

court under section 304 of the Clean Air Act, 42 U.S.C. 7604. The commenter also asserts that EPA's determination must, at a minimum, be supported by an opinion from the Maryland Attorney General's office.

Response: Ann. Code Md. 2-106 states:

2-106—Rights of persons other than this State.

(a) Presumption and finding of fact.—A determination by the Department that air pollution exists or that a rule or regulation has been disregarded or violated does not create any presumption of law or finding of fact for the benefit of any person other than this State.

(b) Proceedings.—Any proceedings under this title shall be brought by the Department for the benefit of the people of this State.

(c) Actionable rights.—No person other than this State acquires actionable rights by virtue of this title.

While this State statute does prevent citizens from bringing suit in federal or state court to enforce provisions of Maryland's air quality control law, the plain and unambiguous language of Ann. Code Md. 2-106 limits its scope to proceedings brought "under this title" or "by virtue of this title" (the "title" in question being Maryland's Title 2, entitled "Ambient Air Quality Control"). Therefore, the statute does not affect any right conferred by any federal law. Section 304 of the Clean Air Act, 42 U.S.C. 7604, is federal law, and beyond the self-limiting reach of the language of Ann. Code Md. 2-106.

Our previous response cited *Maryland Waste Coalition v. SCM Corp.*, 616 F. Supp. 1474, 1477 (D. Md. 1985). While we cited this case because the court specifically observed that Ann. Code Md. 2-106(c) allows only the State, and not private citizens, to bring an action to enforce the Maryland air pollution laws, it is worth noting that the *SCM* court did not cite Ann. Code Md. 2-106 as a bar to the citizen suit brought by the plaintiff pursuant to section 304 of the Clean Air Act. (The court did find that certain of the plaintiff's claims were barred by section 304 to the extent that the plaintiff claims overlapped those in a previously filed enforcement action brought by EPA.)

Furthermore, as we also pointed out in our prior response, "had Maryland attempted to prescribe the types, kinds and weights to be ascribed to evidence entered in a federal forum, such an action would have obvious implications on the system of federalism established by the United States' Constitution."

Had Maryland attempted with Ann. Code Md. 2-106 to divest a right to bring a citizen suit under federal law in a federal court, the federalism

implications would be just as apparent. Such a stark conflict with the federal statute would be nullified by the Supremacy Clause of the United States Constitution, which provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. VI, Paragraph 2.

Under the Supremacy Clause, everyone must follow federal law in the face of conflicting state law. "It is basic to this constitutional command that all conflicting state provisions be without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), citing *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819). "[A] state statute is void to the extent it conflicts with a federal statute—if, for example, 'compliance with both federal and state regulations is a physical impossibility' or where the law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (internal citations omitted).

Ann. Code Md. 2-106 does not on its face conflict with or present an obstacle to the full purpose and objective of Section 304 of the Clean Air Act. Even if such a conflict existed, the statute would be unconstitutional based on the Supremacy Clause as interpreted by the Supreme Court. Therefore, EPA can unequivocally state that Ann. Code Md. 2-106 does not conflict with or affect any rights conferred by Section 304 of the Clean Air Act, including the public's ability to enforce title V permit conditions in federal court. The EPA does not believe that obtaining an opinion from the Maryland Attorney General would add anything to this analysis.

Comment: The commenter believes that a provision of Maryland law, Ann. Code Md. 2-611, illegally shields violators from enforcement so long as they operate in compliance with a compliance plan.

Response: The EPA disagrees with this comment. On September 23, 2002, EPA responded to a comment submitted on March 12, 2001 with respect to Ann. Code Md. 2-611. The original comment erroneously stated that this statutory provision "amounts to a blanket waiver or suspension of applicable requirements, and an amendment of the permit without following required modification procedures, all in violation of title V, and that "the provision could preclude citizens and EPA from enforcing permit requirements * * *

The EPA's response was based in part on the Maryland Attorney General's interpretation of this provision. To give the proper context to the current comment, we believe that it is helpful to set forth EPA's response to the original comment in full below:

EPA Response to Comment 6: Ann. Code Md. 2-611 provides:

A person is not subject to action for a violation of this title or any rule or regulation adopted under this title so long as the person acts in accordance with a plan for compliance that (1) the person has submitted to the Secretary; and (2) the Secretary has approved, with or without amendments, on the recommendation of the Air Management Administration. The Secretary shall act on any plan for compliance within 90 days after the plan for compliance is submitted to the Secretary.

When a State is diligently prosecuting a facility for violations of its permit, it is typical and reasonable to give a facility a compliance schedule to bring a facility into compliance with its permit conditions. Indeed, EPA's regulations at 40 CFR 70.5(c)(8)(iii)(C) and 70.6(c)(3) require that a title V permit application and permit include a compliance plan containing a compliance schedule for requirements for which the covered source is not in compliance at the time of permit issuance. If a facility must modify its permit due to the conditions of a compliance plan, then that facility should follow all proper procedures to modify its permit as needed. This Maryland law does not allow a title V source to bypass the permit modification process. In addition, the State law does not prevent EPA from enforcing permit requirements (as noted in response to Comment 2, Maryland law does not contain a general citizen suit provision to enforce violations of its air pollution regulations, including permit requirements; however, this is not a legal deficiency in the Maryland program).

Further, neither EPA nor MDE [Maryland Department of Environment] interprets Ann. Code Md. 2-611 as a blanket waiver or suspension of any other applicable requirements for a source. Maryland has submitted to EPA an opinion from the Maryland Attorney General that affirms MDE and EPA's position that the law applies only to violations that are expressly addressed by the compliance plan. See Attachment 4. EPA does not agree that Ann. Code Md 2-611 represents a deficiency in the State's part 70 program.

The commenter apparently accepts EPA's explanation with respect to the points addressed above, but now asserts