D.C. Circuit Denies EPA's Petition for Rehearing *en banc* in NAAQS Litigation

On October 29, the D.C. Circuit denied in large part the petition for rehearing filed by EPA in the *American Trucking Ass'ns* case, which involves the consolidated challenges to EPA's revised ozone and particulate matter (PM) standards. As a result, the Court essentially left intact its May 14, 1999 decision remanding the revised standards to EPA on various grounds. *American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

In its petition, EPA sought rehearing of the following rulings:

- By a split vote, the three-judge panel had ruled that the ozone and PM standards must be remanded because EPA's process in setting the standards violated the nondelegation doctrine – the constitutional principle that only Congress may exercise legislative powers and that it may not delegate those powers to an agency without establishing "intelligible principles" to be followed. EPA maintained that the panel majority ignored controlling precedents addressing the doctrine and that, in fact, the Agency had based the standards on "intelligible principles."

- The panel had concluded that Congress intended that a revised ozone standard must be implemented and enforced pursuant to the scheme 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. In its rehearing petition, EPA argued (1) that the preamble language discussing implementation of the revised ozone standard did not constitute reviewable final agency action and (2) that the decision ignored key language within Part D and would lead to the conclusion that no revised ozone standard could be enforceable.

- The panel had ruled that EPA had erred by not considering all health effects from ambient, ground-level ozone, including potentially beneficial effects in screening out ultraviolet radiation. The Agency contended in its petition that the panel had misconstrued relevant statutory language and ignored Congress' intent that EPA address only adverse effects.

EPA sought to have these rulings reviewed *en banc*, i.e., reviewed by all eleven judges serving on the D.C. Circuit.

The Court's October 29 decision disposing of the petition for rehearing consisted of four separate opinions either disposing of the petition or providing dissenting viewpoints. First, the original panel issued an opinion denying the petition in most respects but granting it in part with regard to implementation and enforcement of revised ozone standards. That opinion contains the following rulings:

- The panel stated that, although government counsel had sought to provide "intelligible principles" for standard-setting in the petition for rehearing, those principles had not been adequately set forth during the rulemaking proceeding and therefore could not provide a basis for upholding the standards.

- With regard to implementation of revised ozone standards, the panel denied the petition in large part but modified the original opinion to clarify its holding and address conflicting language in the opinion. The panel found that

it had jurisdiction to review EPA's plans for implementing the revised standard and stated that it was not persuaded by EPA's interpretation of Subpart 2. However, it revised the opinion to clarify that a revised standard must be enforced "in conformity with Subpart 2," not – as the original opinion implied – that a revised standard could not be enforced at all. The precise meaning of the revised language is unclear.

- The panel denied outright EPA's contentions that it was not required to consider beneficial effects of pollutants in setting standards.

Judge Tatel – one of the members of the three-judge panel – wrote a separate opinion concurring in part and dissenting in part with regard to the Subpart 2 issue. He concurred in the modification of the opinion "because, as modified, the opinion now leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with Subpart 2's classifications and attainment dates." However, he dissented from other aspects of the Subpart 2 portion of the opinion because he now believes that EPA's interpretation of the statute, i.e., that Subpart 2 governs only until the old one-hour standard has been attained for an area, is reasonable and should receive deference.

On the key question of whether to grant rehearing *en banc*, the judges denied EPA's request. The vote was actually 5-4 in favor of granting rehearing, but under the Court's rules 6 votes were needed to grant the request. This is because the rules specify that rehearing *en banc* can be granted only when the majority of the judges in "regular active service" vote in favor of rehearing. Because there are currently 11 active judges, 6 votes were therefore needed. (Judge Wald, who has been appointed to the International Court of Justice and will leave the D.C. Circuit later this month, did not vote. Judge Henderson did not vote for unspecified reasons.)

Judge Silberman wrote a separate opinion dissenting from the denial of rehearing *en banc* on the nondelegation doctrine issue. In his opinion, he stated that, although he was sympathetic to the constitutional concerns voiced by the panel majority, he did not believe that the nondelegation doctrine could be used to invalidate the standards. He indicated that the validity of the standards should have been determined under the traditional "arbitrary and capricious" test.

Judge Tatel also dissented from the denial of rehearing *en banc* on the nondelegation doctrine issue and wrote a dissenting opinion in which three other judges joined. In that opinion, he maintained that Supreme Court precedents require that the Court rule that the statute does not improperly delegate authority to EPA. The dissenting opinion also argued that the nondelegation holding involves an issue of "exceptional importance" under the Court's rules and therefore should have been reheard by the Court sitting *en banc*.

As a result of the October 29 rulings, the revised ozone and PM standards remained remanded to EPA and apparently cannot as a practical matter be enforced. EPA has 90 days in which to seek Supreme Court review. Preliminary indications are that EPA will petition the Supreme Court for review of the D.C. Circuit's decision on the nondelegation doctrine issue. ❑

D.C. Circuit Upholds CAM Rule in Most Respects But Overturns Compliance Certification Provision

On October 29, the D.C. Circuit issued its decision in the consolidated challenges to EPA's Compliance Assurance Monitoring (CAM) Rule. *NRDC v. EPA*, Nos. 97-1727 *et al.* The decision is significant because it upholds EPA's fundamental approach in promulgating the CAM Rule and rejects NRDC's arguments that the rule is not sufficiently stringent and fails to satisfy the statutory requirement that EPA provide for "enhanced monitoring." However, the court also ruled that the compliance certification provision established under the CAM Rule, which provides that a source is required to state whether its method for determining compliance provides "continuous or intermittent data," conflicts with the statute and must be remanded to require that a source state whether its compliance is "continuous or intermittent."

Certain industry groups, including the Clean Air Implementation Project, intervened in the case in support of EPA to oppose NRDC's challenges. In addition, a group of electric utility companies filed a petition for review challenging one aspect of the rule's compliance certification provisions – the requirement that the source take account of "any other material information" in making its certification.

The Validity of EPA's Approach in Promulgating the CAM Rule

NRDC contended that the rule's "reasonable assurance of compliance" standard is inadequate and does not satisfy the requirement in section 114(a)(3) of the Act that EPA establish "enhanced monitoring" requirements. It also attacked the rule as being invalid on several other grounds. For example, it argued that the phased-in implementation approach contained in the rule should be overturned.

The court unanimously rejected all of NRDC's arguments attacking the fundamental approach taken by EPA in promulgating the rule as well as the implementation methods chosen by the Agency. The court concluded that NRDC's argument that the CAM Rule did not constitute "enhanced monitoring" under section 114 was a challenge to the reasonableness of EPA's statutory interpretation – an interpretation that is entitled to significant deference. The court pointed out that the term "enhanced monitoring" did not have a specified meaning under the statute, and therefore it rejected NRDC's position that only continuous or direct emissions monitoring could be regarded as "enhanced." The court also determined that EPA had provided a reasonable basis in the record for concluding that the site-specific monitoring approach called for under the rule will be effective in assuring compliance with emissions limits. In addition, the court concluded that EPA's decision to phase in the CAM requirements based on Title V permitting time frames was a reasonable means of implementing the rule.

Rulings on the Compliance Certification Provision

NRDC argued that the compliance certification provision is invalid because it does not require that a source certify that compliance is "continuous or intermittent" and instead only requires that a source certify whether the method for determining compliance is based on "continuous or intermittent data." The court agreed with NRDC that EPA's approach could not be squared with the language of the statute and remanded the provision to EPA. The court found that the relevant statutory language – a source's "compliance certification shall include . . . whether compliance is continuous or intermittent" – was unambiguous and did not permit EPA's interpretation. Accordingly, the court ruled that a source must certify whether its compliance is "continuous or intermittent," not merely whether, as the rule provides, its method of determining compliance is based on "continuous or intermittent data."

However, the court's decision seems implicitly to authorize EPA to develop revised compliance certification provisions that would allow sources to include appropriate caveats addressing what "continuous" compliance means in a particular situation. For example, a source presumably would be able to explain that compliance was "continuous" even though certain data were missing or inconclusive or that compliance was "continuous" except on specified days.

Finally, the court held that the utility petitioners' separate challenge to the compliance certification provisions was not ripe for review. The utility petitioners challenged EPA's requirement that compliance certifications be based on "any other material information," including any "credible evidence." They maintained that the requirement unlawfully increased the stringency of the underlying standards and impermissibly required responsible officials to make legal conclusions regarding what constitutes "credible evidence." Although the court did not reach the merits of this challenge, it did include useful language concerning the ability of sources to add caveats to their compliance certifications. The court stated that EPA itself now agreed that "nothing precludes an owner from adding a caveat to its certification to the effect that, while it is providing other evidence which EPA might find material, the submitter disputes its materiality and reserves the right to challenge the use of the evidence in court."

It is not expected that any party will seek further review of the court's decision. ❑

EPA Launches PSD/NSR Enforcement Initiative Against Electric Utility Industry

On November 3, 1999, EPA announced that it was simultaneously filing civil enforcement actions against eight electric utility companies pursuant to section 113 of the Clean Air Act in various federal district courts. The enforcement actions brought in federal court were directed at 17 different electric utility plants owned by those companies. In all, EPA took some type of judicial or administrative enforcement measures against a total of 32 electric utility plants on that date. The enforcement activities are all part of an EPA enforcement initiative focussing on alleged violations of "prevention of significant deterioration" (PSD) requirements or nonattainment new source review (NSR) requirements in the electric utility industry.

EPA's principal theory in bringing the enforcement actions is that the plants involved had undertaken numerous projects that constituted "major modifications" of existing major sources without obtaining PSD permits for those projects and installing the requisite pollution control technology. One of the most significant aspects of EPA's initiative is the Agency's position that, contrary to past regulatory practices, the projects in question do not qualify for the regulatory exclusion from PSD applicability for changes that constitute "routine maintenance, repair, and replacement." For example, EPA's specific allegations of major modifications for which PSD permits should have been obtained included, *inter alia*, "replacement of primary air fans" and "replacement of furnace floor tubing." EPA appears to be attempting to narrow significantly the scope of the "routine maintenance, repair, and replacement" exclusion. Although, until recently, EPA's own interpretations recognized that whether an activity is "routine" depends on whether specific types of equipment are "repaired or replaced by sources with the relevant industrial category," EPA now contends that activities qualifying for the exclusion must be carried out "frequently" and be "comparatively inexpensive."

The Agency is seeking injunctive relief in each enforcement action as well as civil penalties of up to $25,000 per day per violation prior to January 30, 1997 and $27,500 per day per violation after January 30, 1997. Because EPA is alleging that most violations occurred many years ago and constitute continuing violations, the Agency is seeking to recover potentially millions of dollars in civil penalties.

Future Enforcement Initiatives Focussing on Other Industries

The NSR enforcement initiative for the electric utility industry is only the first and most publicized initiative that EPA plans to undertake. EPA enforcement officials have made clear in the past few months that the Agency will pursue similar NSR enforcement actions in the petroleum refining, pulp and paper, chemical, and glass manufacturing industries as well as others. Indeed, EPA has already begun issuing section 114 information requests and/or notices of violation to a sizable number of facilities in those industries. Morgan, Lewis & Bockius LLP is representing a substantial number of facilities that EPA has targeted in its enforcement initiative.

Such initiatives reflect a significant change in EPA's general approach to enforcing PSD/NSR requirements under the Act. Rather than simply inspecting particular plants on a periodic basis, EPA enforcement personnel are targeting specific industrial sectors for special attention, studying production trends and other industry data in those sectors, seeking specific information regarding projects from targeted facilities, and then taking enforcement actions against several plants in that sector at roughly the same time. ❑

Court of Appeals Denies Industry Motion to Stay the Section 126 Rule

In a brief order, a three-judge panel of the D.C. Circuit has denied industry petitioners' request to

stay EPA's section 126 rule. *Appalachian Power Co. v. EPA*, Nos. 99-1200 *et al.* (Oct. 29, 1999). The section 126 rule conditionally granted petitions filed by six northeastern states seeking to have NOx controls imposed on numerous upwind sources in the Midwest and East.[1/] In May 1999, another panel of that court had granted a similar motion to stay EPA's closely related NOx SIP call rule.

In their motion, petitioners attacked the validity of the section 126 rule on several grounds and asserted that, unless a stay were granted, they would begin incurring expenses by May 2000 in order to meet the May 2003 compliance date set forth in the rule. They sought to have the rule stayed until the court is able to issue a final decision addressing the validity of the rule. However, the court stated in its order that the petitioners "have not satisfied the stringent standards required for a stay pending court review."

The court's denial of the stay motion allows EPA to move forward to implement the section 126 rule, which has become EPA's primary vehicle for imposing additional NOx controls to address ozone nonattainment problems in the eastern United States. EPA had initially intended that the section 126 rule would play a backup role relative to the NOx SIP call. Although EPA concluded that six of the petitions had "technical merit," the section 126 rule provided that the petitions would be granted only if EPA or the states failed to meet deadlines contained in the NOx SIP call rule. However, after the D.C. Circuit stayed the NOx SIP call rule, EPA took steps to make the section 126 rule the primary vehicle for imposing NOx controls. In June 1999, EPA issued a final interim rule that would "delink" the section 126 rule and the NOx SIP call rule so that the section 126 rule would be implemented regardless of the status of the NOx SIP call.

On December 3, 1999, EPA issued a notice indicating that it intends to promulgate a final rule modifying the original section 126 rule (and superseding the interim final rule) sometime later in December. 64 Fed. Reg. 67,781. Because this new final rule would amend the original section 126 rule, it is unclear when the D.C. Circuit will be able to resolve all issues concerning the validity of EPA's actions on the section 126 petitions. ❑

1/ The section 126 rule is described in more detail in the May 1999 *Washington Report* at WR-244.

EPA Guidance Memorandum Provides for Reduced Penalties for Disclosure of Certain PSD/NSR Violations

EPA has issued a guidance memorandum clarifying that a source that discloses and corrects PSD/NSR violations prior to the issuance of its Title V permit is potentially eligible for penalty mitigation under EPA's 1995 Audit Policy.[2/] "Reduced Penalties for Disclosures of Certain Clean Air Act Violation[s]," Memorandum from Eric Schaeffer, Director of Office of Regulatory Enforcement (Sept. 30, 1999).[3/] The memorandum appears to have been issued in conjunction with EPA's recent emphasis on pursuing enforcement actions directed at alleged PSD/NSR violations.

EPA states in the guidance memorandum that a source is required to submit a compliance certification with its Title V permit application and that the certification is to disclose any violations discovered on the basis of a "reasonable inquiry." The memorandum further confirms that the "no look back" policy set forth in White Paper No. 1 still governs the permit application process. Thus, as the White Paper states, sources "are not federally required to reconsider previous applicability determinations as part of their inquiry in preparing Part 70 permit applications." At the same time, the September 30 memorandum states that "sources are never relieved of the obligation to comply with PSD/NSR requirements and EPA has made enforcement of NSR/PSD requirements a national priority in response to growing concern about widespread violations."

2/ EPA's Audit Policy is discussed in detail in the Network's January 1996 Issue Analysis.

3/ The September 30 guidance memorandum is contained in the Network's website under the "Enforcement" category.

The September 30 memorandum explains that EPA may reduce penalties in accordance with its Audit Policy where a source reviews a prior "good faith" decision dealing with PSD/NSR applicability, discloses a violation to EPA and corrects it prior to Title V permit issuance, and satisfies conditions 3 through 9 of the Audit Policy. Conditions 3 through 9 of the 1995 Audit Policy are summarized below:

3. The violation is fully disclosed to EPA within 10 days of when it was discovered (or shorter if required by law);

4. The violation is discovered and disclosed independent of any government, third-party, or whistleblower action;

5. The violation is corrected within 60 days (longer if EPA agrees) and the company certifies correction to EPA;

6. The company agrees in writing to take steps to prevent a recurrence;

7. The violation is not a repeat of a prior violation;

8. The violation does not result in serious actual harm, does not present an imminent and substantial endangerment, and does not violate the terms of any prior order or consent decree; and

9. The company cooperates with EPA's investigation of the matter, including providing all requested documents and access to employees.

It is noteworthy that the September 30 memorandum does not provide that Conditions 1 or 2 be met. Condition 1 is that the violation be discovered through an environmental audit or a due diligence program. Condition 2 is that the violation be identified "voluntarily." According to EPA, a "voluntarily" identified violation is one that is not identified through any monitoring, sampling, or auditing procedure required by a statute, regulation, permit, or judicial or administrative order. Thus, under the September 30 memorandum, the basis for the discovery of a violation is irrelevant so long as Condition 4 is satisfied, i.e., the discovery is not the result of any government, third-party, or whistleblower action.

Although some sources may seek to rely on the policy set forth in the September 30 memorandum, there are concerns about certain potential problems with that policy. Some of these concerns are:

- Neither the Audit Policy nor the September 30 guidance memorandum is binding on EPA; each is simply a statement concerning how EPA might exercise its enforcement discretion in the future. EPA is free to decline to follow the policy in a specific situation.

- Under the September 30 memorandum, the policy applies only if EPA finds that the source's prior PSD/NSR determination was made in "good faith." There may well be a disagreement regarding whether a prior determination satisfies this undefined criterion. This problem is heightened by the fact that in recent years EPA has changed its prior interpretations of many key PSD/NSR applicability provisions.

- Condition 5 of the Audit Policy provides that violations generally be corrected within 60 days. Because many PSD/NSR violations cannot be corrected so quickly, it is unclear how sources can meet this condition.

- Under the Audit Policy, EPA can only reduce the "gravity-based" component of civil penalties, not the "economic benefit" component. Depending on how EPA calculates the economic benefit component, the reduced civil penalty amount can still be quite large. This problem is exacerbated by the fact that previously undiscovered PSD/NSR violations may have occurred as many as ten or 20 years before discovery. Because EPA might assume that the source has received the economic benefit on a

continuing basis since the violation occurred, the final calculation could well result in a huge civil penalty even if the gravity component is reduced to zero. ❑

District Court Makes Several Key Rulings on Clean Air Act Citizen Suit Issues

A federal district court in Kansas has issued an opinion addressing several key issues in a Clean Air Act citizen suit brought against a petroleum refinery. *Anderson v. Farmland Industries, Inc.*, No. 98-2499-JWL (Sept. 22, 1999, D.Kan.). The plaintiffs, a group of individuals living near the refinery, alleged that the refinery had violated emissions limits and reporting requirements on numerous occasions. Plaintiffs sought civil penalties, injunctive relief, and attorneys' fees and costs against the company.

The district court's decision under the Clean Air Act is of particular interest because the court applied the Supreme Court's decision in *Steel Co. v. Citizens for a Better Environment*, 118 S.Ct. 1003 (1998), in addressing a number of factual situations where the plaintiffs' standing under Article III of the Constitution[4/] was in dispute. In *Steel Co.*, which arose under the Emergency Planning and Community Right-to-Know Act, the Supreme Court held, among other things, that a party lacks standing to bring a citizen suit for civil penalties unless it can also allege and ultimately prove that it is entitled to injunctive relief based on the existence of "a continuing violation or the imminence of a future violation."

The district court's opinion addressed summary judgment motions filed by the parties on standing and mootness issues.[5/] In its motion, the refinery contended primarily that plaintiffs lack Article III standing because it had taken corrective action with regard to all alleged violations and therefore the plaintiffs' claims could no longer be redressed by a favorable decision. The refinery also maintained that exceedances involving several emissions units were not violations because the exceedances in question occurred during "startup, shutdown, or malfunction" conditions. The plaintiffs argued that they had suffered redressable injuries on a number of grounds and that the exception for startups, shutdowns, or malfunctions did not apply to the alleged violations.

The district court ruled, among other things, that the plaintiffs had Article III standing to pursue most of the claims alleged in their complaint but that they lacked standing with regard to alleged violations by a coal-fired boiler that had been repaired. The court's principal rulings are summarized below:

- With regard to excess emissions from the refinery's Radco heater, Claus sulfur recovery unit, and FCCU catalyst regenerator, the court ruled that plaintiffs satisfied the injury-in-fact and causation prongs of the Article III standing test. This conclusion was based on the fact that, although the refinery had stated that excess emissions from the facility were not currently drifting over plaintiffs' houses, the refinery failed to deny plaintiffs' allegations that such emissions *in the past* had drifted over the houses, interfered with plaintiffs' use and enjoyment of their houses, and adversely affected the quality of the air breathed.
- As to the redressability requirement for Article III standing, the court ruled that, under *Steel Co.*, the test is whether "a reasonable fact finder could conclude either that defendant was in fact violating the act at the time plaintiffs filed their complaint or that future violations of the act were imminent."

4/ The federal courts have established a three-part test for determining whether a party has satisfied the "case or controversy" requirement of Article III and therefore has standing to bring suit in federal court. The party must show: (1) that it has personally suffered a concrete injury, (2) that the injury is traceable to the challenged action of the defendant, and (3) that the injury will be redressed by a favorable decision.

5/ The court's prior opinion addressing other issues raised by the motions for summary judgment was discussed in a previous article. *See* July 1999 *Washington Report* at WR-260.

The court then rejected the refinery's contentions that plaintiffs had not satisfied the redressability requirement because all the alleged violations had been corrected or all exceedances occurred during "startup, shutdown, or malfunction" conditions. The court found that plaintiffs had produced sufficient evidence that violations were continuing so that summary judgment could not be granted on that point. It also concluded that the refinery had the burden of establishing that exceedances resulted from malfunctions and that the evidence was inconclusive on this question.

- The court concluded that plaintiffs had standing to challenge the refinery's erroneous reporting of excess emissions because certain reports had still not been corrected when the citizen suit was filed. With regard to redressability, the court distinguished this situation from that in *Steel Co.*, where the company had corrected all its reporting violations *before* the suit was filed. In this case, the court concluded that a reasonable fact finder could determine either that violations were occurring when the complaint was filed or that future violations were imminent.

- The court ruled that plaintiffs lacked standing to raise claims alleging violations by a coal-fired boiler that was used intermittently because plaintiffs could not satisfy the redressability element of the standing test. After the boiler had last been operated, the refinery had repaired the boiler's pollution control system. According to the court, the plaintiffs had not met their burden of showing that at the time the complaint was filed a few months later, violations were either ongoing or imminent.

- The court held that plaintiffs had standing to pursue their claim that the refinery has violated the requirement in 40 C.F.R. § 60.11(d) that "at all times, including periods of startup, shutdown, and malfunction, owner and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions." The court concluded that there was evidence of excess SO_2 emissions and that the refinery could not claim that the emissions resulted from malfunctions because a source must meet "good air pollution control practices" at all times, including during malfunctions.

- The court ruled that it would largely deny the refinery's motion for summary judgment with regard to the refinery's mootness arguments because the refinery had not met its burden of showing that plaintiffs' claims based on excess emissions are moot. In particular, the court found that the evidence was unclear regarding whether the malfunction exception applied.

- Finally, with regard to allegations that the refinery had reported excess emissions in the wrong units, the court ruled that the claim for injunctive relief had become moot because the refinery ceased violating this requirement after the filing of the complaint. However, the court concluded that plaintiffs' claim for civil penalties for those alleged violations is not moot. The court expressly declined to follow the Fourth Circuit's decision in *Friends of the Earth v. Laidlaw Environmental Services*, 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 119 S.Ct. 1111 (1999), which held that a citizen suit claim for civil penalties becomes moot once plaintiffs are no longer entitled to injunctive relief. ❑