REPORT OF THE COMMITTEE ON THE ENVIRONMENT

I. INTRODUCTION

This report focuses on recent developments in environmental law which have the potential to substantially impact the energy industry. Considered first is the United States Environmental Protection Agency's (EPA) proposal under the Clean Air Act (CAA) to require individual states to revise their environmental regulations concerning the transport of ground-level ozone, the most harmful component of smog, and ozone-precursors in the eastern United States. While couched in general terms, the EPA's ozone proposals could have a significant and disproportionate impact on the electric power generation industry, particularly older, fossil-fuel electric generating facilities previously subject to relatively little regulation under the CAA. The report examines the EPA's proposed alternative interpretations of section 110(a)(2)(D) of the CAA and discusses how

resolution of the competing interpretations will determine, to a great extent, the ultimate burden of the EPA's proposal on the electric generation industry. Also discussed are related developments concerning the EPA's response to petitions by several northeastern states to reduce ozone-related emissions from older, coal-fired electric generation facilities.

Second, the report examines environmental enforcement-related developments in the citizen suit area with actual or potential impact on the energy industry. In this regard, the report describes the substantial and growing level of private or "citizen" suit enforcement actions under environmental statutes. The report also examines the basis and nature of citizen suits, including the prerequisites of notice and diligent administrative enforcement, the ongoing violation requirement and recent decisions on standing. As a result of the CAA Amendments of 1990 and more recent EPA rules, private enforcement suits under the CAA, including potential citizen suit actions related to alleged non-compliance by electric generation facilities, can be expected to increase.

II. OZONE TRANSPORT

A. Introduction

The EPA's recent initiatives to combat perceived air quality problems in the United States have been well documented.[1] The most critical initiative from the perspective of electric generators, however, has probably gone relatively unnoticed. In November of 1997, the EPA proposed a requirement that twenty-two states revise their legal regimens for air quality compliance (state implementation plans (SIPs)) to combat the transport of ozone and ozone-precursors in the eastern United States where air quality problems have been most persistent (with the exception of California).[2] The EPA's proposed action would find that the transport of ozone (known as smog) and ozone-precursors from certain states in the eastern two-thirds of the United States across state lines to downwind states (e.g., the Northeast) "significantly contributes" to nonattainment of the national ambient air quality standard for ozone.

Although styled in more general terms, the EPA proposal is aimed directly at the electric power generation industry, which will be affected in far greater proportion than other segments of U.S. industry. Nestled within the proposal is a key legal issue regarding the manner in which the cost of controls would be taken into account in establishing pollution reduction obligations. One proposed interpretation of CAA section 110(a)(2)(D) could bring under stringent regulation scores of older, fossil-fueled electric generating stations currently subject to relatively little regulation under the CAA.[3] As discussed in greater detail below, the

1. *See, e.g.*, J.H. Cushman Jr., *On Clean Air, Environmental Chief Fought Doggedly, and Won*, N.Y. TIMES, July 5, 1997, at A8.

2. *See* 62 Fed. Reg. 60,318 (1997) (to be codified at 40 C.F.R. pt. 52).

3. Electric generating stations in the South and Midwest tend to be older and more likely to be

resolution of this issue will go far in determining how and on whom the resulting cleanup burden ultimately will fall.

In addition, in early 1998 the EPA and a group of northeastern states were negotiating a resolution of the states' petitions under CAA section 126, which sought EPA action to reduce emissions from midwestern utilities believed to cause ozone compliance problems throughout the East. As discussed below, the agreement reportedly will establish the EPA's procedural response to the states' section 126 petitions in tandem with its previously mentioned administrative proposals under CAA section 110(a)(2)(D).

B. General Factual Background

Ground-level ozone, the main harmful ingredient in smog, is produced by complex chemical reactions when its precursors, volatile organic compounds (VOC) and nitrogen oxides (NO_x), react in the presence of sunlight. Electric generation facilities emit NO_x and, in many cases, more than trace amounts of VOCs. Older, coal-fired generating facilities, many located in the Midwest and South, are among the biggest contributors to the nation's inventory of NO_x emissions. The chemical reactions that create ozone take place while the pollutants are being transported through the air by the wind. The result is more severe ozone pollution many miles downwind from the source of the chemicals than at the source itself.

The science of ozone formation, transport, and accumulation is complex and still evolving. Ozone is both produced and destroyed by a set of chemical reactions involving NO_x, VOC and sunlight. Emissions of NO_x and VOC are necessary for the formation of ozone in the lower atmosphere. In the complex cycle of chemical reactions, however, ozone concentrations in an area can actually be lowered by the reaction of nitric oxide with ozone to form nitrogen dioxide; then, as the same air mass moves downwind and the cycle continues, the nitrogen dioxide forms additional ozone. The importance of this reaction depends on the relative concentrations of NO_x, VOC and ozone, all of which change with time and location. Sometimes NO_x in the lower atmosphere is beneficial locally but then is harmful downwind. Air quality modeling is used to predict exactly which will be the case at any given geographic point.

Ground-level ozone may induce the following negative health effects:

- Increased respiratory symptoms, particularly in highly sensitive individuals;
- Increased hospital admissions and emergency room visits;
- Decreased lung function;
- Inflammation of the lungs;

---

fueled by coal. Indeed, many of the generating stations have not been subject either to the EPA's New Source Performance Standards or to preconstruction review under the EPA's Prevention of Significant Deterioration Program. *See* Clean Air Act §§ 111, 165, 42 U.S.C.A. §§ 7411, 7475 (West 1995). Such older and more polluting sources often are referred to as "grandfathered."

- Long-term damage to the lungs.

In July 1997, the EPA promulgated a new national ambient air quality standard (NAAQS) for ozone to provide increased protection to the public from these potential health effects.[4]

Some studies also indicate that current ambient levels of ozone are responsible for damage to forests and ecosystems (including habitat for animal species). Ground-level ozone above background levels is also suspected of causing the loss of several hundred million dollars worth of agricultural crop yield each year. The EPA estimates that full compliance with the newly promulgated eight-hour ozone NAAQS will result annually in preventing about $500 million of crop yield loss.

C. General Legal And Regulatory Background

1. The Clean Air Act

For almost thirty years, Congress has focused major efforts on curbing tropospheric (ground level) ozone. It is fair to say that ozone control has been the centerpiece of the CAA.[5] In 1970, Congress required that the EPA issue and periodically review and revise the NAAQS for ozone and other air pollutants.[6] Congress also required the states to submit SIPs to attain those NAAQS, and Congress included a list of minimum requirements SIPs must meet.[7] In 1977, Congress amended the CAA to provide additional time for areas to attain the ozone NAAQS and to impose specific SIP requirements for those nonattainment areas. These provisions first required the designation of areas as "attainment," "nonattainment," or "unclassifiable."[8] Congress also required that SIPs for ozone nonattainment areas include additional provisions set out in part D of title I of the CAA.[9]

The 1977 amendments included two key provisions focused on interstate transportion of air pollutants: (1) the predecessor to current CAA section 110(a)(2)(D), which requires SIPs for all areas to reduce emissions that would have certain adverse downwind effects; and (2) section 126, which authorizes a downwind state to petition the EPA to impose limits directly on upwind sources found to adversely affect that state.[10]

Finally, in 1990, Congress amended the CAA to better address continued nonattainment of the one-hour ozone NAAQS. In its 1990 amendments, Congress required the states and the EPA to review and, if

4. *See* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (to be codified at 40 C.F.R. pt. 50).

5. *See* Clean Air Act §§ 101-602, 42 U.S.C.A. §§ 7401-7671 (West 1995 & Supp. 1998).

6. *See* Clean Air Act §§ 108, 109, 42 U.S.C.A. §§ 7408, 7409 (West 1995 & Supp. 1998).

7. *See* Clean Air Act § 110, 42 U.S.C.A. § 7410 (West 1995).

8. *See* Clean Air Act § 107, 42 U.S.C.A. § 7407 (West 1995).

9. *See* Clean Air Act § 171, 42 U.S.C.A. § 7501 (West 1995).

10. *See* Clean Air Act § 110(a)(2)(D), 42 U.S.C.A. § 7410(a)(2)(d) (West 1995).

necessary, revise the designation of areas as attainment, nonattainment, and unclassifiable under the ozone NAAQS in effect at that time, which was the one-hour standard.[11] Areas designated as nonattainment were generally divided into five classifications based on prevailing air quality conditions within each of the areas.[12] Each classification carries specific requirements, including dates by which the ozone standard must be met.[13] On a scale of increasing severity of the air quality problem, these classifications are "marginal," "moderate," "serious," "severe" and "extreme."

It is at least arguable that the 1990 amendments to the CAA reflect a general awareness by Congress that ozone is a regional problem. As described above, ozone and its precursors may be transported long distances across state lines to combine with ozone and precursors downwind, thereby exacerbating the ozone problems downwind. Section 110(a)(2)(D) is the statutory key to the problem of ozone transport. This provision requires a SIP to have provisions preventing sources of air pollutants from contributing significantly to nonattainment problems or interfering with the maintenance of air quality standards in downwind states.[14] The CAA authorizes the EPA to review a SIP and determine when it is substantially inadequate to meet any CAA requirement, including the requirement to mitigate interstate transport of the type described in section 184 (concerning ozone transport in the Northeast) or section 176A (concerning interstate transport in general). When such a finding is made the EPA must require the state to submit, within a specified period, a SIP revision to correct the inadequacy.[15]

The CAA further addresses interstate transportation of pollution in section 126.[16] Subparagraph (b) of that provision authorizes each state (or political subdivision) to petition the EPA for a finding that emissions from "any major source or group of stationary sources" in an upwind state contribute significantly to nonattainment in the downwind state.[17] If the EPA makes such a finding, it must impose limits on the affected source or group of sources.[18]

---

11. *See* Clean Air Act § 107(d)(4), 42 U.S.C.A. § 7407(d)(4) (West 1995).
12. *See* Clean Air Act § 181(a)(1), 42 U.S.C.A. § 7511(a)(1) (West 1995).
13. *See* Clean Air Act §§ 181, 182, 42 U.S.C.A. §§ 7511, 7511a (West 1995 & Supp. 1998).
14. Section 110(a)(2)(D) provides, in relevant part, that each SIP must:

> contain adequate provisions — (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will — (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard . . . .

Clean Air Act § 110(a)(2)(D), 42 U.S.C.A. § 7410(a)(2)(D) (West 1995).
15. *See* Clean Air Act § 110(k)(5), 42 U.S.C.A. § 7410(k)(5) (West 1995).
16. *See* Clean Air Act § 126, 42 U.S.C.A. § 7426 (West 1995).
17. *See* Clean Air Act § 126(b), 42 U.S.C.A. §7426(b) (West 1995).
18. *See* Clean Air Act § 126(c), 42 U.S.C.A. § 7426(c) (West 1995).

2. Recent Administrative Developments

a. SIP Modifications and Ozone Standards

States have not been able to modify their SIPs to meet the November 15, 1994 statutory deadline for demonstrating attainment of the ozone standard. Moreover, many states have failed to make other SIP submissions required under CAA section 182(c). A major reason for these failures has been that states were not able to address or control ozone pollution transported from the South and Midwest to the East. Accordingly, in 1995 the EPA created the Ozone Transport Assessment Group (OTAG), consisting of representatives of the thirty-seven eastern-most states. Shortly after the OTAG was created, the EPA indicated that it intended to issue a "SIP call" to require states to modify their SIPs to achieve the additional emission reductions necessary to address the ozone transport problem. In January 1997, the EPA published a Notice of Intent in that regard.[19] Ultimately, the OTAG issued a very detailed set of recommended emission reductions which it believes are necessary to reduce ozone transport such that downwind areas will be able to attain the ozone NAAQS. These recommendations took direct aim at scores of major electric generating facilities.

In July 1997, the EPA issued its final action to revise the NAAQS for ozone.[20] The one-hour standard was replaced by an eight-hour standard at a level of 0.08 parts per million (ppm). The eight-hour standard is based on the three-year average of the annual fourth-highest daily maximum eight-hour average ozone concentration measured at each monitor within an air quality management area. The EPA retained the applicability of the one-hour NAAQS for certain areas to ensure adequate health protection during the transition to full implementation of the eight-hour NAAQS.

At the August 7, 1997 Clean Air Act Advisory Committee meeting, the EPA announced the availability of a document that describes the multiple impacts of NO_x emissions on public health and the environment.[21] According to the EPA, "in addition to helping attain public health standards for ozone, decreases in emissions of NO_x help reduce acid rain, greenhouse gases, nitrates in drinking water, stratospheric ozone depletion, excessive nitrogen loadings to aquatic and terrestrial ecosystems, and ambient concentrations of nitrogen dioxide, particulate matter, and toxics."[22]

---

19. *See* Notice of Intent, Calls for State Implementation Plan Revisions for Certain States to Reduce Regional Transport of Ozone, 62 Fed. Reg. 1420 (1997).

20. *See* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (to be codified at 40 C.F.R. pt. 50).

21. ENVIRONMENTAL PROTECTION AGENCY, EPA-452/R-97-002, NITROGEN OXIDES: IMPACTS ON PUBLIC HEALTH AND THE ENVIRONMENT (1997).

22. Environmental Protection Agency, *Proposed Rule for Reducing Regional Transport of Ground-Level Ozone (Smog): Federal Register Notice* (Oct. 10, 1997) <http://.epa.gov/ttncaaal/otag/otagfr.html>

b. State Petitions Under CAA Section 126

There was more simultaneous administrative activity increasing the pressure on the EPA to achieve emissions reductions from upwind sources, most prominently electric generators. In the fall of 1997, the EPA received petitions from eight northeastern states under CAA section 126 identifying upwind sources of ozone precursors which the states claimed significantly contribute to downwind ozone nonattainment. A section 126 petition, according to the terms of CAA sections 126 (b) and (c), is limited to upwind major stationary sources of ozone precursors (e.g., electric power generators that burn coal) and may not consider other aspects of the emissions inventory, such as minor sources and mobile sources. Moreover, the granting of a section 126 petition would require the EPA itself to impose direct controls on sources, rather than issue a SIP call to the states to impose such controls.

D. The Proposed SIP Call and Electric Generators

1. Process for Requiring Submission of Section 110(a)(2)(D) SIP Revisions

As described above, SIPs for all areas must meet the requirements of CAA section 110(a)(2) which impose limits on sources that affect the ability of downwind areas to attain and maintain the NAAQS. Given the pressure that had built up by 1997 from the downwind states and the legal force of the section 126 petitions, the EPA's proposed SIP call to the states to address section 110(a)(2)(D) noncompliance came as no surprise. The EPA has proposed that section 110(a)(2)(D) be applied in different ways with respect to each of the two ozone NAAQS, i.e., the one-hour NAAQS and the eight-hour NAAQS. The goal is to have the states responsible for ozone transport to develop SIPs by 1999 that require significant NO_x reductions and to fully implement these plans before the summer of 2003.

a. The One-hour NAAQS

Each air quality management area is currently required to have a SIP in place to meet the one-hour ozone NAAQS. Moreover, the EPA has determined that where an area is designated nonattainment for the one-hour ozone NAAQS, that standard will continue to apply until it is determined that the area has air quality meeting the standard.[23] Accordingly, each such area is under a current obligation to include provisions in its SIP that will enable the area to meet the requirements of section 110(a)(2)(D) for the one-hour ozone NAAQS.

This obligation to meet the one-hour standard applies even after the EPA determines that an *upwind* area has attained the one-hour standard (and the applicability of that standard thereby terminates for the upwind area). It is the EPA's view that, regardless of the status of the one-hour

23. *See* 62 Fed. Reg. 38,856, at 38,894.

standard with respect to an *upwind* area's air quality, a *downwind* area may continue to have a nonattainment problem under the one-hour standard, and the upwind area's air emissions sources may continue to impact that downwind nonattainment problem. Under these circumstances, the upwind area is required to retain or adopt SIP provisions that meet the requirements of section 110(a)(2)(D).

The EPA proposes to determine that the SIPs for certain identified states are "substantially inadequate" to comply with the requirements of section 110(a)(2)(D) and to mitigate adequately the interstate ozone transport problem described in section 184. The EPA bases its proposal on the theory that ozone precursor emissions and transported ozone from those states contribute significantly to nonattainment downwind. Based on these findings, the EPA has proposed a call for SIP revisions to require the identified states to reduce emissions to mitigate their contribution.[24]

b. The Eight-hour NAAQS

Under the eight-hour ozone NAAQS, areas that have not been designated as attainment, nonattainment, or unclassifiable are not required to have SIPs in place. When those SIPs become due, they must meet the applicable requirements of section 110, which apply to all areas. The SIPs for areas designated nonattainment will also have to meet the additional requirements in subpart 1 of part D applicable to nonattainment areas. The EPA is proposing to require, under section 110(a)(1), that certain states must submit SIP revisions under the eight-hour ozone NAAQS to meet the requirements of section 110(a)(2)(D).[25]

2. The "Significant Contribution to Nonattainment" Issue

The threshold legal consideration under CAA section 110(a)(2)(D) is whether sources "contribute significantly" to "nonattainment in . . . any other State" with respect to the ozone NAAQS. A source cannot be legally subjected to the SIP call unless this test is met. The initial inquiry is to determine the geographic scope of "nonattainment" downwind. The EPA's proposed interpretation of this term is not limited to currently-designated nonattainment areas, but includes areas where air quality currently violates (and will likely continue to violate) the NAAQS for ozone. Although CAA section 110(a)(2)(D) does not refer to "nonattainment areas," it is a phrase that the EPA generally has interpreted to refer to areas that are designated nonattainment under CAA section 107 (section 107(d)(1)(A)(i)). The statutory provision includes only the term "nonattainment" and does not define that term.

After determining the scope of the downwind nonattainment problem, the EPA must next analyze whether the emissions from sources in the

24. *See* 62 Fed. Reg. 60,318 (1997) (to be codified at 40 C.F.R. pt. 52).

25. *Id.* at 60,364-69.

upwind area "contribute significantly" to the nonattainment problem.[26] The EPA analyzed all NO_x emissions in specified upwind areas, made proposed determinations as to the significance of contributions based on the entire inventory of the area's NO_x emissions, and proposes to call for SIP revisions that address overall levels of NO_x emissions.[27] Under the proposal, whether a contribution from sources in a particular upwind area is "significant" would depend on the overall air quality context. The EPA is proposing a "weight of evidence" test under which several factors are considered together, but none of them individually constitutes a bright-line determination.

The legal interpretation of section 110(a)(2)(D) becomes crucial at this point. While each of the two interpretations proposed by the EPA relies on an identical set of factors to make the determinations required under section 110(a)(2)(D), each relies on different factors in different parts of the analysis.

Under the first alternative interpretation, the weight of evidence test for determining "significant contribution" focuses on the following: (1) the amount of emissions and their ambient impact; (2) the level of emissions and emissions density in the particular upwind area; (3) the level of emissions in other upwind areas; (4) the amount of contribution to ozone in the downwind area from upwind areas; and (5) the distance between the upwind sources and the downwind nonattainment problem. Under this approach, when emissions and ambient impact reach a threshold level, as assessed by reference to the factors identified above, those emissions would be considered to "contribute significantly" to nonattainment. The EPA would then define the emission reductions required in order to adequately mitigate the "significant contributions." Critically, evaluation of the cost-effectiveness of available measures for reducing upwind emissions, relative to the cost effectiveness of available controls in downwind areas, enters into this determination only after the "significance" of the contribution is established.

Under the second alternative interpretation of section 110(a)(2)(D), the weight of evidence test for determining "significant contribution" includes all of the factors identified immediately above, including the factors that comprise the adequate mitigation test, i.e., relative cost-effectiveness. Thus, under this second interpretation, the cost effectiveness of controlling upwind emissions would be an important, though not necessarily controlling, factor in evaluating whether emissions meet the "significant contribution" test.

---

26. Neither the CAA nor its legislative history provides meaningful guidance for interpreting the term "contribute significantly." *See* H.R. REP. NO. 101-490(1), at 218 (1990).

27. The EPA does not, in the proposed rulemaking, determine whether particular sectors of the NO_x inventory "contribute significantly" and is not mandating controls on particular sectors of that inventory. That is up to the states.

3. The Legal Justifications for the Two Alternative Interpretations of Section 110(a)

The two alternative interpretations have significantly different legal justifications. The CAA, section 110(a)(2)(D), provides that the SIP for the upwind area must contain adequate provisions prohibiting sources "from emitting any air pollutant in amounts which will — (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State . . . ."[28]

Under the first interpretation, the EPA may determine that a relatively larger inventory of emissions contributes significantly to nonattainment (or interferes with maintenance) in light of the fact that the costs of controlling those emissions are not considered in determining significant contribution. The EPA would then require adequate mitigation of the full set of emissions that contribute to nonattainment or interfere with maintenance.

Other statutory provisions support the idea that the CAA could be construed to require mitigation, in lieu of complete elimination, of emissions that contribute to air quality problems downwind. For example, section 110(k)(5) authorizes the EPA to promulgate a SIP call on a finding that a SIP is "substantially inadequate to attain or maintain the relevant [NAAQS], to mitigate adequately the interstate pollutant transport described in section [176A] . . . or section [184] . . ., or to otherwise comply with any requirement of this chapter."[29] Section 176A describes interstate transport of air pollutants generally and section 184 describes ozone transport in the northeast region in particular, which constitutes part of the transport phenomenon at issue in the EPA proposal. Section 176A authorizes the creation of a transport region when emissions from one or more states contribute significantly to a NAAQS violation in another state and further authorizes a transport commission to assess strategies for mitigating the interstate pollution. These provisions, read together, could be taken to indicate that adequate mitigation of transport is an appropriate response to a SIP call. Arguably, this interpretation should hold when the EPA issues a SIP call based on section 110(a)(2)(D), and when the EPA mandates a SIP revision under section 110(a)(1), based on section 110(a)(2)(D).

The second legal interpretation, in contrast, focuses on the provisions of CAA section 110(a)(2)(D) stating that the SIP must "prohibit" any omission activity "amounts" that contribute significantly to downwind nonattainment or interfere with maintenance. The EPA has identified the states whose full set of NO_x emissions contribute markedly to downwind problems. The term "prohibit" could be interpreted to require that the EPA, upon finding that a state's full set of emissions "contribute significantly" to nonattainment, require the SIP to eliminate *that full set* of emis-

28. Clean Air Act § 110(a)(2)(D), 42 U.S.C.A. § 7410(a)(2)(D) (West 1995).

29. Clean Air Act § 110(b)(5), 42 U.S.C.A. § 7410(k)(5) (West 1995).

sions. This construction, in theory, could mean that the EPA must require the state to shut down all of the emission-generating activities, including electric power plants. It seems highly doubtful Congress would have intended this result.

The EPA's second proposed interpretation rather neatly sidesteps this possible result by taking into account the relative cost effectiveness of the upwind and downwind controls in defining the "amounts" of emissions in each state that contribute significantly to the downwind problem. Once the EPA has set those "amounts" in light of its consideration of the cost factors, the SIPs for the affected states would then need to prohibit only those amounts.

4. The EPA's Recommended Emissions Reductions

For electric generators, the OTAG recommended that the range of NO_x controls in the geographic area in which controls would apply fall between CAA-required controls (about a thirty percent reduction from 1990 levels) and the less stringent of either eighty-five percent reduction from the 1990 rate or 0.15 lb/MMBtu. The EPA's proposed utility emissions reduction budget component is significantly more stringent in two ways. First, it is based on the 0.15 lb/MMBtu emission rate without the eighty-five percent reduction option. (Thus, it is similar to the upper bound recommendation advanced by the OTAG, but excludes the eighty-five percent reduction option.) Second, the EPA's proposed utility emissions budget is based on a larger area from which emissions reductions will be extracted. (The OTAG plan involves only portions of designated states.)

E. State Petitions Under CAA Section 126

As previously noted, in the fall of 1997 eight northeastern states petitioned the EPA under CAA section 126, asking the EPA to require electric generation facilities and large industrial facilities in the Midwest to reduce NO_x emissions by eighty-five percent. If the section 126 petitions, which alleged "significant contribution" by these facilities to downwind ozone nonattainment, were granted, the EPA itself would be required to impose direct controls on sources instead of imposing such controls through SIPs under section 110(a)(2)(D).

As of this writing, the EPA and the petitioning states are pursuing an agreement that would govern the EPA's procedural response to the petitions.[30] Under this agreement the EPA reportedly would issue a final response to the section 126 petitions during the Spring of 1999, but would defer any remedy until the end of 1999. This delay would allow the midwestern states to impose the NO_x reductions under their revised SIPs (pursuant to the outcome of the EPA's ongoing regulatory action under section 110(a)(2)(D), as discussed above), but the EPA would stand ready

30. *See, e.g., EPA/Northeast Near Deal to Coordinate Attack on Transported Ozone*, INSIDE EPA, December 12, 1997, at 3-4.

to act immediately under section 126 in the event the states failed to act. In addition, the EPA has reportedly committed to the issuance of a generic proposal concerning the ozone transport problem by the fall of 1998, at which time the EPA hopes to have finalized its regulatory proposal under CAA section 110(a)(2)(D) concerning ozone-related revisions to SIPs.

III. CITIZEN SUITS

A. Introduction

Environmental citizen suits are a very significant aspect of federal environmental enforcement litigation in terms of both the frequency of these suits and the severity of the sanctions imposed. Significant expansion of this type of environmental litigation began in the early to mid-1980s and initially focused on the Clean Water Act (CWA). While the CWA continues to be a significant focus, citizen suit enforcement under other federal environmental statutes, such as the CAA, the Resource Conservation and Recovery Act (RCRA), and the Emergency Planning and Community Right-to-Know Act (EPCRA), is growing. The pattern followed by the environmental plaintiffs in these suits has often been to target a number of industrial facilities in a specific state or geographic region and file an essentially simultaneously very similar suits using a standard complaint, discovery papers and motions. A possible future focus of citizen suits under the CAA could relate to compliance by electrical utilities with the expanded ozone-related requirements under revised SIPs and operating permits discussed above.

There are several factors that provide the impetus for citizen suits. The first is the availability of civil penalty relief. The citizen suit provisions of federal environmental statutes generally authorize the imposition of civil penalties and injunctive relief. The CAA Amendments of 1990 added civil penalty relief to CAA citizen suits. These civil penalties can be very sizeable and have reached as much as $10 million in recent citizen suits.

Another factor is the strict liability standard that applies to these cases and the plaintiffs' ability to rely on self-monitoring reports as admissions of liability. In this regard, the 1990 CAA Amendments established the Title V operating permit program, which facilitates enforcement by centralizing all air pollution control requirements in a single integrated document, and imposed expanded monitoring and reporting obligations.

A third factor is the availability of attorneys' fees; citizen suit statutes typically provide for fee-shifting (the prevailing party must pay its adversary's litigation costs).

B. Prerequisites for Citizen Suits

In most cases, citizen enforcement under these statutes is narrower than government enforcement, because a citizen suit must be preceded by a period of mandatory notice (typically 60 days) before the suit can be commenced. Usually, the notice is required to be provided to the alleged

violator, the appropriate state enforcement agency and the EPA. If the government undertakes diligent enforcement during that hiatus, the citizen suit cannot be brought.

1. Notice Requirement

A considerable amount of litigation has been directed toward the jurisdictional nature of the notice requirement. For example, the Supreme Court resolved a split in the circuits and held that the sixty-day notice requirement in section 7002(b)(1) of the RCRA is a mandatory condition precedent to commencing a citizen suit.[31] Although the plaintiff had provided notice to the would-be defendant, the plaintiff had neglected to notify either the EPA or the Oregon Department of Environmental Quality. The plaintiff argued for a flexible construction of the notice provision which would allow suits filed before appropriate notice had been given to be saved by a sixty-day stay of district court proceedings. The Supreme Court rejected that argument, reasoning that congressional policy "would be frustrated if citizens could immediately bring suit without involving federal or state enforcement agencies."[32]

In the wake of *Hallstrom v. Tillamook*, many courts have addressed the adequacy of the mandatory pre-suit notice in citizen suit cases. Although these cases often turn on their own facts, a more flexible, plaintiff-oriented standard has been set forth by the Third Circuit.[33] In contrast, the Ninth Circuit has imposed a more exacting standard in which the notice must stand on its own and not require the affected state agency to make extrapolations in order to determine the scope of the violations at issue. [34]

2. Diligent Administrative Enforcement

A recurring theme in citizen suit litigation, particularly CWA citizen suits, is whether there has been diligent state administrative enforcement that precludes a citizen suit. Section 309(g)(6) of the CWA[35] generally bars citizen suits where there has been diligent administrative enforcement under a state law that is comparable to the CWA provisions that govern administrative enforcement by the EPA. Two lines of authority have developed under CWA section 309(g)(6) in determining whether state administrative enforcement meets that "comparability" standard. The Eighth Circuit has held that the comparability standard is satisfied where the state's enforcement code considered as a whole, rather than merely the provisions invoked in a particular enforcement action, contains administra-

31. *See* Hallstrom v. Tillamook County, 493 U.S. 20 (1989).

32. *Id.* at 29.

33. *See* Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 50 F.3d 1239 (3rd Cir. 1995) (notice of one aspect of an effluent violation, such as a violation of a concentration limit, is deemed sufficient for the would-be defendant to identify other violations related to the same permit parameter).

34. *See* Washington Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir. 1995).

35. *See* Clean Water Act § 309(g)(6), 33 U.S.C.A. § 1319(g)(6) (West 1986 & Supp. 1998).

tive penalty provisions similar to those in the CWA, has the same overall enforcement goals as the Act and provides interested citizens with a meaningful opportunity to participate at significant stages of the administrative enforcement process.[36] The other line of authority is represented by the Ninth Circuit's more rigid approach: the specific statute that governed the state administrative enforcement proceeding (as opposed to other provisions of the state's enforcement code) must authorize imposition of administrative penalties and address each of the procedural requirements that govern administrative enforcement of the CWA by the EPA.[37] The Supreme Court has denied petitions for writs of certiorari in both of these cases, thus allowing these somewhat contradictory approaches to interpretation of section 309(g)(6) to stand.

C. The On-Going Violation Requirement: The Gwaltney Case.

One of the most controversial issues in citizen suit litigation has been whether these suits can be brought for purely past violations, that is, violations that abated prior to the citizen suit. This issue has been extensively litigated under the CWA, including cases where, prior to initiation of the citizen suit, permit compliance has been achieved for many, if not all, permit parameters; unduly stringent permit limits had been superseded; or a discharge had terminated. The Supreme Court addressed the on-going violation issue in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*[38] The Court ruled that a CWA section 505 citizen suit could not be brought for purely past violations. Subsequent decisions by other courts have ruled that this principle is to be applied on a parameter-by-parameter basis; an ongoing violation of one permit requirement does not authorize a citizen suit for previously abated violations of other permit requirements.

In this connection it should be noted that prior to 1990, the operative language of the CAA's citizen suit provision, section 304(a), had been identical to section 505(a) of the CWA, and objections to the effect of the *Gwaltney* decision were raised during congressional consideration of the CAA Amendments of 1990. The result was an amendment to CAA section 304(a). While the amended statute retains the former language authorizing suits where the facility in question is "alleged to be in violation" of CAA requirements, that provision is now coupled with language authorizing citizen suits against facilities alleged "to have violated" applicable standards "if there is evidence that the alleged violation has been repeated."[39] Litigation over the precise meaning of that CAA amendment has found its way, albeit somewhat indirectly, to the Supreme Court.

---

36. *See* Arkansas Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995).

37. *See* Citizens for a Better Env't v. Union Oil Co. of Cal., 83 F.3d 1111 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 789 (1997).

38. *See* 484 U.S. 49 (1987).

39. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §707g, 104 Stat. 2399, 2683 (1990).

Steel Company v. Citizens for a Better Environment, involved the citizen suit provisions of section 326 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA).[40] The Seventh Circuit had ruled that section 326 authorizes citizen suits for wholly past violations of EPCRA.[41] In *Steel Company*, the Supreme Court vacated the Seventh Circuit's holding that section 326 of the EPCRA authorizes citizen suits for purely past violations of EPCRA.[42] The Court concluded that since none of the relief sought by the citizen group would likely remedy its alleged injury in fact, the group lacked standing to bring the suit.[43] The Court acknowledged that although prompt resolution of the merits of the EPCRA question is desirable, "it is not as important as observing the constitutional limits set upon courts in our system of separated powers."[44]

D. Recent Decisions on Standing in Citizen Suit Litigation.

Under Article III of the Constitution a private plaintiff who seeks to enforce federal environmental laws (or, for that matter, other federal laws) must demonstrate that it has standing to sue. That requires the plaintiff to show that it has sustained, or will sustain, an injury that is caused by, or is fairly traceable to, the defendant's unlawful conduct and which will be redressed by the relief the plaintiff seeks. A full discussion of the policy and philosophical underpinnings of the constitutional requirement for standing is beyond the scope of this report. However, in the context of public law litigation, such as an environmental citizen suit, a principal purpose of the requirement for standing is to limit the business of the federal courts to adjudicating claims based on injury actually sustained by the plaintiff rather than allowing the courts to be used as a forum to ventilate generalized grievances shared by many in our society.

Standing to sue has been a "perennial" issue in environmental citizen suit litigation. Courts have generally held that the "injury in fact" and causation (or traceability) aspects of standing are satisfied in the CWA context where the defendant has had a non-complying discharge to a waterway in which the plaintiff, or its members, have a recreational, aesthetic, or property interest.[45] Although almost always raised as a defense, challenging the plaintiffs' standing has rarely been successful for citizen suit defendants. Several recent cases, however, suggest a possible change in that trend. For example, the Fifth Circuit has recognized that there must be a reasonable geographic nexus between the offending discharge and the in-

40. *See* Steel Co. v. Citizens for a Better Env't, 90 F.3d 1237 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (1997), *vacated*, 118 S. Ct. 1003 (1998).

41. *See* Citizens for a Better Env't v. Steel Co., 90 F.3d 1237 (7th Cir. 1996).

42. *Id.*

43. 118 S.Ct. 1003, at 1020.

44. *Id.*

45. *See, e.g.*, Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

terests that the discharge was allegedly harming.[46] As the court explained, "some 'waterways' covered by the CWA may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in order to satisfy the 'fairly traceable' element of standing." [47]

The geographic nexus issue that the court in *Sierra Club v. Cedar Point* discussed in dicta was squarely addressed in a subsequent Fifth Circuit case.[48] *Friends of the Earth* involved an oil refinery in Tyler, Texas, that discharged wastewater to the Black Fork Creek pursuant to an NPDES permit. Black Fork Creek flows into Prairie Creek, which then joins the Neches River, which in turn flows into Lake Palestine at a point that is 18 miles downstream from the refinery. The plaintiff's members claimed to have aesthetic and property interests in Lake Palestine that were injured as a result of Crown Central's alleged permit violations. Crown Central challenged the plaintiff's standing to sue and the Fifth Circuit agreed with Crown Central.

The court emphasized that the plaintiff had offered no competent evidence that the refinery discharges at issue had made their way to Lake Palestine or would otherwise affect Lake Palestine. As the court explained, the plaintiff chose instead to rely solely on the truism that water flows downstream, and on that basis proceeded to argue that any injury suffered downstream is "fairly traceable" to unlawful discharges upstream. The court noted that its ruling was narrow and did not impose an arbitrary mileage limit for CWA citizen suit plaintiffs. The court added that although "plaintiffs who use 'waterways' far downstream from the source of unlawful pollution may satisfy the 'fairly traceable' element [for Article III standing] by relying on alternative types of evidence" (such as water samples demonstrating pollutant migration), "we can no longer assume that an injury is fairly traceable to a defendant's conduct solely on the basis of the observation that water runs downstream."[49]

A recent Third Circuit decision involving the CWA's citizen suit provisions is also on point.[50] That decision reversed an earlier district court ruling that the citizen suit plaintiffs had standing to sue. The Third Circuit's opinion emphasized that the same district court had also concluded, in a second phase of the litigation addressing civil penalties, that the defendant's non-complying discharges had caused no harm to the waterway at issue and may, in fact, have improved the waterway by adding essential nutrients. The Third Circuit also noted that the plaintiffs had not alleged in their complaint (or in affidavits submitted in connection with standing) any injury to the waterway at issue in the case.

---

46. *See* Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir.), *cert. denied*, 117 S. Ct. 57 (1996).

47. 73 F.3d at 558 n.24.

48. *See* Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358 (5th Cir. 1996).

49. *Id.* at 362.

50. *See* Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111 (3d Cir. 1997).

On that basis the Third Circuit concluded that the plaintiffs lacked standing to sue and vacated the district court's decision imposing $2.6 million in civil penalties and more than $500,000 in attorneys' fees.

E. The Future of Citizen Suits.

Environmental citizen suits have become a significant portion of environmental enforcement litigation. While the frequency of these suits under individual environmental statutes will vary from time to time, it is expected that citizen suit litigation will increase under several statutes, a primary example being the CAA. One reason for this expected increase is the comprehensive operating permit program established by the 1990 CAA Amendments. Another reason is the availability of civil penalty relief, which was also added by the 1990 amendments. CAA citizen suit enforcement will also be assisted by the EPA's "any credible evidence" rule and the flexibility provided by that rule (as well as in recent court decisions) with respect to the types of evidence that can be used to establish CAA non-compliance.

COMMITTEE ON THE ENVIRONMENT:[51]

Douglas O. Waikart, Chair

Jackson H. Ables, III
Tracy R. Bishop
Mary A. Van Cleve

51. The Committee thanks Scott M. DuBoff and John W. Heiderscheit III of the law firm of Wright & Talisman, P.C., who contributed to the preparation of this report.