EPA's Eight-Hour Rule Vacated

On December 21, 2006, the U.S. Court of Appeals for the District of Columbia Circuit ruled that EPA's 8-hour ozone implementation Rule treats ozone nonattainment areas unequally. The Court also found the Rule allows "backsliding" by nonattainment areas for the 1-hour standard. *South Coast Air Quality Management District v. Environmental Protection Agency, et al.*, Nos. 04-1200; 04-1201.

On both grounds the Court ordered the Rule vacated and the matter remanded to EPA for further action consistent with the Court's opinion. (In addition to these two primary substantive questions, the Court ruled on a number of procedural issues raised by intervening parties. These questions are not addressed here.)

The Rule in question, promulgated in 2004, announced a new approach to the regulation of ozone under the Clean Air Act. EPA announced that its "one-hour" standard would be withdrawn in favor of the "eight-hour standard" militated by the Act, and required to be issued by a previous consent decree.

The procedure designed by EPA in transitioning from one standard to the other results in treating nonattainment areas differently when the area is in nonattainment under both the new eight-hour standard and the now-revoked one-hour standard. The issue of unequal treatment will not likely affect the Metropolitan Washington Region Nonattainment Area.

Possible Impact on the Washington Metropolitan Region

The Metropolitan Washington Region, however, could be affected by the decision relating to "backsliding." The Clean Air Act (Sec. 172) says there should be no weakening of controls when a primary air quality standard is relaxed. EPA and the Court interpret this action to apply when the air quality standard is made more stringent.

Areas classified as nonattainment under the one-hour ozone standard such as the Washington region are not allowed to remove the controls such as penalties, rate of progress milestones, or contingency plans that were part of a previous one-hour ozone SIP.

EPA made an exception with New Source Review (NSR), a permitting process for major facilities such as power plants that restricts major modifications and new construction based on an area's air quality classification. EPA maintained that NSR is not a "control," and could, therefore, be weakened. The court disagreed with EPA's interpretation and said that NSR was designed to limit ozone levels.

Under the 1-hour ozone standard, which the 2004 Rule revoked effective in June 2005, the Washington region was classified as a "Severe" nonattainment area and the states were required to adopt NSR permitting thresholds that expanded the number of facilities

regulated. A facility with the ability to emit 25 tons or more became regulated under this provision. With the new 8-hour ozone classification of “Moderate,” however, the number of facilities could be reduced to those with the ability to emit 100 tons or more.

If the opinion stands, Washington Metropolitan Region facilities will continue to be regulated unter the more restrictive 25 ton standard.

Another example given by the court affects the Section 185 penalty required for Severe nonattainment areas. The court said that the penalty for failure to attain (Section 185) is a control that must be retained to avoid backsliding. Again, if the opinion stands, the Region must continue its Section 185 penalties.

EPA has received an extension of time to take further court action to March 22, when it may file a motion for reconsideration. EPA has not commented or responded to the court’s decision. Under the decision EPA has until May 30 to review and propose to retain or revise the 8-hour ozone standard.