

# ENVIRONMENTAL LAW

The Newsletter for the TBA's Environmental Law Section

## TVA free to ignore EPA order: Court declares EPA enforcement action against TVA unconstitutional

By Robert J. Martineau, Jr. and Michael K. Stagg

In a landmark case issued on June 24, 2003, the United States Court of Appeals for the Eleventh Circuit issued a decision in the case of Tennessee Valley Authority v. Whitman.<sup>1</sup> The Court reviewed an Administrative Compliance Order (ACO) issued against TVA alleging that the utility had violated Clean Air Act requirements by undertaking various routine maintenance, repair, and replacement projects at its coal-fired power plants without obtaining proper New Source Review permits. In the decision, the Eleventh Circuit held that the statutory scheme that allows the imposition of severe civil and criminal penalties under an ACO "is repugnant to the Due Process Clause of the Fifth Amendment."<sup>2</sup> The Court held that "TVA is free to ignore the ACO without risking the imposition of penalties for noncompliance."<sup>3</sup> The Court told EPA that it must prove a Clean Air Act violation in federal court.<sup>4</sup>

In November 1999, EPA issued an ACO against

TVA requiring TVA to identify any modifications to its facilities undertaken without permits, apply for the necessary permits, and enter into a compliance agreement with EPA.<sup>5</sup> Under the Clean Air Act, failure to follow the ACO could lead to severe penalties and even criminal sanctions.<sup>6</sup> After a series of revisions to the initial ACO, EPA agreed to reconsider its decision by holding a hearing on the issue whether TVA had violated the CAA.<sup>7</sup> The Administrator ordered the Agency's Environmental Appeals Board (EAB) to conduct the hearing and ordered the EAB to issue a decision on a very short time frame.<sup>8</sup> Following the EAB hearing, the EPA issued a final ACO to TVA and TVA petitioned for review in the Eleventh Circuit.<sup>9</sup>

In the decision, the Court reviewed the unusual nature of the hearing afforded TVA. The Court blasted the purported fair hearing by EPA, noting it lacked any of the protections normally provided in administrative adjudications.<sup>10</sup> In reviewing the

process by which EPA claims were supposedly adjudicated, the Court said that "the EAB and ALJ manufactured the procedures they employed on the fly, entirely ignoring the concept of the rule of law."<sup>11</sup> It observed that the EAB used Part 22 rules of procedure only as guidance and that the "rules were applied on a purely ad hoc basis."<sup>12</sup> Writing for the Court, Judge Tjoflat observed, "Sometimes, the ALJ likened the sixth amended ACO to a 'complaint' so as to permit the EPA to supplement the record; other times, the ALJ referred to the ACO as a mere 'compliance order' and used this categorization to bar TVA's discovery."<sup>13</sup> The Court noted that TVA "had to utilize only those documents that the EPA voluntarily divulged," "the proceeding was rushed," "EPA's case was not divulged until three weeks before the hearing," and that EPA's reasoning that the projects at issue caused emissions increases was "not divulged at all prior to the hearing."<sup>14</sup>

In addressing the constitutionality of the ACO, the Court reviewed at great length the statutory and legislative history of the ACO and earlier judicial decisions. The Court concluded that despite a general view that the ACO did not have the force and effect of law, its view was that:

The statutory scheme established by Congress—in which the head of an executive branch agency has the power to issue an order that has the status of law after finding, "on the basis of any information available," that a CAA violation has been committed—is repugnant to the Due Process Clause of the Fifth Amendment.<sup>15</sup>

The Court said that before the government can impose severe civil and criminal penalties, a "defendant is entitled to a full and fair hearing before an impartial tribunal."<sup>16</sup> Judge Tjoflat found that the ACO scheme deprived a regulated party of a "reasonable opportunity to be heard and present evidence" on two critical issues: (1) whether the conduct underlying the ACO actually took place, and (2) whether the alleged conduct constitutes a CAA violation.<sup>17</sup>

The Court said the statute unconstitutionally delegates judicial power to a non-Article III tribunal and "relegates Article III courts to insignificant tribunals"

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# Letter from the Chair



By Steven Stout

**T**his is my final column as chair of this section.<sup>1</sup> A lot was accomplished over the past year, and we look forward to more progress and improvement as Jim Wright moves into the office of section chair.

Over the past year in these columns, I have been sharing ideas from a book written by Stephen Breyer (now an associate justice of the United States Supreme Court) called *Breaking the Vicious Circle: Toward more Effective Risk Regulation* (Harvard University Press: Cambridge, Mass. 1993).

As I have written before, this column provides an opportunity to think about the policy behind the complex set of statutes, cases, and regulations at the state and federal level that are the basis of environmental law. Those of you in private practice will advise clients about in an

environmental audit, or perhaps will attempt to challenge an agency interpretation in the context of permitting or enforcement. Government attorneys will prosecute an administrative enforcement action or defend a permitting decision. But what we do not do - or at least not often - is to really examine the policy basis underlying these environmental laws and regulations.

I had planned originally to discuss solutions that Breyer offered to reform the way government bureaucracy makes decisions and regulates risk. This cannot be done thoroughly in this space, but I will talk about some criticism of Breyer and how his book has lasting influence. One of the regulatory tools that I think Breyer would use more is cost/benefit analysis.

Georgetown law professor Lisa Heinzerling authored a review of Breyer's book in the *University of Chicago Law Review* in 1995. Before becoming an academic, she served on the staff of the Senate Judiciary committee and helped Senator Joseph Biden prepare his questioning of Breyer in confirmation hearings when President Clinton appointed Breyer to the Supreme Court. I first read about Ms. Heinzerling in an issue of *Environmental Forum*.<sup>2</sup>

*Environmental Forum* also includes a regular column by economist Frank Arnold. He writes about economic issues related to environmental law and policy. He wrote an interesting one-page column about the arsenic standard for drinking water. I think most of us will remember that controversy from 2001. In some areas in Western states, water is scarce and arsenic is found at naturally-occurring levels higher than the new standard. Building the treatment systems for arsenic will be expensive, since many of these locations will be small water systems. The capital costs cannot be spread over a large number of users, and,

consequently, the increase in water rates will be enormous.

Will the people in these communities thank EPA for saving them from cancer? Since it is hard to correlate actual cancer or disease clusters with the water in these areas, I think not. Although the arsenic rule is based on the premise that long-term exposure to arsenic causes cancer, I have read that there are studies that show that people living in the areas with the natural concentrations of arsenic above the new standard have less of a cancer rate than most other places. So, the people may not look at their water bills with a sense of gratitude.

Arnold argues that when we talk about saving lives we are really talking about extending lives.<sup>3</sup> Instead of counting statistical lives to evaluate benefits, we should talk about "statistical life-years," he reasons. The types of cancers avoided by the putative benefits of the arsenic rule would be almost exclusively among the elderly. So, the \$200 million estimated annual costs (accepting the accuracy of the EPA estimate) of implementing the arsenic standard goes to preventing particular types of cancer in people who have consumed water containing some level of arsenic for their entire lives. What will be achieved is an extension of those lives.

Arnold writes<sup>4</sup>:

"... (t)he reported value of the quantified benefits of the rule - roughly 20-30 fewer fatal and 15-25 fewer non-fatal bladder and lung cancers annually ranges from about \$140 million to \$200 million per year. Annual costs are slightly above \$200 million per year."

One can see that the costs and benefits are roughly equal and benefits are hard to quantify. Arnold also writes:

"To monetize the benefits, dollar values for avoided cancer cases and fatalities are required. The arsenic rule used \$6.1 million per fatality avoided and 60 percent of that for non-fatal cases. The fatality value is based mostly on a large set of economic studies that estimate how much compensation people demand for bearing small increments of mortality risk, typically in their occupations. Economists refer to this as the 'value of a statistical life' because no specific individuals are saved."<sup>5</sup>

But the studies involved young workers and related to the opinions of value of avoiding death in mid-life by an accident cutting short a normal lifespan, versus an older person who would be eliminating the risk of one particular type of cancer to the effect of extending an already long life for maybe five more years. A statistical life -year would be the economic value of another year of life, and this would probably translate to be

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# News from the 2003 solid/hazardous waste conference

The East Tennessee Environmental Crimes Task Force: *making science fiction science fact*

By Guy W. Blackwell and Karen H. Stachowski

Since 1991, the East Tennessee Environmental Crimes Task Force ("Task Force")<sup>1</sup> has investigated and successfully prosecuted over 34 significant environmental criminal cases with 57 defendants in East Tennessee. The convictions have resulted in significant jail sentences for corporate management level defendants, \$1,482,230.00 in fines, \$2,630,754.00 in restitution and over \$29,267,326.00 in remediation fees.<sup>2</sup>

Normally, criminal environmental cases in East Tennessee were reactive. That is, the Task Force received information from company employees, citizen activists, and regulators with the Tennessee Department of Environment & Conservation and the Environmental Protection Agency. Usually, the crime had already been committed or was about to be committed. In response, the Task Force used normal investigative techniques in an attempt to develop an environmental case. The Task Force has also targeted chronic regulatory violators with a long history of interactions with the State and Federal environmental agencies.<sup>3</sup>

However in November of 2000, the Task Force deviated from business as usual in order to address a complaint by a local marina owner that only fifteen percent of houseboats on Norris Lake were equipped with marine sanitation devices. The result was approximately 400,000 gallons of untreated human waste dumped into Norris Lake every season.<sup>4</sup> Exposure to and ingestion of human waste is a serious health risk to people using the lake.<sup>5</sup> The Task Force determined that the normal investigative process and prosecution in this matter may not result in the amount of compliance they were seeking in relation to the resource and time constraints.

Therefore the Task Force researched the matters and met with the Tennessee Marina Association ("Association") to discuss concerns and solutions to the problem. The solution (the "Norris Lake Project") was to set an amnesty period in which boat owners were educated about the problems, health risks, the regulations on marine sanitation devices and applicable federal criminal environmental statutes. The Norris Lake Project began with the Task Force issuing a press release in every newspaper and television station in the Knoxville area. The press release provided information to the boating public, including names and numbers of people who could answer any questions that the public may have. Meetings were held at each of the marinas surrounding Norris Lake to discuss and answer questions regarding the need for marine sanitation devices and the amnesty period. The results were dramatic. In one boating sea-

son, Norris Lake had 98% of its boat owners in compliance with marine sanitation device regulations. No prosecutions were necessary to gain this compliance.<sup>6</sup>

With the success of the Norris Lake Project and experience with the Center for Strategic Enforcement (the "Center"), the Task Force decided to take a similar approach to the problem of unauthorized releases of hazardous waste and other pollutants into the environment.<sup>7</sup> The question is how will the Task Force be able to target companies that are possible non-notifiers? This is where science fiction is rapidly becoming science fact. The Task Force is using computer databases from the Center, EPA, the Office of Surface Mining, TVA, TDEC, and information from Dunn & Bradstreet.<sup>8</sup> The merging of databases has been an arduous process, and is not yet fully complete.<sup>9</sup> Upon completion of the merger, the Task Force can use standard industrial codes contained in the merged database which will indicate the type of process and chemicals used by a particular business. From this, the Task Force will determine the potential type of hazardous waste or other pollutants generated by that business and potential for harm<sup>10</sup> as

determined by the location of the business. Utilizing the databases of TDEC and EPA, the Task Force will identify the businesses that have properly notified state and federal agencies of the generation of hazardous waste or have received a permit for the discharge of pollutants. Once a potential violator has been identified the Task Force may begin an investigation.

The Task Force hopes to have the merger of the databases completed by this fall. However, prosecutions will not immediately follow. As with the Norris Lake Project, the Task Force will announce an amnesty period in which persons and companies may learn about their respective environmental obligations and come into compliance. The Task Force hopes to make public announcements regarding an amnesty period this fall. ■

## Endnotes:

1 The Task Force consists of fourteen federal agencies who donate resources to environmental investigations. From this group, six federal agents representing FBI, EPA-CID, TVA-OIG, TVA Police and DOE-OIG work full time on environmental investigations.

2 In the past year and a half, the Task Force has concluded six environmental cases in the Chattanooga area alone. These cases primarily involved Resource Conservation and Recovery Act ("RCRA") violations, but also included Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") and Clean Water Act



## Letter from the Chair

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about 5 percent of the value of a statistical life. How much is this worth? I know this is a morbid subject, but under the arsenic standard this approach would result in about \$300,000 in benefits for the value of a year of life. The benefits of the new arsenic standard are much less than the costs under this approach.

The argument about cost/benefit analysis is really near to the arguments against Breyer, because more of this process by technically-trained bureaucrats would be part of the cure for the problems that Breyer identified in the current process of risk regulation. Heinzerling decries the use of cost-benefit analysis at all.<sup>6</sup> She simply does not want to place a monetary value on human life, but I still see a role for cost-benefit analysis in comparing the efficiency of different regulations. Why would we not want to save more lives than are now being saved for the same level of spending? Aside from the monetization of the value of a life, a part of cost/benefit analysis is determining the value per life saved. As noted in my previous columns, there is wild "inconsistency" and "random agenda selection" to use Breyer's terms in the current regulatory system.

Heinzerling opposed the presidential appointment in 2001 of John Graham to head the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB). In his remarks to the National Academy of Engineering, could you guess

what book Graham (who was confirmed by the Senate) cited as an example of how to better manage regulatory policy?<sup>7</sup> I think this is a point on which to close. It shows that ten years after publication Breyer's book is still influential and is worthy of consideration. Thanks, again, for a good year as section chair. ■

### Endnotes:

1 Actually I am now immediate past chair. But four columns and a nice plaque were part of the deal.

2 I know that some of you will be familiar with the policy journal of the Environmental Law Institute (ELI). An article appeared about her in the November/December 2001 issue of this journal on pages 36-39. I highly recommend membership in the Environmental Law Institute, and the subscription to the journal published bi-monthly is a benefit.

3 The only things certain are death and taxes. There is a question as to how and when each of will die, not whether we will die.

4 "Arsenic and Politics: A Mystery Solved", Environmental Forum, March-April 2002, page 18.

5 In other places, it has been referred to as a QALY (Quality Adjusted Life Year. See note 6 below).

6 "Discount Stopper", Environmental Forum, November-December 2001, pages 36-39.

7 Correct! - Breaking the Vicious Circle by Stephen Breyer - you win the prize! Jim Wright is in charge of prizes now.

## News from the 2003 solid/hazardous waste conference

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("CWA") violations. Each case involved the conviction of at least one company official. Five of these company officials received sentences ranging from five to twelve months in jail. The cases totaled over \$45,000.00 in fines and approximately \$1.25 million in restitution to the State of Tennessee.

3 These interactions include but are not limited to technical support, Notices of Violation, Notices of Non-compliance, Show-Cause meetings and administrative orders.

4 Utilizing the numbers from Norris Lake and applying it to other TVA lakes, the estimate of untreated human waste reaching TVA lakes in East Tennessee is over 7 million gallons.

5 Human waste contains many bacteria including salmonella, shigella, and Escherichia coli (E.coli). Health risks associated with exposures to these bacteria include inflammation of the bowels (hemorrhagic colitis), hemolytic-uremic syndrome (kidney failure, seizures, coma), thrombotic thrombocytopenic purpura (impaired kidney function and fever); hepatitis C (inflamed liver), typhoid fever, and gastroenteritis (inflammation of the stomach and intestines).

6 The Task Force is currently focusing on northeast Tennessee Lakes with regard to compliance with marine sanitation devices regulations.

7 The Center for Strategic Enforcement is an EPA group in Lakewood, Colorado. Several years ago, the Center was in the process of putting together a number of databases regarding business information.

8 Dunn & Bradstreet information provides the size, sales and chief executive office location of the particular businesses.

9 Although the merger is not complete, test runs have been made. During such test runs, the database identified a potential violator already under investigation by the Task Force. That investigation is now completed and has resulted in a guilty plea.

10 Potential harm could include: locating of the business on a 303(d) listed stream (an already impaired stream), location of business on a high quality water, endangered or threatened species are located near the business, or the business is located upstream of an intake for a public water system. ■

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# 303(d) list must be promulgated as a rule

by Bill Penny

**O**n July 11, 2003, Davidson County Chancellor Ellen Lyle granted the City of Cookeville's Motion for Summary Judgment which sought to invalidate the 1998 water quality 303(d) list and to declare that organic enrichment was an un-promulgated water quality standard.<sup>1</sup> The City of Cookeville was represented by Bill Penny of the Nashville office of Wyatt, Tarrant & Combs LLP. The ruling may have potential widespread ramifications, since Tennessee's 303(d) list has become such a widely used and referenced requirement.

At issue in the case was a nitrogen limit imposed by the Division of Water Quality Control of the Tennessee Department of Environment and Conservation for the City of Cookeville. The City of Cookeville claimed that to meet the effluent limit, the City would have to expend as much as four million dollars. The City contended that nitrogen was not a problem and has a permit appeal pending; however, the City was further concerned that the nitrogen limit was imposed without legal authority.

*At issue in the case was a nitrogen limit imposed by the Division of Water Quality Control of the Tennessee Department of Environment and Conservation ... The ramifications of this ruling could be extensive.*

The ramifications of this ruling could be extensive. Obviously other NPDES permittees, particularly those for whom the Division has imposed effluent limits for nitrogen because of organic enrichment or because of the receiving stream's appearance on the list, may now have an argument that the Division cannot legally impose the limits. However, there are other ramifications. First, the multi-sector industrial general permit is not available to dischargers on 303(d) listed streams. Second, the construction general storm water permit requires a quarterly monitoring report as well as more frequent inspection. In fact, the Division of Water Pollution Control has issued substantial penalties against companies who did not submit quarterly

reports. Third, the Division has established waste load allocations through establishment of Total Maximum Daily Load (TMDL) determinations for a number of watersheds. The genesis of these determinations was the 1998 303(d) list.<sup>2</sup>

In a related issue, the Water Quality Control Board, in response to the Chancellor Lyle's decision, voted on July 23, 2003 to enact emergency rules to establish nutrient criteria for water quality standards. The same nutrient criteria were also being proposed by the staff of the Division as part of the triennial review, but the Board has not yet adopted them. As justification, the Board adopted a statement which stated that the order prevented the Department from establishing permit limits such as nitrogen in NPDES permits, and as a result an emergency was created because they could not adequately protect the waters. The City of Cookeville objected to the statement of emergency arguing that the stated justification did not comply with the statutory criteria; however, the Board, nevertheless voted to approve the emergency rules. ■

## Endnotes

1 Chancellor Lyle ruled from the bench in open court based upon the statement of undisputed facts and the briefs of the parties. There was no memorandum opinion. For additional information contact Bill Penny at [wpenny@wyattfirm.com](mailto:wpenny@wyattfirm.com) or call at 615-251-6757

2 While Chancellor Lyle's decision did not address either storm water or TMDLs, the City of Cookeville made reference to these issues in the briefs as additional examples of the use of the list.

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# Meet Alan M. Leiserson

Interview conducted by Jason D. Holleman

**JDH:** How long have you been with the department?

**AL:** Since August of 1983.

**JDH:** And you have been in the Office of the General Counsel the whole time, right?

**AL:** Yes, actually I was hired about a year or two after they consolidated all of the attorneys into one office. Before that they had been working for various divisions rather than reporting to the Commissioner.

**JDH:** Walk us through how your role has evolved through the years and what your role is going to be with the new administration.

**AL:** I began as an Assistant General Counsel, became the supervisor of the environmental attorneys and

eventually became acting General Counsel. After being acting General Counsel for a little while, I became TDEC General Counsel late in the McWherter administration. Then, Greer Tidwell came in [as General Counsel] under Sundquist. More and more, my duties continued to focus on legislative work. So, that background fits in now with what Commissioner Child has asked me to take on as an expansion of my legislative job, and additionally, take on more of a policy role.

**JDH:** Let's talk about what your new duties; can you elaborate?

**AL:** Well, it's really still a work in progress, but one aspect of it is to coordinate federal agencies' environmental assessments. I have the responsibility for coordinating the various divisions as they respond to the federal inquiries. In the prior administration, the policy office had the press people in it, but Commissioner Child has created a communication unit for most external communications.

**JDH:** Well, give us another example of a project that you are working on in the policy arena.

**AL:** Right now we are working on some of the issues relating to air and trying to be supportive of what is going on with the air pollution division and Barry Stevens in regard to early action compacts. There are a lot of education efforts, which are ongoing. There was the Knoxville air summit

that focused on assisting the counties with actions that can be taken to implement the early action compact program. More recently there were a series of events in Memphis, Nashville, and Knoxville, sponsored by the Tennessee Chamber of Commerce and Industry for local officials, business leaders, and others. Air Pollution and Policy Office staff gave presentations on ozone non-attainment, early action compacts, and what actions businesses can take to reduce emissions of oxides of Nitrogen.

**JDH:** What can you tell us about the Commissioner's plan for the deputy for environment position? How is that coming along?

**AL:** The Commissioner has been interviewing for that position, and we are hoping that someone will be hired soon.

**JDH:** Can you talk to me about what that person's role will be within TDEC?

**AL:** Well, I think that it will be similar in large respect into what John Leonard's role was in the Department. There may be some reorganization that happens, but I think it is going to be generally the same.

**JDH:** What can you tell us the Commissioner's primary goals and what you see developing within TDEC in the short term?

**AL:** To speak about this in the big picture, the Commissioner has been emphasizing three points. They are balance, accountability, and cultural change. Balance is, to a large extent, the idea that we can accomplish both economic growth in the state and environmental protection. Accountability means people are entitled to have answers and have reasonable turn around times. We cannot promise that we will always agree with folks, but we can promise that we can explain things. And the cultural change piece has a few different components to it that you can see being put forth concretely in the early action compacts.

**JDH:** Tell us more about the "cultural changes" that you see evolving within TDEC?

**AL:** Sure, I can in terms of working with local governments and other governmental agencies. Cultural change is the emphasis that the Commissioners and the Governor have placed on the departments within state government working together. For example, we are involved in cooperative efforts with both TDOT and ECD on this issue. The clean cities program is one initiative that we're focusing on in Middle

*Alan M. Leiserson, Tennessee Department of Environment and Conservation was interviewed in Nashville, Tennessee by Jason D. Holleman, Associate, Farmer & Luna PLLC in Nashville. The focus was his evolving role at the department under the new administration. The interview was edited due to length restrictions.*

Tennessee, and we're working towards promoting alternative fuel opportunities to Tennessee. Currently, this group is working on providing ethanol fuel (E85) at a gas station near the Titan's stadium by Spring Street and Main Street, starting this summer.

**JDH:** Clean Cities is a nonprofit organization, correct?

**AL:** Yes. There are several programs sponsored by the group, but we are obviously interested in the air quality program. General services has responsibilities for Tennessee's fleet of cars and some of the more modern and recent models will be the ones that are the flexible fuel vehicles that can take alternative fuels.

**JDH:** Where does TDOT fit in with this?

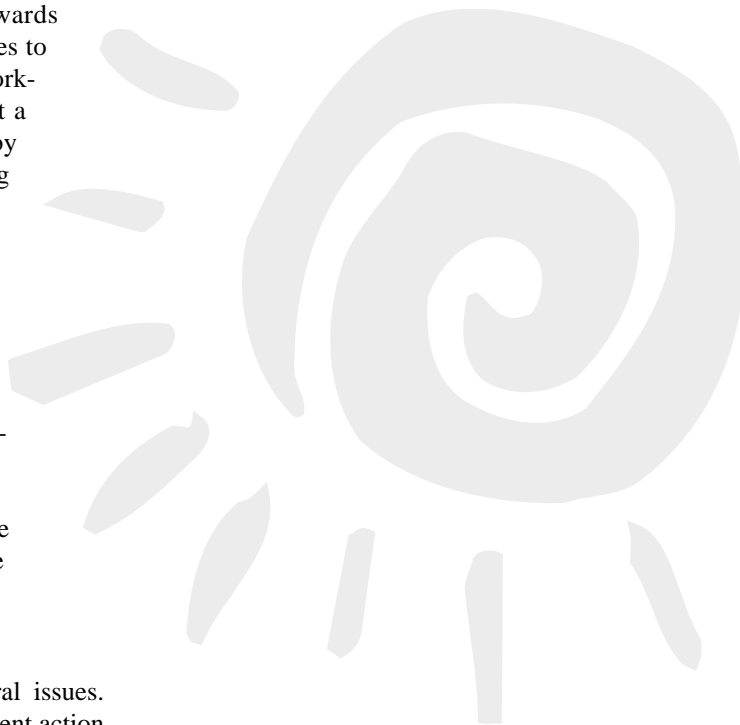
**AL:** We are working with them on several issues. Well, let me think, one is the enforcement action concerning state routes 840 and 26. On that case we have been negotiating a Consent Decree not only with TDOT, but also with the affected industry, certain environmental groups and property owners. Furthermore, Commissioner Nicely and commissioner Child have been to each other's staff meetings and have communication with one another a lot.

**JDH:** What about the interplay between the environment piece and the conservation piece of the department. Do you see any changes with the administration or with the structural make up TDEC in the near future?

**AL:** I guess I don't really see a lot of change in the foreseeable future, but I was very excited about Jim Fyke being hired and the possibilities that he brings to the conservation side.

**JDH:** Tell me more about what you think Jim Fyke will contribute.

**AL:** Well, his hiring has been very well received and has been good for morale internally as well as externally. For example, there were a number of bills introduced in the General Assembly this year similar to ones that have been introduced in the passed couple of years. One that would take parks and create an independent commission for parks on the TWRA model. However, the legislative were quick to agree when we requested that they give Jim an opportunity to get on board before any structural changes were made.



**JDH:** Anything else you would like to mention?

**AL:** We are looking forward to implementing the Governor's Executive Order creating the inter-agency working group on air quality. Commissioner Child will be chairing the effort, which is comprised of the departments of Economic and Community Development, Environment and Conservation, F&A, General Services, Transportation, Health, and Tourist Development. The purpose is both to support the efforts of local governments to improve air quality and to provide leadership for the state's own efforts in regard to ozone.■

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# Early action compacts

by Steve Stout

**T**o meet EPA's new eight hour ozone standard, <sup>1</sup> achieve clean air faster, and avoid the traditional stigma of non-attainment, the state of Tennessee is pursuing an alternative to the traditional planning and regulatory development process to comply with the federal Clean Air Act (CAA) called Early Action Compacts (EACs).

In a letter to Region IV EPA administrator Jimmy Palmer dated July 14, 2003, TDEC Commissioner Betsy Child recommended that 18 counties be designated as non-attainment for the 8-hour ozone standard.<sup>2</sup> Participation in the EAC process is even broader, including 29 counties. According to a July 14 TDEC press release:

The state has submitted the following counties as having the potential to be designated as "non-attainment:" Anderson, Blount, Davidson, Hamilton, Haywood, Knox, Jefferson, Loudon, Meigs, Putnam, Rutherford, Sevier, Shelby, Sullivan, Sumner, Washington, Williamson and Wilson.

Tennessee counties expected to exceed or be in "non-attainment" with the federal ozone standard, as well as those counties that are contributing to ozone levels in other counties, have joined the state and the U.S. Environmental Protection Agency (EPA) in agreements called "Early Action Compacts" (EACs).

Ordinarily, pursuant to § 110 of the CAA, a state would have three years following the designation of areas as non-attainment to develop a State Implementation Plan to achieve necessary reductions in levels of air pollution to meet the standard, and then three more years to actually attain the standard. Tennessee has chosen to pursue a process involving Early Action Compacts to meet the new ozone standard sooner.

The Early Action Compact (EAC) is a voluntary agreement among the state and local governments in Tennessee and EPA that commits the state and local governments to follow EPA's "Protocol for Early Action Compacts Designed to Achieve and Maintain the 8-Hour Ozone Standard." Attainment will be reached by December 31, 2007, almost three years sooner than the traditional non-attainment SIP process. In return for the early action, EPA will defer the effective date of non-attainment designation in those areas covered by Early Action Compacts. This deferral would have the effect of holding in abeyance some serious consequences associated with non-attainment designation, including transportation conformity and new source review offset requirements.

To ensure that state government is doing its part to improve air quality, Governor Phil Bredesen signed an executive order on July 22, 2003 creating an Interagency Working Group on Air Quality to support state and local efforts to comply with new federal reg-

ulations and improve air quality across Tennessee.

"Meeting tough, new federal air quality standards will require the participation of all Tennesseans. State government intends to lead by example," Bredesen said. "This working group will identify actions state agencies can take to reduce their own impacts on air quality, while supporting Tennessee communities and businesses in their ongoing efforts to comply with federal air quality standards."

The working group is chaired by TDEC Commissioner Betsy L. Child and includes the departments of Economic and Community Development, Environment and Conservation, Finance and Administration, General Services, Health, Transportation, and Tourist Development.

"We appreciate Governor Bredesen's leadership in bringing the diverse and unique resources of state government to the fight for clean air," Child said. "The governor has authorized the working group to make recommendations on state action to help Tennessee meet federal standards, coordinate interagency resources, collect and analyze information and data, and identify and implement needed training."

Bredesen has also charged the working group with exploring specific air quality efforts including transportation control measures, mass transit, congestion mitigation projects, idling minimization, use of alternative, cleaner fuels, and local air quality education programs.

## Early Action Compact Facts

Contributed by Melanie Cantania

- There are seven EACs in Tennessee comprising the following counties:
  - Shelby, Tipton, Fayette
  - Haywood
  - Robertson, Sumner, Cheatham, Dickson, Davidson, Williamson, Wilson, Rutherford
  - Putnam
  - Marion, Hamilton, Meigs
  - Anderson, Loudon, Union, Knox, Blount, Jefferson
  - Sevier, Hawkins, Sullivan, Washington, Unicoi, Carter and Johnson.
- Participating EAC partners agree to implement a range of control measures needed to meet the federal 8-hour ozone standard by December 31, 2007. The traditional non-attainment process requires compliance between 2007 and 2014, depending upon a variety of factors.
- EPA will designate non-attainment areas (including EAC counties) by April 15, 2004. It will defer the effective date for those counties taking voluntary action under EACs as long as the EAC meets EPA milestones. EPA will apply non-attainment restrictions to those counties it had identified as non-

attainment if the EAC fails to meet milestones.

- EAC counties submitted their list of likely control measures to reduce ozone-causing emissions on June 13, 2003. Control measures must be in place before the 2005 ozone season.

Examples of these state and local control measure options are: creation of Ozone Action Day programs, carpool and vanpool programs at major employers, use of alternative fuels, banning open burning, vehicle inspection and maintenance programs, early implementation of low-sulfur fuels, public education on individual actions to reduce the formation of ozone, additional environmental controls on industry, lowering highway speed limits, installing commuter highway lanes, etc.

- The EAC process has involved extensive public outreach and involvement of local officials and businesses. Approximately 60 public meetings have been held in EAC counties in the past year.
- Complex, mathematical air quality modeling must be completed for each EAC. This modeling must demonstrate that given local measures, state action and regional conditions, the EAC will attain the 8-hour ozone standard by 2005-2007. Air quality measurements must confirm the modeling results. The modeling will allow each EAC to assess the effectiveness of control measures, and determine whether selected measures are sufficient to reach compliance.<sup>3</sup>

**For more information, see:**

- <http://www.state.tn.us/environment/apc/eac/>
- <http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/proprule.html>
- <http://www.epa.gov/ttn/naaqs/ozone/eac/>

**Endnotes:**

1 On July 18, 1997, the U.S. Environmental Protection Agency (EPA) revised the national standard for ground-level ozone from a 0.12 ppm (parts per million) 1-hour standard to a 0.08 ppm 8-hour standard. Currently, all areas of Tennessee attain (meet) all national ambient air quality standards (NAAQS), including the 1-hour ozone standard. However, under the newer 8-hour ozone standard a number of counties in the State could be designated as non-attainment for ground-level ozone. This standard was challenged in court. See a previous issue of this newsletter in June 2002 for an article, "Court Affirms Stricter Ozone and Particulate Matter Standards", by Jennifer Brundige discussing the United States Supreme Court's decision in the American Trucking Association case, 121 S. Ct. 903 (US2001) as well as the decision by the District of Columbia Court of Appeals on remand, , 286 F. 3d 355 (DC Cir. 2002). Past newsletters are available on the Section website at [www.tba.org/sections](http://www.tba.org/sections).



2 EPA was sued in November 2002 by several environmental groups including national groups Natural Resources Defense Council (NRDC) and Sierra Club and the American Lung Association. This lawsuit was based on the failure of EPA to make designations of non-attainment areas under the eight-hour ozone standard. EPA agreed to a settlement with the parties in which it agreed to make the non-attainment designations by April 15, 2004. One of the parties was the Southern Alliance for Clean Energy based in Knoxville. EPA published a notice of this proposed consent decree in the Federal Register November 20, 2002 ( 67 FR 70070-71). The parties to the consent decree agreed to meet and discuss "ways in which areas that approach or monitor minimal exceedances of the 8-hour standard could be encouraged to develop and implement early action plans offering a more expeditious time line for achieving emission reductions; \*\*\*\*\* " This is an obvious reference to the EAC protocol put forth by EPA.

3 This modeling effort has been under development for some time. It is funded jointly by Tennessee air pollution agencies both state and local as well as the states of Arkansas and Mississippi. The study itself is known by the acronym ATMOS ( Arkansas Tennessee Mississippi Ozone Study). More information is available at the above-referenced TDEC website. Both the TDEC Division of Air Pollution Control and the Tennessee Air Pollution Control Board as well as many other stakeholders with local governments and other organizations including environmental citizen groups are involved in the development of EACs. ■  
*Steve Stout is Assistant General Counsel for the Tennessee Department of Environment and Conservation and is Chair of TBA's Environmental Law Section.*

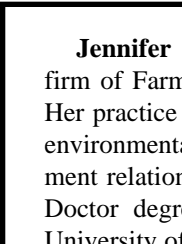
*Also Contributing - Melanie Cantania, Acting Director of Communications for the State of Tennessee Department of Environment and Conservation.*



**Leslie Shechter** has joined the firm of Farmer & Luna PLLC with more than 20 years of experience in both public and private practice. From 1994 to 2000, she served with the Metropolitan Nashville Department of Law as Associate Metropolitan Attorney, with the Metropolitan Council, Metro Department of Finance, Department of Water and Sewer, and Metro Planning Commission as her primary client agencies. In addition, she advised the Office of the Mayor and various departments, boards, and commissions of Metro Government and was responsible for supervising the Metro Law Department's approximately 25-attorney staff. From mid-2000 until early-2003, she headed up the Land Use and Zoning and the State and

Local Government subgroups as a member of the Nashville law firm of Waller Lansden Dortch & Davis, PLLC. Her private practice since 2000 has included a focus on land use, zoning, urban and municipal law, and governmental relations.

Ms. Shechter received a Bachelor of Arts degree from Johns Hopkins University in 1976. She received her Juris Doctor degree in 1979 from the Washington University School of Law in St. Louis, Missouri and a Masters of Law in Urban Law from the Washington University School of Law in 1980. Ms. Shechter served as President of the Tennessee Municipal Attorneys Association from 1998 to 1999. She has been a board member of the Court Appointed Special Advocates (CASA) of Nashville since 1999 and is currently President of the Nashville CASA Board.



**Jennifer Brundige** also recently joined the firm of Farmer & Luna, PLLC, as an associate. Her practice includes the areas of regulatory and environmental law, civil litigation, and government relations. Ms. Brundige received her Juris Doctor degree, with highest honors, from the University of Tennessee College of Law in 2000. While at the University of Tennessee, she was Research Editor for The Tennessee Law Review, a member of Phi Kappa Phi honor society and Phi Delta Phi legal fraternity, and graduated Order of the Coif. Prior to beginning her legal practice, Ms. Brundige served as a law clerk to the Honorable James D. Todd, Chief Judge of the

United States District Court for the Western District of Tennessee. From mid-2001 until early 2003, she was an associate with Waller Lansden Dortch & Davis, PLLC, in the Environmental Working Group. Ms. Brundige serves as the Vice Chair of the 2003 Environmental Law Committee of the Nashville Bar Association. She is a member of the Environmental Law Section of the Tennessee Bar Association and is a member of the Section of Environment, Energy and Resources of the American Bar Association.



## Karen Stachowski named deputy commissioner for environment



**T**ennessee Department of Environment and Conservation Commissioner Betsy L. Child has appointed Nashville environmental attorney Karen H. Stachowski deputy commissioner for environment. Stachowski will assume her new post August 4, 2003.

"Karen has the experience, education and energy to lead our environmental programs," Child said. "I am confident she will provide the coordination and leadership we need as we work to protect and improve the quality of Tennessee's air, land and water."

Stachowski comes to TDEC after a short tenure with the Nashville law firm of Waller Lansden Dortch & Davis. While at Waller Lansden, Stachowski provided legal guidance on environmental matters including enforcement, litigation, permitting, and legislative and

rulemaking activities. Her areas of expertise include water pollution control, safe drinking water, hazardous waste, well drilling and Superfund.

"I am honored that Commissioner Child has chosen me as deputy commissioner," Stachowski said. "I look forward to the challenges of this position, and to the opportunity to work with TDEC staff, the public, the regulated community and our partner agencies to protect Tennessee's citizens and environment."

Prior to joining Waller Lansden, Stachowski served in the Tennessee Attorney General's Office and the TDEC Office of General Counsel. While with the state, she was responsible for environmental criminal enforcement requests, legislation and regulation in areas such as underground storage tanks, ground water protection, safe drinking water, solid waste and water pollution control.

*continued on page 11*

Stachowski holds a juris doctorate degree from the University of Memphis. While a student at the University of Memphis, she served as vice president of the Association for Women Attorneys and vice president of the Environmental Law Council. She received the Dean's Award for Academic Excellence in Environmental Law, the Dean's Distinguished Service Award, and was named outstanding law graduate by the National Association of Women Lawyers. She also completed coursework towards a doctorate in toxicology at the University of Arkansas for Medical Sciences.

Stachowski received her bachelor of science in biology cum laude from the Mississippi University for Women in 1992. While at MUW, she was named outstanding senior biology student, was named to national honorary chemistry society Gamma Sigma Epsilon, and to national biological honor society Beta Beta Beta. ■

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**TVA free to ignore EPA order** *(continued from page 1)*

where the regulated party is forced to show cause why it should not be subject to penalties or imprisonment for violating the order.<sup>18</sup>

While the decision is a significant victory for TVA, the decision may have widespread implications for all of EPA's enforcement programs because the ACO is a widely used enforcement mechanism under the CAA and other environmental statutes. This decision strikes a significant blow to that enforcement tool. EPA has indicated that it is considering whether to sue TVA in federal district court and whether to seek further review of the Court's decision. A copy of the opinion may be accessed from the website for the Eleventh Circuit at <http://www.ca11.uscourts.gov/opinions/ops/200015936.pdf>. ■

**Endnotes:**

No. 00-15936, 00-16234, 00-16235, 00-16236, 2003 U.S. App. LEXIS 12830 (11th Cir. June 24, 2003). At the time of this publication, EPA had not filed a petition for a rehearing en banc or petition for certiorari.

- 2 Id. at \*2.
- 3 Id. at \*3.
- 4 Id.
- 5 Id. at \*18.
- 6 Id. at \*52.
- 7 Id. at \*20.
- 8 Id.
- 9 Id. at \*25.
- 10 Id. at \*21.
- 11 Id. at \*22.
- 12 Id. at \*22-23.
- 13 Id. at \*23.

- 14 Id. at \*21-22.
- 15 Id. at \*62.
- 16 Id.
- 17 Id.
- 18 Id. at \*63.



**Robert J. Martineau, Jr.** is a member with Waller Lansden Dortch & Davis, PLLC, Nashville, Tennessee. His practice includes utilities, administrative law and environmental law with an emphasis on Clean Air Act matters and corporate environmental management systems. Mr. Martineau received his Juris Doctor

degree from the University of Cincinnati. He is a vice-chair of the Air Quality Committee of the Section of Environment, Energy and Natural Resources of the ABA and a vice-chair of the Environmental Committee of the ABA section on Administrative Law.



**Michael K. Stagg** is a member with Waller Lansden Dortch & Davis, PLLC, Nashville, Tennessee. His practice includes administrative law; natural resource law, and environmental law including air issues, water issues and toxic tort issues. Mr. Stagg received his Juris Doctor from the University of Tennessee and

his LLM in environmental law from George Washington University Law School. His bar activities include membership in the environmental and litigation sections of both the ABA and TBA and the environmental section of the NBA.



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# ENVIRONMENTAL LAW

The Newsletter for the TBA's Environmental Law Section

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