

D.C. Circuit Overturns Revised Ozone and Particulate Matter Standards

In a decision that will likely have far-reaching impacts on many of EPA's Clean Air Act regulatory programs, a three-judge panel of the D.C. Circuit ruled on May 14 that EPA's revised national ambient air quality standards (NAAQSs) for ozone and particulate matter are unlawful. *American Trucking Ass'ns v. EPA*, Nos. 97-1440, *et al.*, 1999 WL 300618 (D.C. Cir. May 14, 1999). As a result, the court remanded all the revised standards to EPA and additionally vacated the coarse particulate standard. The stunning decision has created great uncertainty with regard to the Agency's implementation of such measures as the NOx SIP call for the eastern United States, EPA's rulings on section 126 petitions by northeastern states to address ozone transport issues, the regulation of fine particulates, and EPA's new regional haze program. Although EPA has announced that it will seek further review of the panel's decision, the outcome of such appeals will likely not be resolved for at least several months.

The court concluded that the rules were deficient in four separate respects:

- By a 2-1 vote, the judges ruled that EPA's construction of the statutory provisions governing the promulgation of NAAQSs effected an unconstitutional delegation of Congress' legislative powers to the Agency. The court remanded the ozone standard and the PM-2.5 standard to EPA so that it could attempt to develop a statutory construction that provides "intelligible principles" governing EPA's selection of specific primary standards that are "requisite to protect the public health" with an "adequate margin of safety."

- The court concluded that Congress intended that a revised ozone standard must be implemented and enforced pursuant to the designation scheme and deadlines set forth in Subpart 2 of Title I, Part D, which was added by the 1990 amendments, not the more general provisions of Subpart 1. As a result, the court stated that the revised ozone standard – the 8-hour standard – is currently not enforceable.
- The court ruled that EPA had erred by not considering all health effects from ambient, ground-level ozone, including potentially beneficial impacts in screening out ultraviolet radiation. The court directed EPA to consider such health effects on remand.
- The court concluded that EPA had been arbitrary and capricious in deciding to use PM-10 as an indicator pollutant for coarse particulates rather than using PM-10-2.5 (a measure that would include particles larger than PM-2.5 but smaller than PM-10). The court's decision expressly vacated the PM-10 standard.

We discuss each of these rulings below.

Violation of Nondelegation Doctrine

The most significant ruling in the decision is that EPA's construction of the Act effected an unconstitutional delegation of

Congress' lawmaking powers to the Agency. The nondelegation doctrine, which has been largely dormant since the 1930s, is based upon the constitutional separation of powers among the three branches of government. The majority concluded that EPA had not set forth "intelligible principles" for setting specific limits, i.e., for determining which level is "requisite to protect the public health" with an "adequate margin of safety" under section 109. The majority characterized the Agency's basic approach as merely relying on the notion that lower standards are more protective than higher standards without indicating how it chose a particular limit among a broad range of possible limits. In other words, the majority believed that EPA had not explained why .08 ppm for the ozone standard was appropriate rather than, e.g., .07 ppm, .09 ppm, or another number.

However, the majority stopped short of concluding that the statute itself was unconstitutional. It concluded that EPA might be able to articulate a construction consistent with the nondelegation doctrine and, as a result, it remanded both the ozone standard and the PM-2.5 standard to EPA for this purpose. The revised ozone standard was remanded to EPA but not vacated because the court concluded that it was not enforceable for the separate reasons discussed below. The court stated that additional briefing would take place to determine the appropriate remedy for the PM-2.5 standard. After supplemental briefing on the remedy issue, the court issued an order on June 18 stating that it was not persuaded that vacatur of the PM-2.5 standard would be "appropriate. . .at this time."

The dissenting judge maintained that the majority had applied an overly demanding test and that the statute provided sufficiently specific criteria to be followed by EPA in setting NAAQSs. He noted that section 108 sets forth criteria to be applied in setting a standard, that NAAQSs must be based on section 108 criteria documents, and that EPA must address any recommendations made by the independent Clean Air Scientific Advisory Committee (CASAC). The dissenting judge also argued that the Supreme Court has upheld delegations of

power in other contexts where the statutory criteria were even less specific than in section 109. Finally, he contended that the record adequately supported EPA's selection of the levels in question.

Enforcement of Revised Ozone Standard

The court concluded that the statute mandated that a revised ozone standard must be implemented and enforced pursuant to the designation scheme and deadlines set forth in Subpart 2 of Title I, Part D, not the more general provisions of Subpart 1. Subpart 2, which was added by the 1990 Amendments, sets forth a detailed scheme of classifications, deadlines, and control measures for achieving attainment of the ozone NAAQS. On the other hand, Subpart 1, which was part of the statute prior to the 1990 Amendments, contains general measures to address nonattainment of any NAAQS and gives EPA broad discretion to fashion a classification system and to develop control measures. EPA had interpreted the statute as allowing it to implement the revised ozone standard pursuant to Subpart 1. Petitioners argued that EPA was not authorized to revise the old 1-hour standard without further action by Congress and that, in any event, a revised standard could only be implemented in accordance with the specific requirements of Subpart 2.

The panel concluded that EPA was authorized to revise the pre-1990 ozone standard. However, the panel unanimously rejected EPA's interpretation of its authority to implement a revised standard as being unsupported by the statute. It determined that Congress had not intended to limit the applicability of Subpart 2 to the pre-1990 standard and therefore held that EPA could only implement a revised standard in accordance with the detailed requirements of Subpart 2. However, in the "Conclusion" section of the opinion, the court stated that "[w]e do not vacate the new ozone standards because the standard is unlikely to engender costly compliance activities in light of our determination that it cannot be enforced" The court did not explain the

apparent inconsistency between these two statements. The precise extent to which the revised ozone standard can be enforced, if at all, by EPA will presumably be clarified in the future.

Consideration of All Identifiable Health Effects of Ozone

The panel ruled that EPA had erred by not considering all potential health effects caused by ground-level (or tropospheric) ozone, including health effects which are alleged to be beneficial. In particular, certain petitioners had claimed that tropospheric ozone has certain beneficial effects because it helps screen the population from harmful ultraviolet radiation. The court based its conclusion primarily on the language of section 108(a)(2), which provides that EPA is to consider "all identifiable effects" of a pollutant in developing a NAAQS. In remanding the issue to EPA, the court made clear that it would not dictate the approach to be used by the Agency in considering the alleged health benefits of tropospheric ozone.

Vacating of Coarse Particulate Standard

The court unanimously ruled that the revised PM-10 standard was "arbitrary and capricious" and vacated that standard outright. The court concluded that EPA had not justified using PM-10 as an indicator for coarse particulates in conjunction with the new PM-2.5 fine particulate standard. Because any PM-10 measurement necessarily will also include an arbitrary amount of fine particulates, i.e., particles that are less than 2.5 microns in size, the court determined that PM-10 will be an arbitrary indicator of coarse particulates and will result in "double regulation" of the PM-2.5 component. Further, EPA had not shown why use of a PM-10-2.5 standard – a standard directed at particles larger than 2.5 microns but less than 10 microns – would not be feasible.

Other Rulings

In addition to ruling that the standards are deficient for the reasons discussed above, the court also rejected other challenges by petitioners to the standards. Among other things, the court ruled that EPA could not consider costs in any manner in promulgating

NAAQSs; that EPA had complied with the National Environmental Policy Act, the Unfunded Mandates Reform Act, and the Small Business Regulatory Enforcement Fairness Act (SBREFA); that PM-2.5 was not a “new pollutant” and therefore that EPA need not satisfy additional statutory requirements; and that EPA need not demonstrate the specific biological mechanism causing adverse health effects before regulating a pollutant.

Possible Appeals

EPA has announced that it intends to seek further review of the panel’s decision on one or more issues. EPA’s appeal options include seeking a rehearing from the same three-judge panel or seeking Supreme Court review. EPA has indicated that it has asked the Solicitor General approval to file a petition for rehearing in banc, i.e., a rehearing before all eleven judges on the D.C. Circuit. Any such petition would be due on June 28. While the D.C. Circuit accepts only a few cases for rehearing in banc each year, the importance of the nondelegation doctrine question and the existence of a strong dissenting opinion on that issue significantly increase the likelihood that rehearing might be granted. If rehearing in banc were granted, the court would likely not issue a decision in the case until the spring of 2000. The parties would then have the option of seeking review of that decision in the Supreme Court. As a result, the uncertainty in EPA’s regulatory programs caused by the court’s opinion may continue for a considerable period of time, thereby delaying implementation of key aspects of those programs. □

D.C. Circuit Stays NOx SIP Call Deadline

On May 25, 1999, a panel of the D.C. Circuit granted in part a motion to stay the deadline for submittal of SIPs to comply with the NOx SIP Call rule. *Michigan v. EPA*, No. 98-1497 (D.C. Cir. May 25, 1999). The rule, promulgated in October 1998, made a finding that certain sources of NOx emissions (primarily utilities and large industrial boilers) in 22 states

and the District of Columbia “contribute significantly” to ozone nonattainment in downwind states. 63 Fed. Reg. 56,394 (Oct. 27, 1998). EPA also determined that the amount of significantly contributing emissions equalled those emissions that cost-effective controls would eliminate. As the first step in accomplishing these reductions, the rule required affected states to file SIP revisions no later than September 1999.

Several affected states, as well as industry groups and other regulated entities, filed petitions for review of the rule. Petitioners also asked for an expedited ruling, given the approaching September 1999 deadline. Although the court granted the motion for expedited hearing, the court indicated that it could not hear oral argument before September 1999 at the earliest. Accordingly, certain petitioning states requested EPA to stay the SIP submittal deadline until after the court made its decision on the merits. EPA shortly thereafter denied the request, and the state petitioners filed a motion with the court to stay the deadline.

Although the motion requested a stay until April 2000, the court simply granted the stay “pending further order of the court” – presumably after oral argument and a decision on the merits. Technically, the ruling does not bear on the merits of the petitions. However, the court explicitly stated that the states had met the stringent standards for the stay – including showing a likelihood of success on the merits. The ruling therefore at least indicates that the court sees one or more issues of concern regarding the rule.

The issuance of the stay appears to increase substantially the importance of EPA’s actions on the petitions filed by eight northeastern states requesting findings under section 126 of the Act that certain sources in upwind states should be required to substantially reduce NOx emissions. Indeed, EPA is proposing to modify its recent actions on those petitions in light of the stay order. See the related article on the section 126 petitions below. □

EPA Finds “Technical Merit” in Six of Eight Section 126 NOx Petitions; Decides to Undertake Additional Rulemaking to Address Subsequent Events

On April 30, the Administrator signed a final rule determining that certain major stationary sources of NOx identified in six of the eight petitions filed under section 126 of the Act by northeastern states are significantly contributing to nonattainment in, or interfering with maintenance by, one or more of the petitioning states with respect to the National Ambient Air Quality Standards (NAAQSs) for ozone. 64 Fed. Reg. 28,249 (May 25, 1999). The petitions relied on one or both of the primary ozone standards, i.e., the “old” 1-hour standard and the 1997 revised 8-hour standard. EPA determined that the six petitions in question have “technical merit.” However, according to the rule, the petitions would subsequently be deemed granted only if the states and/or EPA did not meet deadlines contained in the related NOx SIP Call rule. The section 126 rule, which potentially impacts 19 states and the District of Columbia, targets large fossil fuel-fired electric generating units and large fossil-fuel fired industrial boilers and combustion turbines for additional controls to reduce NOx emissions.^{1/}

Since the signing of the section 126 rule in April, subsequent events have had a substantial impact on that rule. In particular, two decisions of the D.C. Circuit – one remanding the 8-hour ozone standard and one staying the submission of SIPs under the NOx SIP Call rule – have caused EPA to reassess its

1/ Affected groups have already requested judicial review of the section 126 rule. Within days after the notice of the rule appeared in the *Federal Register*, the Midwest Ozone Group, the Utility Air Regulatory Group, and others filed petitions for review in the D.C. Circuit.

regulatory approach. Although EPA had originally intended that the section 126 rule be a backup or “insurance” measure in case the NOx SIP call did not move forward as planned, EPA now intends to rely primarily on the section 126 rule to address ozone transport problems – at least as an interim measure. As explained below, EPA has announced that it will temporarily stay the effect of the May 25 final rule and will conduct additional rulemaking to grant outright the section 126 petitions that have technical merit to the extent that they rely on the 1-hour ozone standard.

Determinations of Technical Merit

In August 1997, Connecticut, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont filed section 126 petitions, seeking a finding that certain upwind NOx sources or categories of sources significantly contribute to nonattainment with, or interference with maintenance of, one or both of the ozone NAAQSs in the petitioning state. Section 126 authorizes a downwind state to request a finding from EPA that emissions from a major stationary source or group of sources in an upwind state violate section 110(a)(2)(D) by contributing significantly to nonattainment with, or interfering with maintenance of, a NAAQS in the downwind state. All eight petitioning states requested findings concerning the 1-hour ozone standard, and five petitioning states (Maine, Massachusetts, New Hampshire, Pennsylvania, and Vermont) also sought findings for the 8-hour ozone standard.

With regard to the 1-hour ozone standard, the final rule states that EPA finds technical merit in parts of the petitions from Connecticut, Massachusetts, New York, and Pennsylvania. EPA found no technical merit in the 1-hour petitions from Maine, New Hampshire, and Rhode Island because (1) EPA believes that some sources or source categories in certain states named in these petitions are not significantly contributing to nonattainment in the relevant petitioning state under the 1-hour

ozone standard; (2) for certain other sources, EPA believes it lacks sufficient information to show whether they do or do not significantly contribute to downwind nonattainment; and (3) EPA has no basis for finding significant contribution to certain areas in Maine, Massachusetts, New Hampshire, Pennsylvania, and Rhode Island that have now attained the 1-hour standard. In addition, the rule denies completely the 1-hour petition from Vermont because the standard no longer applies in that state.

With regard to the 8-hour ozone standard, the rule concludes that there is technical merit in portions of the petitions from Maine, Massachusetts, New Hampshire, and Pennsylvania. EPA is also denying portions of these petitions with respect to the 8-hour standard either because (1) EPA has information demonstrating that some of the sources or source categories named in these petitions are not significantly contributing to nonattainment in the relevant petitioning state; or (2) EPA does not have adequate information to show that the sources are significantly contributing to such nonattainment. Finally, the rule denies the Vermont petition in full because EPA believes Vermont has no current or future projected 8-hour ozone nonattainment problems.

Conclusions as to Upwind States

For the upwind states, the rule concludes that significant contributions to nonattainment or interference with maintenance with respect to one or more of the petitioning states arise from NOx emissions in 20 jurisdictions: Alabama, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, and West Virginia. The following table provides a summary of EPA’s determinations:

Upwind State	Significant Contribution for 1-hr Std	Significant Contribution for 8-hr Std
AL		PA
CT		ME, NH
DC	CT, NY	ME, NH
DE	CT, NY	ME, NH
IL		PA
IN	CT, NY	PA
KY	CT, NY	PA
MA		ME, NH
MD	CT, NY	ME, NH
MI	CT, NY	PA
MO		PA
NC	CT, NY, PA	PA
NJ	CT, NY	ME, NH
NY	CT	ME, NH
OH	CT, NY, PA	PA, MA
PA	CT, NY	ME, NH
RI		ME, NH
TN		PA
VA	CT, NY, PA	PE, ME
WV	CT, MA, NY, PA	PA, MA

Further, the rule concludes that sources in Georgia, South Carolina, and Wisconsin do not significantly contribute to nonattainment in any petitioning state.

Control Requirements Under Section 126 Remedy

Although the rule determines that the petitions have technical merit concerning certain

sources in the affected states, the rule does not yet impose or require affected states to impose controls. Instead, the rule ties imposition of NO_x control measures under the section 126 petitions to the measures and schedules required by EPA's final NO_x SIP call issued in October 1998 to 22 states east of the Mississippi River and the District of Columbia. The NO_x SIP Call rule provides for the establishment of NO_x emissions caps (or "budgets") for each of the

affected 23 jurisdictions and the imposition of a regional NO_x allowance trading program. If certain actions by the affected states and EPA under the NO_x SIP Call rule do not occur by specific dates, the section 126 rule states that the portions of the petitions with technical merit will be automatically deemed granted.

Rather than using the remedies recommended in each petition, EPA decided that, if failure by the affected states or EPA triggers the section 126 obligations, EPA will use the NO_x SIP Call budget trading program to implement NO_x controls. States included in the NO_x budget trading program for purposes of the section 126 remedy will receive allowances equal to the sum of two tonnage limits: (1) the total tons of NO_x that large electric generating units would emit in an ozone season after achieving a 0.15 lb/mmBtu NO_x emissions rate, assuming historic ozone season heat input adjusted for growth to the year 2007, and (2) the total tons of NO_x that large non-electric generating units would emit in an ozone season after achieving a 60% reduction in ozone season NO_x emissions compared to uncontrolled levels adjusted for growth to the year 2007. Sources subject to this program could install controls or buy NO_x allowances on the market to meet their individual source allocations for that season.

Timing of NO_x Controls

Under the rule as promulgated, the technically meritorious section 126 petitions might be automatically granted as early as November 30, 1999 for those states that either fail to submit or submit inadequate NO_x SIP call plan revisions. The rule also sets May 1, 2000, as a backup date if EPA fails to approve a SIP submittal that meets the November 1999 deadline. An automatic grant on either date would trigger a 3-year deadline for compliance with NO_x control measures (namely, by November 30, 2002 or May 1, 2003). However, because the NO_x reduction program under the NO_x SIP call and the section 126 petitions would require actual emissions reductions only during the May to September "ozone season," sources need not demonstrate actual reductions until

May 1, 2003, the start of the first ozone season after the November 30, 2002 compliance date.

Implications of Recent Court Rulings

Recent developments have substantially affected implementation of the section 126 rule. First, on May 14, the decision in *American Trucking Ass'n v. EPA*, Nos. 97-1440 *et al.*, 1990 WL 300618 (D.C. Cir.), held that the 8-hour ozone NAAQS is unlawful and remanded the standard to EPA for further consideration. If the court's ruling is ultimately upheld, EPA may no longer have sufficient grounds for its section 126 findings as they pertain to the 8-hour ozone standard. Second, on May 25, the D.C. Circuit stayed the September 1999 deadline for states to submit revised SIPs under the NO_x SIP Call rule. Because the court will not hear oral argument in the NO_x SIP Call case until October 1999, the probability of section 126 petitions being automatically granted on November 30 in accordance with the terms of the section 126 rule increased substantially.

EPA's Responses to Court Rulings

On June 11, 1999, EPA announced a temporary stay of the section 126 rule until November 30, 1999. EPA intends to use the interim period to conduct rulemaking to address issues raised by the court rulings. In the stay notice, EPA states that *American Trucking* curtailed its ability to enforce the 8-hour ozone standard and that the stay issued for the NO_x SIP Call makes it "no longer appropriate to link [EPA's] findings under section 126 to the compliance schedule for the NO_x SIP Call." Accordingly, EPA plans to issue a proposal that will (1) stay indefinitely its determinations concerning the 8-hour petitions, (2) delete the automatic trigger set for November 30, 1999, and (3) take final action on the petitions by November 30, 1999. EPA will also delay final rulemaking on the NO_x budget trading program until it takes final action on the petitions. A letter from the Administrator to the governors of the petitioning states accompanied the notice of stay and informed the governors that EPA would

focus its attention on the 1-hour petitions after decoupling them from the NO_x SIP Call. Consequently, although no upwind state has a currently effective obligation to address NO_x emissions, the states identified under the 1-hour petitions can expect the upcoming proposal to provide such requirements. □

EPA Issues Final Regional Haze Rule

In late April, the Administrator signed a final rule establishing a national Regional Haze Program.^{2/} The final rule substantially expands the depth and breadth of EPA's existing visibility program and may result in significant new regulatory requirements being imposed on a broad range of industrial sources. Although the final rule deletes or modifies some of the most troublesome aspects of EPA's July 1997 proposed rule (see July 1997 *Washington Report* at WR-142), it still raises many concerns.

The rule is intended to carry out section 169A(a)(1) of the Act, which sets forth a national visibility goal calling for "the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution."^{3/} Under section 169A(a)(4), EPA is to promulgate regulations which "assure . . . reasonable progress toward meeting the goal" set forth above. Those regulations are to require that each state in which a Class I area is located or whose emissions may cause or contribute to visibility

2/ As of the publication date of this Bimonthly Report, the final rule had not yet been published in the *Federal Register*.

3/ Mandatory Class I areas consist of certain national parks, wilderness areas, national memorial parks, and international parks. There are currently 156 Class I areas in existence throughout the United States.

impairment in such areas include measures in its SIP to address visibility impairment. The regional haze regulations address visibility impacts from emissions that occur over broad geographic areas.

EPA's July 1997 proposal was met with a barrage of adverse comments from the states and industrial sources. In particular, numerous commenters maintained that the proposed deadlines were unreasonable, that the proposal failed to give states sufficient flexibility to develop and implement workable programs, that the proposal unduly focused on emissions from stationary sources rather than the whole range of sources, and that it did little to encourage regional planning efforts.

Below we highlight the major features of the final rule and, where relevant, indicate the changes made by EPA from the proposed rule. We also discuss possible impacts on the final regional haze rule caused by the D.C. Circuit's recent decision in *American Trucking Ass'ns v. EPA*, Nos. 97-1440 *et al.*, 1999 WL 300618 (D.C. Cir. May 14, 1999), in which the court overturned EPA's revised ozone and particulate matter standards.

New Approach for Reaching Statutory Visibility Goal

The Act provides that EPA is to promulgate regulations that "assure reasonable progress" in meeting the statutory goal of eliminating visual impairment in Class I areas and that contain "criteria for measuring reasonable progress." In the final rule, EPA has promulgated what it characterizes as a more flexible approach for achieving "reasonable progress" than set forth in the proposed rule. Under the final rule, each state is to determine what progress is needed to achieve the statutory goal in 60 years or less.

In the proposed rule, EPA provided that each state must meet a uniform "presumptive target" in order to achieve reasonable progress. The presumptive target for each state would have been a one deciview improvement in

visibility in either 10 or 15 years. In the final rule preamble, the Agency indicated that commenters had criticized the proposed approach for being too rigid, for not recognizing the differences in improvement needed for western states as compared to eastern states, and for allowing some states to take 200 years to reach the statutory goal. EPA explained that in the final rule it decided to use a different approach that it believed would give the states greater latitude in developing reasonable progress goals and applying the statutory factors. Under this approach, each state is to meet its own "reasonable progress goal" that is intended to result in visibility improvement in Class I areas on the haziest days and prevent degradation on the clearest days.

EPA's approach is based on its conclusion that it is reasonable to expect states to reach natural background levels for visibility in 60 years. This conclusion was based on EPA's assumption that such measures as the NOx SIP call, the revised 8-hour ozone standard, the revised particulate matter standards, and the acid rain program will result in a three deciview improvement in visibility from 1995 to 2005. EPA then assumed that it would be reasonable to expect the same rate of improvement in succeeding decades. After determining that, on the average, states need an 18 deciview improvement to reach natural background levels, EPA concluded that it would take six decades (60 years) to reach natural background levels at that rate of improvement, i.e., three deciviews per decade.

States must take four steps to satisfy the reasonable progress requirements.

- the state (or regional planning entity) must compare the visibility conditions in deciviews for the most impaired days during the baseline period (2000 to 2004) with natural background conditions for each Class I area
- the state is to determine what uniform rate of improvement is needed to attain natural background conditions by 2064

- the state must identify how much improvement is needed for its first regional haze implementation plan, which is to cover a ten-year period
- the state must identify the measures needed to make the required progress and determine whether such measures are "reasonable" based on the statutory factors of costs of the measures, the time necessary for compliance, the energy and nonair quality environmental impacts, and the remaining useful life of any existing source subject to the measures

If a state determines that the measures it has identified are not "reasonable," it must justify that determination in its SIP submission and demonstrate why a less demanding goal is reasonable in light of the statutory factors.

Deadlines for Submissions of Initial Visibility SIPs Tied to Designation Decisions for PM-2.5 Standard

The proposed rule would have required that initial regional haze SIPs be submitted within 12 months of the effective date of the final rule. However, numerous commenters maintained that the proposed deadline would allow the states insufficient time to develop their SIPs and, in particular, would not allow adequate time to coordinate the regional haze program with implementation of the new PM-2.5 standard.

In June 1998, Congress addressed the deadline issue in the Transportation Equity Act for the 21st Century (TEA-21). That statute superseded the requirement for a 12-month SIP submission deadline and established a specific schedule for regional haze SIP submissions. Under TEA-21, the regional haze SIP submission deadlines are linked to EPA's attainment designations for the PM-2.5 standard. The states are required to submit proposed PM-2.5 designations within one year after three years of PM-2.5 data is available for that state. For

areas designated as nonattainment for the PM-2.5 standard, the regional haze SIP will be due at the same time as the SIP for the PM-2.5 standard, i.e., three years after a nonattainment designation. For areas designated as attainment or unclassifiable, the regional haze SIP is due one year after the date of designation. The final rule preamble explains that EPA expects that PM-2.5 designations will generally be submitted between July 2003 and July 2004. As a result, EPA expects that regional haze SIPs for attainment and unclassifiable areas would be due between July 2005 and July 2006 and that they would be due for nonattainment areas between July 2007 and July 2008. Revised SIPs would be due ten years later and each ten years thereafter.

Specific Provisions Addressing GCVTC Report

Numerous commenters criticized the proposed rule for giving insufficient weight to the recommendations contained in the 1996 Report of the Grand Canyon Visibility Transport Commission (GCVTC). In the final rule, EPA explicitly addressed those recommendations and in section 51.309 of the regulations included specific measures for those western states covered by the report. If western states meet the requirements of that section, they will be deemed to have satisfied the national program requirements of the regional haze rule. Initial indications are that the Governors of western states were pleased with the changes to the final rule and that they will not challenge the validity of the rule.

BART Requirements and Alternative Approaches

Section 169A(b)(2) of the Act states that EPA's visibility protection regulations are to provide that certain major stationary sources – those placed in operation between August 1962 and August 1977 that emit pollutants that “may reasonably be anticipated to cause or contribute to” visibility impairment in Class I areas – must apply the “best available retrofit technology”

(BART). The July 1997 proposed rule stated that such sources must be identified and that the states must determine BART for each identified source within three years of promulgation of the final rule. Many commenters argued that EPA should place less emphasis on regulating BART sources and other major stationary sources and should place greater emphasis on regulating mobile sources, area sources, and other sources of relevant emissions such as road dust or controlled burns. Some commenters contended that the BART provisions were an artifact of prior versions of the statute and that EPA was not required to promulgate special requirements for BART sources.

In the final rule, EPA rejected contentions that it was not required to specially regulate BART sources. However, EPA provided additional time for states to develop source-specific BART requirements and stated that it did not intend to emphasize regulation of BART sources to the exclusion of mobile sources, area sources, or other sources contributing to visibility problems.

In deciding whether a potential BART source “may reasonably be anticipated to cause or contribute to” visibility impairment in Class I areas, a state is to determine whether such sources, when considered collectively over a broad area, would impair visibility. Moreover, a state is to apply the following factors in making a BART determination: costs of compliance, energy and nonair quality environmental impacts, any existing pollution control technology in use at the source, the remaining life of the source, and the degree of improvement in visibility that may be anticipated to result.

EPA also provided that states may utilize alternatives to source-specific BART requirements such as regional emissions trading systems. In order to use an alternative approach, a state must demonstrate that the approach will achieve reasonable progress greater than would be achieved by imposing source-specific BART limits. According to the rule, the emissions trading system or other approach may involve sources that are not BART sources.

Possible Impacts on Final Rule from *American Trucking* Decision

As discussed in a separate article in this *Washington Report*, a three-judge panel of the D.C. Circuit recently ruled in the *American Trucking* case that EPA's revised ozone and particulate matter standards are deficient and are remanded and/or vacated. Although EPA has indicated that it will seek further review of the panel's opinion, the decision, if upheld, may have at least two impacts on the regional haze rule.

First, parties might challenge the regional haze rule based on the same nondelegation doctrine theory relied upon by the panel in *American Trucking*. The relevant statutory language establishing the regional haze program sets forth a goal calling for "the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution" and calls for EPA to promulgate regulations which "assure . . . reasonable progress toward meeting the goal." Based on the reasoning of the *American Trucking* panel, it is unclear what "intelligible principles" are to govern EPA's establishment of specific "reasonable progress" requirements. EPA's preamble discussion does not appear to set forth such principles.

Second, the *American Trucking* decision will likely delay the deadlines by which the states are to submit their initial regional haze SIPs. As explained above, those deadlines are currently linked by statute to the deadlines by which EPA is to make attainment designations under the PM-2.5 standard. Because the court has remanded that standard to EPA, the process of designating PM-2.5 attainment areas will probably be delayed as a result, thereby moving back even further the deadlines for submitting regional haze SIPs. □

EPA Issues New Title V Guidance Document

EPA recently issued a significant new guidance document addressing key Title V permitting issues. That guidance was set forth as Enclosures A and B to a letter dated May 20, 1999, from John Seitz, Director of OAQPS, to officials of STAPPA/ALAPCO.^{4/} The May 20 letter was sent in response to letters from STAPPA/ALAPCO in which those organizations had criticized EPA's approaches to implementing Title V in many respects and had requested that the Agency provide clarification on certain issues. See May 1998 *Washington Report* at WR-189.

A number of the positions set forth in the guidance raise serious concerns for sources subject to Title V. On several issues, the guidance appears to set forth reasonable positions and is consistent with the positions taken in EPA's Title V White Papers. We discuss the key points in the guidance below.

Terms To Be Included in Title V Permits

Under the heading "Federal Enforceability," EPA reiterates its recent position that all requirements in SIPs and in SIP-approved permits (i.e., minor NSR permits) must be included in Title V permits, unless the permitting authority takes "appropriate steps in accordance with Title I substantive and procedural requirements to delete those conditions from its SIP or SIP-approved permit."

With regard to minor NSR permit terms, EPA implicitly recognizes that they need not be included if they were not established in the first instance to satisfy a federal requirement and if the permitting authority chooses to delete them or make them state-only requirements through a Title I permit process (which EPA has stated can be carried out concurrently with the Title V permit process). However, EPA does not address

4/ The letter and enclosures are contained on the Network's website under the "Title V Operating Permits" category.

the fact that states have used their minor NSR programs for purposes that go far beyond what is required under the Clean Air Act. Nor does EPA address the fact that many minor NSR terms have been changed through lawful state operating permit programs in circumstances where no further minor NSR permitting was required. Thus, in this situation, the current lawful obligations of the source are no longer the ones contained in the original minor NSR permit. EPA's argument that such superseded minor NSR terms must be included in Title V permits further supports the position of industry and states that EPA's position that all minor NSR permit terms be included in Title V permits is not supported by the Act.

EPA's position that all SIP provisions be included as applicable requirements also raises serious legal issues. EPA's regulations and state analogs provide only for SIP requirements that implement "relevant" requirements of the Act to be included in Title V permits. Many SIP requirements were not included to attain and maintain national ambient air quality standards and thus do not implement "relevant" Act requirements. These include air toxics requirements, odor, noise and various other provisions. The guidance fails to explain how such provisions can properly be considered Title V applicable requirements under federal and state law.

In addressing which terms must be included in permits, the guidance also raises another serious concern. As indicated above, EPA's basic position is that all terms that are "federally enforceable" must be included unless procedures are followed to bring to an end their federally enforceable status. In this latest policy, EPA casts the net as broadly as possible to determine which terms are federally enforceable for purposes of being classified as applicable requirements under Title V (i.e., all SIP terms and minor NSR permit terms, as well as all EPA standards). However, EPA distinguishes the meaning of "federally enforceable" requirements for this purpose from those that have been so identified "in the past in another context to identify a **smaller subset of provisions** that may be used to limit a source's potential to emit [PTE]." In the PTE "context,"

EPA requires that minor NSR and SIP terms be practically enforceable for them to be deemed federally enforceable. This distinction undermines EPA's position with regard to Title V. If a term cannot be relied on for a federal purpose (i.e., limiting a source's PTE), EPA would appear to lack any basis for claiming that the term is a federal requirement for purposes of Title V and enforcement under sections 113 and 304.

New Source Review "Lookback"

In general, the policy on NSR "lookback" appears to be consistent with the policy in EPA's White Paper No. 1. EPA continues to indicate that a company's responsible official "does not have a federal obligation to reconsider previous applicability determinations." However, companies are required to report non-compliance of which they "are aware."

EPA also discusses the standard of review it will apply in reviewing state PSD and NSR determinations. EPA says that it "lacks authority to take corrective action merely because the Agency disagrees with a state's lawful exercise of discretion in making BACT and LAER or related determinations." EPA goes on to state that "State discretion is bounded, however, by the fundamental requirements of administrative law that agency decisions not be arbitrary or capricious, be beyond statutory authority, or fail to comply with applicable procedures."

However, despite the opposition of industry and permitting authorities, EPA continues to assert that it has authority in the Title V objection process to second-guess PSD/NSR applicability and BACT/LAER determinations made by state permitting authorities. EPA says that it "generally will not object to the issuance of a Title V permit due to concerns over BACT/LAER determinations made long ago during a prior preconstruction permitting process." However, EPA indicates that its policy is to provide adverse comments where it believes there are deficiencies in the NSR/PSD permitting process and "take corrective action, including objecting to the Title

V permit if its comments were not resolved by the State.” EPA also discusses how it will handle unresolved PSD/NSR issues by including “placeholder” language to assure that the permit shield does not attach to the emission units at issue.

Supersession

EPA continues to indicate that Title V permits may not state that they “supersede, void, replace, or otherwise eliminate” the independent legal existence and enforceability of SIP-approved permit terms. On the other hand, EPA indicates that permits may state that they “subsume” or “incorporate” SIP-approved permit terms and conditions. As already discussed, however, SIP-approved permit terms do not necessarily reflect a source’s current legal obligations. The guidance fails to explain why states should not be able to supersede outdated or irrelevant SIP-approved permit terms to ensure that the Title V permit is an accurate repository of the source’s current applicable requirements.

MACT/Title V Interface Issues

EPA addresses a number of MACT/Title V interface issues in Enclosure B. As with the balance of the guidance, EPA has failed to accept many permitting authority and industry positions regarding simplification of the requirements for addressing MACT standards in Title V permits. However, EPA does recognize that it is important that date-specific startup, shutdown, and malfunction (SSM) plans not be incorporated into Title V permits and that Title V permit revisions not be required each time SSM plans are changed. EPA also indicates that it is continuing to consider whether it should revise its “once-in-always-in” applicability policy for MACT standards.

Value of Obtaining a Permit Shield

EPA’s positions in the guidance appear to increase the importance of obtaining a permit shield when a Title V permit is issued. For

example, in attempting to justify its continued objection to permitting authorities providing for terms in Title V permits to “supersede” terms in minor NSR permits, EPA stresses that a permit shield provides that “compliance with the conditions of the [Title V] permit shall be deemed compliance with any applicable requirements as of the date of permit issuance” EPA argues that the existence of Title V permits as a mechanism for clarifying a “source’s obligations and compliance status” shows that the underlying requirements must remain in effect so that there are requirements that continue in existence that are to be clarified. This position confirms the importance of obtaining a Title V permit shield to assure that an enforcement authority or citizen suit plaintiff cannot successfully claim that a source is out of compliance with underlying requirements even though it is in compliance with Title V permit terms that differ in some respects from the underlying requirements. □

EPA Denies Petition Seeking Objection to Title V Permit

On May 4, 1999, the EPA Administrator signed an order denying a petition requesting that EPA exercise its authority under section 505(b) of the Act to object to a Title V permit as not being in compliance with the “applicable requirements” of the Act. *In the Matter of Roosevelt Regional Landfill, Regional Disposal Co.*, Permit No. DE 98AOP-C242. Section 505(b)(2) of the Act provides that “any person” may request that the Administrator object to a Title V permit by filing a petition within 60 days of the end of EPA’s review period for the permit. The order in question is one of the first orders formally denying such a petition.

This matter is significant for at least two reasons. First, the petition was filed by a competitor of the permit applicant. This highlights the fact that the Title V petitioning process may be used by a variety of parties seeking to achieve different purposes. Second, as we explain in more detail below, the order sets forth EPA’s views regarding its ability to object to minor NSR permit terms during the Title V permitting process and the standard of review it is to apply.

The case involved a Title V permit issued by the Washington Department of Ecology to Roosevelt Regional Landfill. A competitor, TPS Technologies, sought to have EPA object to the permit based on four separate allegations: (1) the state had failed to explain why the controls for this landfill were different from those at another landfill; (2) the permit did not identify all emissions units; (3) calculations for VOC emissions were inaccurate; and (4) the permit did not reflect EPA Region IX’s comments regarding possible noncompliance with NSR requirements.

Ruling on Scope of EPA’s Objection Authority and Applicable Standard of Review

EPA ruled that the claim alleging unexplained differences in control requirements as compared to another landfill had not been properly raised during the public comment period on the draft permit and therefore could not be raised in the petition. However, EPA went further and concluded that, even if the issue had been properly raised, petitioners’ arguments lacked merit. EPA stated that it believed it had the authority to review the validity of minor NSR permit terms in determining whether to object to a Title V permit:

The merits of minor NSR issues (and issues under other federal preconstruction review programs such as Prevention of Significant Deterioration (“PSD”) and major nonattainment NSR) can be ripe for consideration in a timely petition to object under title V. See Order In re Shintech Inc., at 3 n.2 (Sept. 10, 1997).

The Agency went on to explain that states have “considerable discretion” in making BACT determinations under their minor NSR programs and that “EPA lacks authority to take corrective action merely because the Agency disagrees with a State’s lawful exercise of discretion in making BACT-related determinations.” EPA then stated that a state’s BACT determination could be overturned only if it failed to satisfy the “arbitrary and capricious” test normally applicable to review of administrative decisions. EPA rejected the petitioner’s merits arguments because it determined that the conditions at the other landfill relied upon by petitioner were distinguishable on factual grounds.

Rulings on Other Claims

With regard to the claim that not all emissions units were adequately identified, the Administrator concluded that, with one exception, the petitioner had not specified what units had not been identified. As to that unit, EPA stated that, because the unit was

adequately covered by facility-wide applicable requirements and no other applicable requirement applied uniquely to it, the generic grouping of that emissions unit was proper.

Addressing the claim that VOC emissions had been improperly calculated, EPA stated that the petitioner had not shown that any applicable requirement had been omitted from the permit because of the alleged errors. In other words, the petitioner had failed to show that the errors had any significant impact on the final permit.

Finally, because the petitioner had failed to specify precisely which of Region IX's comments concerning NSR issues had not been reflected in the permit, EPA denied the petitioner's remaining claim that the facility's permit did take account of alleged NSR noncompliance problems. □

Changes Take Place in Section 112(r) Risk Management Program

On June 21, 1999, tens of thousands of facilities must submit plans under EPA's section 112(r) Risk Management Program. Intended to promote accident prevention, these plans contain detailed information about facilities' hazards, accident history and potential, prevention programs and emergency response measures.^{5/} With the deadline quickly approaching, a few "final" changes have occurred or are on a fast track. These changes include actions by the D.C. Circuit, EPA, and Congress.

5/ EPA's final rule implementing the Risk Management Program provisions in section 112(r) was described in the July 1996 *Washington Report* at WR-76.

Court Issues Stay of RMP Applicability for Propane

On April 27, 1999, the D.C. Circuit entered a temporary stay of the Risk Management Program (RMP) rule as it applies to propane. Until the court orders otherwise, any source or process at a facility subject to the RMP rule due *solely* to the presence of propane is not subject to the requirements of the rule. Accordingly, such sources need not conduct a hazard assessment, an accident prevention program, or emergency response planning and need not submit an RMP plan by June 21, 1999.

EPA Modifies RMP Rule on Fuels Issues

In response to the D.C. Circuit's order and the introduction of bills in both the House and the Senate that would exempt flammable fuels from the RMP rule, EPA published a notice of proposed rulemaking that proposes to exempt processes containing up to 67,000 pounds of certain flammable hydrocarbon fuels. 64 Fed. Reg. 29,171 (May 28, 1999). This exemption would not apply to processes that manufacture such fuels, or to processes or facilities subject to the RMP rule for other regulated (non-fuel) substances.

In order to provide itself with sufficient time to complete the rulemaking on flammable hydrocarbon fuels, EPA also issued a final rule providing a six-month stay of the effectiveness of the RMP rule for processes containing up to 67,000 pounds of those flammable hydrocarbon fuels. 64 Fed. Reg. 29,167 (May 28, 1999). Accordingly, until December 21, 1999, the RMP rule does not apply to processes that would qualify for the proposed exemption. The regulatory stay applies regardless of whether the court lifts the stay issued with respect to propane. Under such circumstances, a source eligible for both stays would remain exempt until December 21, 1999, but a source eligible

only for the judicial stay would become subject to all applicable obligations under the rule.

Finally, on May 26, 1999, EPA published a direct final rule that resolved an inconsistency in the treatment of substances liquefied by refrigeration. 64 Fed. Reg. 28,696 (May 26, 1999). Because a liquefied gas requires time and sufficient surface area to reach its boiling point before vaporization, the offsite consequence analysis assumptions in the existing rule for liquefied toxic gases led to a release rate less than the total quantity released in 10 minutes. This result assumes that the substance is stored in an area with passive mitigation, that is, a diked area. However, the existing rule did not contain a similar assumption for liquefied flammable substances. The direct final rule corrects this discrepancy. As a result, sources reporting worst-case scenarios for flammable substances liquefied by refrigeration need not assume complete volatilization of the release quantity if passive mitigation is applicable.

Congress Considers FOIA Exception for RMP Offsite Consequence Analyses

At the request of the Administration, Representative Bliley recently introduced H.R. 1790, entitled the "Chemical Safety Information and Site Security Act of 1999." An earlier version was introduced in the Senate as part of the flammable fuels exemption legislation, S. 880. The bill, if enacted, will exempt the offsite consequence analysis (OCA) portion of the RMP plans from disclosure under the Freedom of Information Act (FOIA) and will prohibit federal and state officials from disclosing OCA data in electronic form. The primary purpose of the bill is to prevent terrorists from using OCA data to identify domestic targets.

Additional provisions of the bill require EPA to (1) provide paper copies of OCA data under appropriate guidance created to minimize

the potential that a third party might create an Internet database and (2) make OCA information available to the public for inspection, but not copying, at federal reading rooms nationwide. The bill sets forth restrictions on EPA's provision of OCA data to state and local government officers, and provides criminal penalties for any federal, state or local governmental official who knowingly discloses OCA data in contravention of the restrictions in the bill. The bill also directs EPA to develop guidance on OCA data procedures within 60 days and exempts such guidance from judicial review. The bill further grants EPA discretion whether to promulgate regulations on OCA data procedures, and it encourages consultation with other appropriate federal agencies on future procedures and guidance. Last, the bill last authorizes the Attorney General to review and report to Congress on industry site security practices.

Efforts to enact legislation have quickly followed. At a May 19, 1999 hearing of the House Subcommittee on Health and Environment, representatives of federal, state and local agencies, as well as other groups, testified about H.R.1790. The Department of Justice, EPA, and the FBI supported the bill as drafted. Other witnesses, representing groups such as industry, firefighters, emergency planners, and police supported the bill in principle, but suggested certain revisions. The remaining witnesses, including groups such as emergency planners, citizen organizations, unions and librarians, opposed the bill. Since the hearing, conference managers in both the House and Senate have been working toward a compromise package. □