

CLEAN AIR ACT

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Supreme Court Issues Major Ruling on Standing and Mootness Issues in Citizen Suits

On January 12, the United States Supreme Court issued a decision addressing the requirements for citizen suit standing in environmental cases and the criteria for determining whether a citizen suit has become moot. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693 (2000). By a 7 to 2 vote, the Supreme Court reversed a decision of the Fourth Circuit holding that citizen suit plaintiffs' claims for civil penalties had become moot because the defendant had come into compliance and the plaintiffs had not been granted injunctive relief.

The Supreme Court's opinion distinguished the situation before it from that in *Steel Co. v. Citizens for A Better Environment*, 523 U.S. 83 (1998), and also limited the potential scope of that decision. In *Steel Co.*, the Supreme Court had ruled that a citizen suit plaintiff lacked Article III standing to bring suit to impose civil penalties against a defendant where the plaintiff was not entitled to injunctive relief to prevent future harm.

Background

The *Laidlaw* case arose when Friends of the Earth and other environmental groups brought suit against the company under the citizen suit provisions of the Clean Water Act. The plaintiffs alleged that the company had violated its NPDES permit on numerous occasions and sought injunctive and declaratory relief, an award of civil penalties, and attorneys' fees. After the complaint

was filed, the company allegedly violated its permit limits on 13 more occasions in the following two months and then subsequently came into compliance with its permit. The federal district court imposed civil penalties of more than \$400,000 but denied the plaintiffs any injunctive relief based on its conclusion that the company had ultimately come into substantial compliance with its permit.

The plaintiffs appealed the district court's failure to award a greater amount of civil penalties to the Fourth Circuit but did not appeal the denial of injunctive relief. The defendant company also appealed the district court's decision and contended, among other things, that the plaintiffs lacked Article III standing to pursue the action.

On appeal, the Fourth Circuit vacated the district court's decision and ruled that the case had become moot. The court of appeals concluded that, because the company had come into compliance with its permit terms and plaintiffs had failed to appeal the denial of injunctive relief, there was no longer a live "case or controversy" under Article III. Relying on the *Steel Co.* decision, the court of appeals reasoned that the only remedy currently available to the plaintiffs – civil penalties payable to the Treasury – would not redress any injury that plaintiffs had suffered. The court also ruled that no attorneys' fees should be awarded because the plaintiffs' failure to obtain any relief meant that they were not "prevailing or substantially prevailing part[ies]" under the fee entitlement provisions of the Clean Water Act.

Standing

As a threshold matter, the majority ruled that the court of appeals should have determined whether plaintiffs had Article III standing to bring the action before addressing the issue of mootness. Based on its analysis of the affidavits and trial testimony in the record, the majority determined that plaintiffs had established the requisite injury in fact based on affidavits of individual members of the plaintiff organizations stating that the unlawful discharges into the North Tyger River had adversely affected their use and enjoyment of the river. The affidavits typically stated that, because of the polluted condition of the river, the citizen in question would not fish in the river nor take advantage of recreational facilities located at or near the river.

The majority further concluded that the defendant's payment of civil penalties to the Treasury could provide sufficient redress to the plaintiffs to satisfy Article III standing requirements. The majority concluded that the payment of such civil penalties has a deterrent effect that was sufficient to support plaintiffs' standing. In this regard, the majority distinguished the holding in *Steel Co.*, where the Court had held that the defendant's payment of civil penalties to the Treasury did not satisfy redressability requirements. The majority stated that the *Steel Co.* holding applies only to situations involving wholly past violations at the time the complaint was filed – not violations that were still occurring when the complaint was filed.

Mootness

The majority also held that the plaintiffs' civil penalty claims did not necessarily become moot once the company came into substantial compliance with its permit. It noted that voluntary cessation of an activity does not ordinarily deprive a federal court of jurisdiction. The majority stated that the Fourth Circuit, in relying on *Steel Co.*, had

confused the closely related but distinct doctrines of standing and mootness. According to the majority, there are circumstances in which the prospect that a plaintiff will engage in harmful conduct may be too speculative to support standing, but not too speculative to overcome a claim of mootness. Thus, the majority limited the *Steel Co.* holding that citizen suit plaintiffs cannot seek civil penalties for wholly past violations to situations where standing, rather than mootness, is at issue. Moreover, the court ruled that the district court's denial of injunctive relief in this case did not necessarily mean that there was no prospect of future harm – especially since the district court believed in this case that the deterrent effect of the civil penalties would be sufficient to prevent future harm. On remand, the district court is to consider any pertinent evidence concerning whether the case is now moot – including the fact that the plant has been shut down – and to determine whether attorneys' fees should be awarded.

The Dissenting Opinion

Justice Scalia, in an opinion joined by Justice Thomas, strongly disagreed with the majority's ruling on both the standing and mootness questions. He contended that the affidavits relied upon by the plaintiffs were far too vague and unsubstantiated to establish that any of the individuals had been injured in fact. According to him, the majority's conclusion that the allegations in the affidavits were sufficient means that, if a member of an environmental organization lives near an offending plant, "it would be difficult not to satisfy the majority's lenient standard." With regard to redressability, Justice Scalia maintained that the case law provides that payment of civil penalties to the Treasury cannot redress a private injury, that it is speculative to assume that such a payment will prevent harm to plaintiffs in the future, and that the majority opinion improperly allows private parties to utilize public remedies. Finally, he disagreed with the distinction between standing and mootness made by the majority and

stated that a plaintiff's personal interest in the outcome of litigation must continue throughout that litigation. □

EPA Promulgates Final Rule Granting Section 126 Petitions

On January 18, 2000, EPA published a final rule granting petitions filed by four states (Connecticut, Massachusetts, New York, and Pennsylvania) pursuant to section 126 of the Act seeking to reduce emissions of ozone precursors from upwind states. 65 Fed. Reg. 2674. Section 126 provides that a state may petition EPA for a finding that a major source or group of stationary sources in another state emits pollutants that "significantly contribute" to nonattainment of a National Ambient Air Quality Standard (NAAQS) in the petitioning state. Upon making such a finding, EPA is to impose requirements on the source or sources in question sufficient to bring them into compliance within three years.

The effect of EPA's action is to impose much more stringent limitations on NOx emissions from 392 listed major sources in 12 midwestern and eastern states as well as the District of Columbia.^{1/} Those sources covered by the final rule will be subject to the NOx Budget Emissions Program – a federal emissions trading program set forth in the final rule. Although the majority of the 392 listed sources are coal-fired electric utilities, many of the listed sources are non-utility facilities containing large industrial boilers. Under the final rule, the listed sources must implement controls to achieve the mandated reductions by May 1, 2003.

The January 18 final rule represents a major change in EPA's approach to addressing ozone transport issues. Initially, EPA intended that

its NOx SIP call would be the primary mechanism for imposing additional controls on upwind NOx sources. The Agency indicated that its rulemaking response to petitions filed by eight northeastern states pursuant to section 126 would provide a "default" or backup mechanism for addressing ozone transport in case the NOx SIP call was not carried out on schedule. In its May 25, 1999 rule addressing the section 126 petitions (64 Fed. Reg. 28,250), EPA found that four of the eight petitions had "technical merit" and provided that the four petitions would automatically be granted if certain deadlines in the NOx SIP call rule were not met. The findings of "technical merit" addressed both the "old" 1-hour ozone standard and the revised 8-hour ozone standard.

Two separate decisions issued in May 1999 by the D.C. Circuit caused EPA to reconsider and change its basic approach. First, the D.C. Circuit issued an order staying the NOx SIP call rule pending a final decision on the judicial challenges to it. Second, the D.C. Circuit overturned EPA's revised 8-hour ozone standard in *American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (1999). In light of these two decisions, EPA decided to stay the May 25, 1999 rule so that it could undertake additional rulemaking to "delink" the section 126 rulemaking from the NOx SIP call rulemaking and to make the section 126 petitions the principal mechanism for addressing ozone transport. The January 18 rule finalizes that new approach. In addition, the January 18 rule revises EPA's prior response to the section 126 petitions so that the final rule addresses nonattainment only with regard to the 1-hour ozone standard.

EPA's decision to proceed primarily under section 126 rather than the SIP call provisions of section 110 has significant consequences in terms of the Agency's authority to address ozone transport and the shape and scope of the resulting regulatory program. In particular, under section 126, EPA is to directly regulate sources that it finds have "significantly contributed" to nonattainment of an ambient standard. Under the section 126 rule, EPA specifically lists the major sources that

1/ The 12 states are Delaware, Indiana, Kentucky, Maryland, Michigan, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Virginia, and West Virginia.

are targeted by that rule and provides the reductions that must be obtained by those sources. On the other hand, under section 110, EPA is only authorized to determine that specific upwind states that “significantly contribute” to downwind nonattainment problems must revise their SIPs to eliminate such contributions. Under the statute, each state subject to a SIP call has discretion in determining which sources should be further regulated through SIP revisions and what additional controls should be imposed on each type of source. Thus, the NOx SIP call rule provides an overall emissions budget for each state and purports to give each state discretion in determining how to meet its budget figure. For example, each state can determine the extent to which additional controls on mobile sources should be imposed in order to obtain necessary NOx emissions reductions.

The primary regulatory mechanism in the final section 126 rule is the NOx Budget Emissions Program – an emissions trading program that will be administered directly by EPA rather than by each state for the sources within its boundaries. Under that emissions trading program, which is based on the program contained in the earlier NOx SIP call rule, targeted facilities will be issued emissions credits which they will be able to bank and trade to help meet annual restrictions on NOx emissions. Emissions credits will initially be issued to facilities based on their heat input.

It is expected that the final section 126 rule will be judicially challenged by a number of parties, including electric utilities and certain midwestern states. Such petitioners will likely argue, among other things, that the rule is unlawful because EPA did not determine whether or to what extent each of the listed sources “significantly contributes” to downwind nonattainment problems but instead simply imposed “once-size-fits-all” controls across the board on all the listed sources.

EPA also indicated in the final rule that it is currently considering whether to grant section 126 petitions recently filed by four additional states. Those states are Delaware, Maryland, New Jersey, and the District of Columbia. □

EPA Seeks Supreme Court Review of D.C. Circuit Decision Overturning Revised Ozone and Particulate Matter Standards

On January 27, EPA filed a petition for certiorari with the Supreme Court requesting review of the D.C. Circuit’s May 1999 decision in *American Trucking Assn’s v. EPA*, 175 F.3d 1027, *pet. for reh. denied*, 195 F.3d 4 (D.C. Cir. 1999). In that decision, the D.C. Circuit ruled that EPA’s revised ozone and particulate matter standards should be remanded to EPA primarily because the court believed that EPA’s interpretation of section 109 of the Act, which authorizes EPA to promulgate and revise national ambient air quality standards (NAAQSs), is unconstitutional.^{2/} Two similar petitions seeking Supreme Court review were also filed by the American Lung Association and the States of New Jersey and Massachusetts.

In urging that the Supreme Court hear the case, EPA’s petition maintains that the D.C. Circuit’s decision, among other things, “presents an important federal question with profound implications for the health of the American public and the effectiveness” of the Clean Air Act. Moreover, according to the petition, the decision “raises issues of extraordinary governmental concern . . . respecting the constitutionality of a broad range of federal statutes requiring agencies to draw lines based on scientific judgments.”

^{2/} A more detailed discussion of the *American Trucking Ass’ns* decision is set forth in the May 1999 *Washington Report* at WR-241.

The petition presents three principal questions. First, EPA contends that the court erred in ruling that section 109 of the Act, as interpreted by EPA, effects an unconstitutional delegation of legislative power to the Agency, i.e., the statute violates the “nondelegation doctrine.” Second, EPA argues that the court “exceeded its jurisdiction by reviewing, as a final agency action that is ripe for review, EPA’s preliminary preamble statements on the scope of the agency’s authority to implement the revised ‘eight-hour’ ozone NAAQS.” Third, EPA maintains that the court erred in ruling that Subpart 2 of Title I, Part D, which addresses implementation of the ozone standard in effect in 1990, restricts EPA’s general authority to implement a revised and more stringent ozone standard.

EPA’s petition focuses primarily on the D.C. Circuit’s ruling that EPA’s interpretation of the statute violates the nondelegation doctrine by failing to provide “intelligible principles” for the setting of NAAQSs. According to EPA, the court’s ruling on the nondelegation doctrine issue “is a striking departure from [the Supreme Court’s] nondelegation jurisprudence” and the grant of authority in section 109 is “far more specific than the sweeping delegations consistently upheld by the Supreme Court for more than sixty years.” EPA further contends that the D.C. Circuit’s nondelegation doctrine ruling transforms the doctrine from a means of preserving the constitutional separation of powers into a basis for “unwarranted judicial supervision of the exercise of administrative discretion.”

It is likely that the Supreme Court, after considering oppositions to the petitions to be filed by industry parties, will decide whether or not to grant the petitions sometime this spring. If the petitions are granted, oral argument in the case would probably be held late this fall. □

New Source Review Reform Discussions Continue

During the month of January, industry representatives undertook a number of activities aimed at convincing EPA to develop a reasonable new source review (NSR) reform proposal. The principal activities were an all-day session on January 13 with Assistant Administrator Perciasepe and other EPA staff regarding the establishment of an utility “off-ramp” and a broad-based industry hour-long meeting with the Assistant Administrator on January 21 regarding the basic NSR program.

At the January 13 session, three principal points regarding NSR reform were made. First, the Assistant Administrator indicated his intent to promulgate an NSR reform rule by October of 2000. He indicated that any off-ramps, such as the one under consideration for utilities, would be proposed for comment and finalized later. Second, EPA seemed to be focused on proposing an off-ramp for utilities that would require that more stringent controls be installed more quickly than the overwhelming majority of utilities would find acceptable. Third, EPA, the States, and environmental groups continue to express concerns regarding the establishment of a “potential-to-potential” accounting mechanism, although this issue would become less significant if utility units are required to be well-controlled.

In light of the Assistant Administrator’s stated interest in finalizing a rule by October, a major focus of the January 21 industry meeting was to convince him that EPA staff should continue to engage in discussions with industry regarding the development of a reasonable NSR reform rule. The industry delegation was made up of a small group of representatives of trade associations – both association officials and company representatives. The principal objective, in addition to convincing the Assistant Administrator to continue with discussions, was to express industry-wide concern with pending EPA proposals and the far-reaching implications of the NSR rule for industry. At the conclusion of the meeting, the Assistant Administrator seemed to indicate that he would support continuation of

discussions, but wished for them to be handled on an expedited basis. Since that time, another round of EPA/industry discussions have been scheduled for February. □

EPA Issues Guidance on “Federally Permitted Releases”

On December 21, 1999, EPA issued interim guidance on the definition of “federally permitted release” in section 101(10)(H) of CERCLA insofar as it relates to the reporting of certain air emissions. 64 Fed. Reg. 71,613. The interim guidance has raised a number of significant concerns among industry representatives. In particular, the guidance would treat certain permitted air emissions as not being “federally permitted releases” even though they appear to come squarely within the terms of the statutory definition.

Section 103 of CERCLA requires the person in charge of a facility to immediately notify EPA’s National Response Center of any release of a hazardous substance in an amount equal to or greater than its “reportable quantity” under EPA’s regulations. Similarly, section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA) requires the owner or operator of a facility to notify state and local officials of any release of a CERCLA hazardous substance or an EPCRA extremely hazardous substance in an amount equal to or greater than its “reportable quantity.”

However, the statutes do not require notification for a “federally permitted release” as defined in section 101(10) of CERCLA. Subparagraph (H) of that definition provides that the term “federally permitted release” includes

any emission into the air subject to a permit or control regulation under section 111, section 112, Title I part C, Title I part

D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by [EPA]), including any schedule or waiver granted, promulgated, or approved under these sections.

The interim guidance purports to narrow the types of releases that will be deemed to meet the statutory definition and specifically states that the following, *inter alia*, do not come within the definition of “federally permitted release”:

- (1) An unpermitted or unregulated release that is exempt from Clean Air Act permits or control regulations, such as units that are grandfathered or otherwise exempt from permitting.
- (2) Releases that are caused by an accident or malfunction.
- (3) Releases during startup or shutdown of a facility where there is no limit or other control on the release during the startup or shutdown period.
- (4) Releases that are regulated or permitted solely to address volatile organic compound (VOC) contributions to ozone ambient air quality problems.
- (5) Releases that are permitted or regulated solely to address particulate matter (PM) ambient air quality concerns.

Industry representatives believe that the guidance is seriously flawed because it would eliminate the reporting exclusion for certain emissions that satisfy the statutory definition of a “federally permitted release.” For example, the

guidance provides that permit terms or regulations controlling VOCs or PM must be pollutant specific for HAPs in order to come within the "federally permitted release" exclusion, even though the statute itself broadly includes "any emission" "subject to a permit or control regulation under" the listed statutory provisions or a SIP.

In light of the troublesome language in the guidance interpreting the scope of Clean Air Act requirements, many industry organizations are planning to prepare comments and engage in advocacy regarding this interim guidance. EPA has scheduled a public hearing on the interim guidance on February 24. The initial public comment period has been extended to March 10. □