

## VIEWPOINT

# Pollution lawsuit overkill

■ TVA fights back against EPA actions, claiming the agency is changing the rules.

By Ben Lieberman

**N**EARLY every day, the U.S. Environmental Protection Agency announces a new lawsuit or administrative action against an alleged industrial polluter. Many people, especially those in the media, instinctively side with EPA, assuming the government is protecting the public interest while industry is only out for itself.

But what happens when the alleged polluter is also a federal agency, and feels so wronged that it turns around and sues EPA? Such intragovernmental fighting makes clear that something is awry with federal enforcement of environmental laws.

Beginning last November, EPA initiated a wave of lawsuits and administrative enforcement actions against 44 electric power plants in the South and Midwest. There were seven administrative orders against the Tennessee Valley Authority, a federally owned utility headquartered in Knoxville that provides power throughout a seven-state region. EPA claims these coal-burning facilities have been flouting the Clean Air Act for decades, creating a swath of ozone smog that stretches to the Northeast.

Last month, TVA became the first of these entities to fire back, filing a petition for review of EPA's actions with the 11th U.S. Circuit Court of Appeals in Atlanta. After months of failure to find a resolution acceptable to both agencies, TVA Chairman Craven Crowell said that "to protect the interests of our customers, we have resorted to the courts to ensure we are treated fairly as we continue to maintain our plants while supplying low-cost, reliable power."

Both TVA and the investor-owned utilities targeted by EPA's enforcement actions claim they are victims of an *ex post facto* rewrite of Clean Air Act rules. Under the law, utilities must go through a lengthy permitting process and meet numerous strict standards before they build a facility or substantially modify an existing one.

Routine maintenance, on the other hand, does not trigger such tough requirements. Through its new enforcement initiatives, EPA is essentially reinterpreting the law, arguing that dozens of facility changes plant managers thought were routine maintenance actually count as major modifications.

"All of TVA's activities meet the Clean Air Act's requirements as EPA has historically interpreted it," said Joe Bynum, executive vice president

of the TVA Fossil Power Group. "Now EPA is changing the rules."

If TVA loses, EPA "could require TVA to spend up to \$3 billion to comply," Bynum said. Ratepayers will eventually foot the bill, with TVA predicting an increase of as much as 14 percent for its customers.

If the investor-owned power plants lose, they will be subject to fines of as much as \$25,000 a day for violations that had gone on for years, in addition to the high costs of bringing facilities into compliance with EPA's newly defined requirements. An EPA victory also would mean that many routine power plant repairs would be held up with months of red tape, hampering operations.

TVA and the other utilities are concerned about the impact of EPA's actions on the reliability of the electricity supply, already a burgeoning problem throughout the country. EPA has singled out for extra scrutiny facility maintenance projects TVA believes will result in "decreases in forced outages and curtailments attributable to breakdown of the component being replaced." If EPA has its way, such projects would be delayed, if not prevented.

As with many other environmental "solutions," these measures are chasing a greatly overstated problem. Ambient ozone levels already have declined by more than 30 percent since

1970, EPA figures say. Reduced power plant emissions have contributed to this trend, which is likely to continue regardless of the outcome of the agency's latest crackdown.

"Smog has declined substantially over the past three decades and will continue to decline, even without these actions against coal-fired power plants," said Kay Jones, former senior adviser on air quality to the President's Council on Environmental Quality during the Ford and Carter administrations.

All the usual arguments made against EPA actions — the alleged violations did not really occur, the proposed remedies will burden consumers and accomplish little for the environment — tend to be dismissed as cheap excuses when they come from private corporations. But they are often true, especially recently as the Clinton EPA has embarked on a number of aggressive enforcement efforts of questionable merit.

As Jonathan Adler documents in a new study for the Reason Public Policy Institute titled "Environmental Performance at the Bench: The EPA's Record in Federal Court," EPA loses a substantial percentage of its legal challenges because of its failure to follow the law.

The message that federal environmental enforcement has gotten badly off track is slowly gaining believers. And in the case of EPA's latest attack on utilities, even the federal government has become one of them.

*Ben Lieberman is a policy analyst with the Competitive Enterprise Institute in Washington.*



Ben Lieberman