data

Media attention surrounding the TRI data has prompted many industries, including the electric utility group, to create public relations or outreach programs for public education.¹⁰³ Studies have been conducted to identify those strategies and methods that have been most effective in the past with respect to developing positive interaction between industries and communities, while increasing the utilities' credibility.¹⁰⁴ One suggestion provided by the research is for electric companies to identify and train a spokesperson for each of the facilities, and to refer questions and concerns to that person or panel.¹⁰⁵

A proactive approach has been employed by some utilities.¹⁰⁶ For instance, Florida Power & Light (FPL) sought to improve communications with the public

98. These other factors include chemical concentration, toxicity, and exposure potential. 62 Fed. Reg. 23,834, at 23,866.

99. *Id.*

100. 62 Fed. Reg. 23,834, at 23,866.

101. *Id.*

102. Robert J. Oltmanns, *TRI Accountability Raises the Bar for Utilities' Public Relations*, ELEC. LIGHT & POWER, Apr. 1999, at 20.

103. *FPL Engages in Community Dialogue on Power Plant Operations*, PR Newswire, June 8, 1999 [hereinafter *Community Dialogue*]; Stewart Jennison, *Toxics Add Up in Report on Owensboro, Ky., Util.*, MESSENGER INQUIRER, June 27, 1999 (available in LEXIS, Energy and Public Utility News Stories, Current).

104. Research was conducted by Skutski & Oltmanns, which included interviewing petrochemical manufacturers. Oltmanns, *supra* note 102.

105. *Id.*

106. The following companies provide examples: Florida Power & Light Company; The Edison Electric Institute; National Rural Electric Cooperative Assn.; American Electric Power; Tennessee Valley Authority; Public Service Company of New Hampshire; and Public Service Company of Oklahoma.

by meeting with individuals in the communities near its twelve utility plants in Florida. For its program, FPL reported that by the time the TRI reports are filed with the EPA and the state, this outreach program will have conducted meetings with nearly 100 community groups and individuals in communities.¹⁰⁷ Employees of FPL have informed the community about the plants' operations, emissions that result from the production of electricity, and how the emissions are measured and reported to the EPA.¹⁰⁸

Lobbying groups like Edison Electric Institute and National Rural Electric Cooperative Association¹⁰⁹ embraced the suggestions and submitted an estimate of numbers before the July 1, 1999, reporting deadline in hopes of alleviating public concerns surrounding the emissions.¹¹⁰ The two groups were concerned that the public might associate the high TRI numbers with an increased health risk, even though the groups assert that the potential risk for health problems is minimal.¹¹¹ American Electric Power took a different approach by trying to justify the high numbers after they were submitted to the EPA.¹¹² The Tennessee Valley Authority (TVA) took yet another approach and made a simple statement to the press, acknowledging that when electricity is produced, chemicals will be released; however, it went on to emphasize the fact that TVA meets or exceeds the state and federal regulations that control emission releases.¹¹³

In addition to the above-mentioned impacts on the industry, the recent court decision will likely influence the electric utility industry to take the initiative to find various techniques for reducing the amount of toxic chemical emissions, thus potentially resulting in increased costs for ratepayers.¹¹⁴ FPL used the TRI to provide information on how the facility anticipates generating electricity to meet the needs of its customers while communicating planned improvements in the way it operates so as to decrease the level of toxins emitted.¹¹⁵ FPL has also proposed capacity expansion, reduction in emissions for the most significant pollutants, and improvement in the recovery of ash waste.¹¹⁶

107. *Community Dialogue*, *supra* note 103.

108. *Florida Power & Light* (visited Oct. 30, 1999) <<http://www.fpl.com>>.

109. The association represents major coal and oil burners.

110. *Utilities Try to Pre-empt Criticism By Releasing Toxics Figures Early*, *ELEC. UTIL. WEEK*, June 14, 1999, at 5.

111. The two groups cite a 1998 study in which the EPA found no significant threats to public health from utility emissions. *Id.* The study found that emissions from electric utilities do not appear to create an additional cancer risk of more than one in one million. However, the EPA noted that more studies are needed to determine whether cuts in emissions from these facilities were necessary to protect public health. Ken Ward, Jr., *New EPA Regulations force West Virginia Power Plants to Cut Emissions*, *THE CHARLESTON GAZETTE*, July 11, 1999 (available in LEXIS, Energy and Public Utility News Stories, Current).

112. The Vice President for Environmental Affairs at AEP admitted the numbers for its plant were higher than others, but justified it by saying that AEP is one of the largest coal-burning utilities in the industry. Ward, *supra* note 111.

113. *Utility TRI's Show No Health Risks*, *COAL AGE*, July 1999, at 6.

114. *Using the Toxics Release Inventory* (last modified Apr. 26, 1999) <<http://www.epa.gov/opptintr/tri/triuse.htm>>.

115. FPL is below any levels that are thought to be of concern to the public's health; the company is still expanding effort to reduce its emissions even further. *Community Dialogue*, *supra* note 103.

116. *Florida Power & Light, Community Care* (visited Mar. 25, 2000) <<http://www.fpl.com>>.

3. Awareness of Emissions in the Community

An additional impact of the court's finding will be an increased awareness of potential health effects. The public will now be able to discover what chemicals are being manufactured, released, or transferred in their community by the electric utility industries. The TRI data will enhance community knowledge of whether chemicals being released into their communities pose a threat to human health.¹¹⁷

Although not all of the chemicals emitted by fossil fuel electric utilities are listed as Occupational Safety and Health Administration carcinogens, these facilities do emit several chemicals and metals that are known¹¹⁸ or suspected to be carcinogenic to humans in concentration.¹¹⁹ Probably the most significant carcinogenic chemical being released by these facilities is arsenic, which is found in the ash left from burning coal.¹²⁰ Arsenic, besides being a carcinogen, is suspected of being toxic to the cardiovascular system and may be associated with the development of diabetes.¹²¹ According to the Edison Electric Institute,¹²² only about 1% of man-made arsenic emissions come from the utility industry.¹²³ In addition to carcinogens, many of the chemicals and metals may have other harmful health effects on the cardiovascular system, kidneys, eyes, nose, throat, and skin.¹²⁴ Despite data that emissions from electricity generating facilities may have potential health consequences, the majority of the industry seems to think that the power plants are safe and do not pose a health risk.¹²⁵ The industry appears to be relying on an independent study of U.S. power plant emissions conducted by the Harvard Center for Risk Analysis.¹²⁶ The Center found that the

117. *Toxics Release Inventory & Health* (last modified Apr. 26, 1999) <<http://www.epa.gov/opptintr/tri/triuse.htm>>.

118. Arsenic and chromium compounds are known cancer-causing agents. *Toxic Release Inventory OSHA Carcinogens Box 2-A: Basis of OSHA Carcinogen Listing for Individual Chemicals* (last modified June 25, 1999) <<http://www.epa.gov/opptintr/tri/oshacarc.htm>>.

119. Cobalt, lead, and nickel are possibly carcinogenic to humans at concentrated levels. *Id.*

120. At facilities such as Owensboro Municipal Utilities (OMU) this information could be particularly harmful to relations in the community, since it has been reported that the ash from the coal settles in a pond where the water-soluble arsenic drains off into the Ohio River. Jennison, *supra* note 103. However, it should be noted that what is important is not mere exposure to the chemical but rather the concentration of exposure.

121. Karen Breslin, *Removing Arsenic from Drinking Water* (visited Nov. 8, 1999) <<http://www.ehpnetl.niehs.nih.gov/dpcs/1998/106-11/innovations-abs.html>>.

122. A research group which represents the electric utility industry.

123. The majority of arsenic comes from natural, weather-related activities and other natural sources such as forest fires and volcanic eruptions. Jennison, *supra* note 103. Just as arsenic is naturally found in natural sources, all the "carcinogens" are elements of nature and are present in nature.

124. Sulfuric acid is corrosive and can cause permanent damage to the lungs at concentrated levels and can cause irreversible eye injury. *Sulfuric Acid* (last modified Jan. 18, 1999) <<http://www.artsci.gmcc.ab.ca/people/grebensteinm/h2so4.htm>>. Barium can irritate the lungs, eyes, nose, throat, and at very high levels can cause an irregular heartbeat. *ToxFAQs: Barium* (last modified Sept. 1, 1995) <<http://www.ic.be/incin/barium.htm>>. Concentrated levels of hydrochloric acid can irritate eyes, burn the skin and disturb breathing passages. *Hydrochloric Acid* (visited Nov. 8, 1999) <<http://www.artsci.gmcc.ab.ca/people/grebensteinm/hcl.htm>>.

125. Examples of such industry thinking include LG&E, PSO, OMU, PSNH, EEI, NRECA, and AEP.

126. Cherie Jacobs Lane, *Florida's Tampa Electric Co. Tallies Toxic Emissions in Report*, TAMPA TRIBUNE, July 3, 1999 (available in 1999 WL 17355284).

potential risk for health effects caused by the emissions is of little significance.¹²⁷ Despite such findings of the Harvard study, some concerns remain, and other research analysts believe that there is a need to document the amount of chemicals released.¹²⁸ With improved technology, and increased knowledge of the chemicals being emitted into a community, nearby utility facilities may face an increased number of residents who allege that utility air emissions affected their health.¹²⁹

The cycle may begin again in response to the EPA's recent estimate that about one-third of the mercury emissions in the United States come from utility facilities.¹³⁰ It has been estimated that the utilities release 52 tons of mercury.¹³¹ This past summer, the EPA began to collect data on mercury emissions by directing approximately 1400 coal-fired power plants nationwide to analyze the coal they burn for mercury content and report the results to the EPA.¹³²

The EPA has lobbied to impose mercury regulations, but Congress, who ordered the agency to wait until mid-2000 when the National Academy of Sciences finishes a study examining the health effects of mercury emissions, has refused its attempts.¹³³ However, Representative Tom Allen (D-Maine) has introduced a new bill that would require mercury emissions from fossil fuel utilities to be 95% below their current emissions baseline.¹³⁴

B. Benefits Incurred by the Court's Decision

The court's decision will have beneficial effects upon communities near fossil fuel generators by keeping them abreast of the emissions the utilities are releasing into the environment, thereby allowing them to use the information to take control of their health and safety.¹³⁵ The EPA touts the TRI as an aid to "diagnose, treat, or study health effects resulting from chemical exposure in the

127. *Id.*

128. Rick Siegal, a research analyst for the Environmental Quality Commission, and Chairwoman Aloma Dew. Jennison, *supra* note 103. Additionally, Gail Kamaras of the Legal Environmental Assistance Fund states the Harvard study "may not include human exposure to multiple chemicals at once." Lane, *supra* note 126.

129. Oltmanns, *supra* note 102.

130. This is especially true if mercury is added to the TRI as a toxic chemical that must be reported with the other toxic chemicals emitted by listed industries. EPA Administrator Carol Browner, with the support of some utilities, invited the utility industry to expand its reporting requirement beyond the TRI reporting obligation and include mercury. The companies releasing expanded emissions data were Consolidated Edison, KeySpan Energy, Niagra Mohawk Power, Ontario Power Generation, PECO Energy, PG&E Generating and Public Service Electric and Gas. *Utilities Issue Preliminary TRI Findings in Attempt to Allay Public Concerns*. UTIL. ENV'T REPORT, June 18, 1999, at 1 (available in LEXIS, Energy and Public News Stories, Current) [hereinafter *Preliminary TRI Findings*].

131. *Pending Bills Require Fossil plants To Reduce mercury Emissions By 95%*, UTIL. ENV'T REPORT, Aug. 13, 1999 (available in 1999 WL 11491216) [hereinafter *Pending Bills*].

132. The EPA directed plants with generation capacity greater than twenty-five MW to report their findings. *Preliminary TRI Findings*, *supra* note 130.

133. *Pending Bills*, *supra* note 131.

134. *Id.*

135. *Using the Toxics Release Inventory* (last modified Apr. 26, 1999) <<http://www.epa.gov/opptintr/tri/triuse.htm>>.

community or workplace."¹³⁶ Additionally, the decision will likely indirectly force the manufacturers to utilize improved technology to update their facilities or spawn inventions of new techniques to reduce the level of toxic chemicals released each year.¹³⁷ Similarly, universities and independent researchers can use the TRI reports to propose alternative methods for preventing the release of toxic chemicals.¹³⁸

V. CONCLUSION

The court's decision in *Dayton Power* upholding the EPA's authority to expand the section 313 reporting requirement in the EPCRA to fossil fuel generators is significant not only because it found the plain language of the statute authorized the expansion, but because of the record developed during the comment period. Moreover, the EPA's interpretations of the statute were found to be reasonable by the court. Additional support was found in the generation of additional public information as part of the expanded TRI reporting program. Although raw data can be misinterpreted, utilities can combat these ill-perceived notions and enhance community rapport through well-planned informational efforts.

Christie Ingram

136. *Id.*

137. *Using the Toxics Release Inventory* (last modified Apr. 26, 1999) <<http://www.epa.gov/opptintr/tri/triuse.htm>>.

138. *Id.*