Ozone Implementation Issues

[JURISDICTION] requests that the EPA implement the ozone standards proposed on January 19, 2010, under title I, part D, subpart 1 of the Clean Air Act, rather than under subpart 2, for all areas with ozone design values of 0.09 parts per million or less. This action would stand on firm legal ground, would be consistent with EPA's previous positions on ozone implementation, and would provide for more expeditious and efficient attainment of the ozone standards than implementing the standards under subpart 2 for these areas.

In an op-ed published in the *Wall Street Journal* on January 18, 2011, President Obama announced a government-wide review of existing federal regulations, writing that, "we are seeking more affordable, less intrusive means to achieve the same ends—giving careful consideration to benefits and costs." Implementation of the proposed ozone standards under the more general requirements for nonattainment areas under subpart 1 would be exactly the kind of more affordable, less intrusive means to achieve the same ends that President Obama was referring to.

EPA initially decided to implement the 1997 eight-hour ozone standard exclusively under subpart 1 for all eight-hour ozone nonattainment areas. In 2001, the Supreme Court ruled in *Whitman v. American Trucking Associations* that EPA's implementation rule was an unreasonable interpretation of the Clean Air Act because it made Subpart 2 "abruptly obsolete" and would have "rendered Subpart 2's carefully designed restrictions on EPA discretion utterly nugatory." However, the court did not rule that the EPA could never implement an ozone standard exclusively under subpart 1 for any ozone nonattainment area. Instead, it acknowledged that there were several aspects of subpart 2 that could be poorly suited to implementation of a revised ozone standard, and specifically identified the following gaps: approximating the ozone thresholds for subpart 2 classifications from the Clean Air Act for a new standard, implementing the new standard for areas that were measuring lower ozone levels than what was considered unhealthy at the time of the 1990 Clean Air Amendments' passage, and the attainment dates for nonattainment areas. Based on these gaps, the Court found the following:

> *These gaps in Subpart 2's scheme prevent us from concluding that Congress clearly intended Subpart 2 to be the exclusive, permanent means of enforcing a revised ozone standard in nonattainment areas. The statute is in our view ambiguous concerning the manner in which Subpart 1 and Subpart 2 interact with regard to revised ozone standards, and we would defer to the EPA's reasonable resolution of that ambiguity.*

The Supreme Court found, however, that the EPA's interpretation that it could implement a new ozone standard under subpart 1 exclusively for areas that were exceeding the approximation of the old one-hour standard in effect at the time the 1990 Amendments passed was not reasonable. The ruling implicitly upheld EPA's interpretation that the Clean Air Act permitted implementation of an eight-hour ozone standard under subpart 1 only for nonattainment areas with ozone below the approximation of the old one-hour standard.

In response to the Court's ruling, the EPA proposed a revised implementation rule on June 2, 2003 (68 FR 32802). This proposal included two options for implementing the 1997 eight-hour ozone NAAQS: using subpart 2 for all nonattainment areas (Option 1); and using subpart 1 for all eight-hour ozone nonattainment areas except those that had one-hour ozone design values that would have made it an

ozone nonattainment area following the passage of the 1990 Clean Air Act Amendments, which would be subject to subpart 2 (Option 2).

EPA finalized the first phase of the implementation rule in April 30, 2004, settling on Option 2 (subpart 1 for most areas, subpart 2 for areas with one-hour ozone levels exceeding the levels identified by Congress as non-attaining in 1990) (69 FR 23951). The reasoning EPA provided for choosing this Option was that, **"where Congress has not explicitly mandated that areas are subject to subpart 2, we don't believe it makes sense to adopt an approach that would shift some or all of those 'gap' areas to subpart 2, which provides significantly less flexibility for bringing areas affected by transported pollution into attainment" (69 Federal Register 23958)**.

We agree with the EPA's reasoning that subpart 1 ought to be used to implement an ozone NAAQS unless Congress explicitly mandated otherwise, and are requesting that EPA apply this same reasoning to implementing the revised ozone standards proposed in January 2010. We agree with EPA's explanation for why subpart 1 is a more effective and less costly option for attaining the NAAQS. The following statement by EPA on the advantages of subpart 1 implementation helps illustrate this point:

> *An area might be able to achieve greater air quality improvement at less cost from local NO_X reductions than from local volatile organic compounds (VOC) reductions of 15 percent mandated for certain subpart 2 areas.* ***This will enable some areas to meet the 8-Hour NAAQS at less cost than under the other classification options****…Subpart 2 does not allow EPA and the States to consider transported pollution in determining the feasibility and benefits of mandated controls or in determining the appropriate attainment date for the area" (69* FR *23958).*

As an area that is heavily influenced by transported pollution (based on monitoring data from high ozone days, sources within our five-county metropolitan statistical area are responsible for only about 10-15 percent of the ozone we measure—see the 2010 conceptual model for the area prepared by the University of Texas) and where modeling shows NO_X emissions to have a greater effect on ozone than VOC emissions, we are particularly interested in ensuring that our area does not get subject to an implementation rule that would subject us to the rigid requirements of subpart 2 that would not allow EPA or the state to consider those factors. Other mandatory control requirements under subpart 2, such as mandatory inspection and maintenance programs, stage II vapor recovery programs, clean fuel fleet programs, reasonably available control technology requirements for sources covered by control technique guidelines, and specific tiered new source review offset requirements also may be unnecessary requirements for attaining the NAAQS for areas like Austin.

Under several of the subpart 2 classification scenarios identified by EPA in a stakeholder presentation distributed in April 2010, the Austin area would be classified as a marginal area based on our 2010 ozone design value. We are concerned about the prospect of this because we share the concerns EPA expressed in the April 30, 2004, implementation rule that "the practical effect of placing many areas that cannot attain by 2007 [the 3-year attainment deadline] into the marginal classification would be to delay development of plans for improving air quality to meet the 8-hour standard. This would be inconsistent with Congress's intent, reflected in the requirements of the Act, that areas attain air quality standards as expeditiously as practicable" (69 FR 23963). Another consequence of a marginal classification would be to delay the adoption of a motor vehicle emissions budget for several years, which would make transportation planning considerably more difficult. Under the Clean Air Act, the EPA is prohibited from requiring marginal areas to submit attainment demonstrations or contingency

measures. The option to "bump up" from marginal to moderate therefore give states a very difficult choice: bump up to moderate and subject an area to many additional requirements that may have little or no effect on reducing ozone or remain marginal and risk missing the attainment deadline with no plan and no contingency measures in place. We understand that one of EPA's chief concerns in crafting an implementation rule is to avoid setting up areas classified as marginal for failure like this, and we agree with the EPA's analysis in 2004 that subpart 1 provides a good way to avoid such a situation.

In response to the EPA's 2004 rule, several parties sued the EPA over this and other aspects of the rule. In the *South Coast Air Quality Management District v. EPA* decision in 2006, the DC Circuit Court of Appeals ruled stated that, "the 2004 Rule violates the [Clean Air] Act insofar as it subjects areas with eight-hour ozone in excess of 0.09 ppm to Subpart 1" (page 895). The 0.09 ppm level comes from previous EPA rulemaking language, stating that 0.09 ppm "generally represent[ed] the continuation of the [old] level of protection" (62 FR 38858). The Court did not say that the EPA was prohibited from relying exclusively on subpart 1 for any areas that were at or below 0.09 ppm, and in fact, explicitly stated that the Supreme Court's decision in *Whitman* "forecloses" that contention (page 893).

In January 2009, EPA responded to the *South Coast* decision by proposing to change all areas designated nonattainment under subpart 1 to nonattainment areas under subpart 2 (74 FR 2936), this proposal also contained additional language indicating that the EPA took this action for expediency's sake, not because it felt the Court's decision compelled it to. The EPA stated that "we considered the possibility of proposing to place areas with design values below 0.09 ppm 8-hour design value under subpart 1, but are not proposing this option in the interest of not further delaying implementation of the 8-hour NAAQS that was established 10 years ago." It also explicitly contended in a footnote that, "As the court made clear in its decision on rehearing, the CAA does not mandate coverage under subpart 2 of all areas designated nonattainment for an ozone NAAQS. As EPA moves forward to develop an implementation strategy for the new 2007 ozone NAAQS, we will consider whether subpart 1 alone might apply in some areas for purposes of implementing that NAAQS" (74 FR 2939).

The *South Coast* Court did rule that, "EPA's interpretation of the Act in a manner to maximize its own discretion is unreasonable because of the clear intent of Congress in enacting the 1990 Amendments was to the contrary" (page 895). We understand that EPA may be concerned that despite its contention to the contrary in the January 2009 proposed rulemaking, it may now be worried that the South Coast decision does not provide clear enough legal grounds to use subpart 2 to implement because of statements such as, "even assuming (without deciding) for purposes of this appeal that the 2004 Rule would be a reasonable approach to reducing air pollution, it is not a reasonable interpretation of Congress's approach in the 1990 Amendments," and "to the extent EPA's rationale rests on the claims that technology has advanced since 1990, Congress considered this possibility by providing for periodic review of each NAAQS…There are no comparable provisions that Subpart 2 requirements may be stripped away if EPA becomes convinced that it may achieve attainment more efficiently." Despite these statements, it is important for EPA to keep in mind the following points:

1. The South Coast Court's ruling that "EPA's interpretation of the Act in manner to maximize its own discretion is unreasonable" was specifically tied to its ruling that "the 2004 Rule violates the Act **insofar** as it subjects areas with eight-hour ozone in excess of 0.09 ppm to Subpart 1" (page 895).
2. The South Coast Court explicitly expressed its interpretation of the Whitman ruling as allowing EPA to implement an eight-hour ozone standard under subpart 1 (page 893).
3. In its ruling on a rehearing petition on June 8, 2007, the Court clarified that "this court concluded that EPA had **misconstrued the extent of the gaps to exercise its interpretive discretion more broadly than the Supreme Court had authorized**," which should make it clear that its ruling on

EPA's unreasonable interpretation of the Clean Air Act related its application of subpart 1 to areas with eight-hour ozone levels in excess of 0.09 ppm, not to its application of subpart 1 to legitimate "gap" areas.

4. The Court further clarified that "The court merely recognized that under Chevron agency action that does not constitute a reasonable interpretation of the statue must be vacated. Because Congress sought to reduce EPA discretion by enacting Subpart 2 as part of the 1990 amendments to the CAA, **EPA could not reasonably rely upon its preference for regulatory flexibility** in setting the boundary between Subpart 1 and Subpart 2. EPA's claim that the court nullified the discretion recognized by the Supreme Court " The court did not rule that the EPA did not have the discretion to set the boundary between subpart 1 and subpart 2, just that it had to be based on a reasonable interpretation of the statute.

5. A reasonable interpretation of the statute that would allow for subpart 1 implementation could rely on the stated purposes of title I:

   - to protect and enhance the quality of the Nation's air resources so as to as to promote the public health and welfare and the productive capacity of its population (§101(b)(1))
   - to encourage and assist the development and operation of regional air pollution prevention and control programs (§101(b)(4))

   Relying on the features of subpart 1 that would enable more expeditious attainment of an ozone NAAQS (such as eliminating the marginal classification and reducing attainment deadlines for areas that would otherwise be classified as severe or higher) and that would facilitate a regional approach to pollution prevention (such as the ability to classify areas and adjust attainment deadlines to take pollution transport into account) would avoid running afoul of the restrictions imposed by the *South Coast* court.

In summary, we agree with EPA's previously stated position that subpart 1 is a more effective and less costly way of ensuring expeditious attainment of an eight-hour ozone NAAQS than subpart 2. We also agree with EPA that it should not subject areas to subpart 2 unless Congress explicitly requires it (as that has been interpreted by the courts). Finally, we agree that the Clean Air Act does not mandate coverage under subpart 2 of all areas designated nonattainment for an ozone NAAQS. Therefore, we request that EPA use subpart 1 to implement the new standard for all areas with ozone design values of 0.09 ppm and less, in accordance with the restriction imposed by the *South Coast* decision.

Given the court cases and EPA's existing statements on this issue, many of which we have referenced here, for EPA to implement the proposed ozone standards under subpart 2 for areas with ozone design values of 0.09 ppm or less would be arbitrary and capricious. We understand why EPA might think that using subpart 2 might ensure that it doesn't run contrary to the *South Coast* decision. However, given the discretion that both that court and the Supreme Court have confirmed that EPA has in this situation, and EPA's stated concerns with subpart 2 implementation for areas that Congress has not explicitly required it to be used, it seems unlikely that deciding now to rely exclusively on subpart 2 implementation for all nonattainment areas regardless of whether it will be more effective or is required for these areas is an unreasonable interpretation of the Clean Air Act and the relevant Court cases. Since the Courts have clearly stated that there is ambiguity in the statute for areas with eight-hour ozone levels of 0.09 ppm and below, the EPA would face the burden of demonstrating why subpart 2 is a superior means of expeditiously attaining the NAAQS for areas where it has the discretion to use subpart 1. It is inconceivable that a decision by EPA to rely exclusively on subpart 2 would not prompt litigation on exactly this issue. The EPA has a far clearer legal and policy basis for using subpart 1 to implement the proposed ozone standards under subpart 1 than under subpart 2 for areas that the Courts have not ruled that EPA is use subpart 2.

Summary Benefits of Subpart 1 Implementation

There are numerous benefits for EPA's implementation of the new ozone standards under Subpart 1, rather than Subpart 2, including:

- **Subpart 1 would enable synchronized attainment deadlines for areas throughout a state that could be adjusted to account for availability of control measures and the regional nature of ozone pollution, rather than the system of classifications and attainment deadlines under Subpart 2 that doesn't allow for consideration of ozone transport**,
- Subpart 1 would eliminate 15-year, 17-year, and 20-year attainment deadlines for areas that would otherwise be classified as Severe or Extreme,
- While some areas that might otherwise be classified as marginal, moderate, or serious under subpart 2 and would have no more than 3, 6, and 9 years to attain the standard might now be eligible for up to 10 years to attain, all areas would still have to attain as expeditiously as practicable under subpart 1, which is also true for areas subject to subpart 2, and given what we know about ozone transport, those areas might not have been able to attain within those time frames anyhow without getting "bumped up." And **since areas that would be classified as severe and extreme under subpart 2 would need to attain in no more than 10 years, subpart 1 implementation would accelerate attainment for those areas and all of the areas they might be affecting.**
- Subpart 1's possibility of synchronized attainment deadlines will significantly reduce the amount of time and resources needed for technical preparation for attainment demonstrations, since states could model a single base year and single future year for all areas, rather than four or five different future years, and additional years of emissions estimates for RFP milestones,
- Subpart 1 allows many more areas get the full emission reduction benefits of the transport SIPs that are due three years after the new ozone standards are finalized and the full benefits of federal engine standards and fleet turnover that will occur over the years following finalization of the standards,
- Because of the possibility of ten-year attainment deadlines, **subpart 1 enables consideration of the co-benefits of longer-term measures such as transportation planning, land use planning, and energy efficiency, that will both reduce ozone and have many other social and environmental benefits, but which would not be able to implemented in only three or six years if an area was classified as marginal or moderate under subpart 2**,
- Subpart 1 contains less prescriptive requirements for control measures, which will enable states more flexibility in designing control strategies that are appropriate for their jurisdictions and enable them to optimize their planning and enforcement staff resources and financial resources to focus on the rules and strategies that will have the most impact on local ozone levels,
- Subpart 1 reasonable further progress requirements that are tied to the emission reductions needed for the attainment demonstration, rather than the very blunt requirements for a 15% reduction in local VOC emissions and 3% per year reduction in local NO_X or VOC afterwards under Subpart 2, neither of which may be necessary to attain the NAAQS,
- Subpart 1 reasonable further progress requirements do not need to make adjustments for pre-1990 controls as does subpart 2 (which, twenty years later, has become a substantively meaningless, but administratively burdensome requirement)

- **Subpart 1 would require attainment demonstrations and contingency measures for all nonattainment areas, unlike Subpart 2**, which would exempt areas classified as Marginal from these requirements and any local control measures other than new source review permitting,
- Subpart 1 would entail earlier adoption of a Motor Vehicle Emissions Budget for areas classified as Marginal than would be possible under Subpart 2, which will help Metropolitan Planning Organizations conduct thoughtful transportation planning,
- Offset requirements under Subpart 1 just require that new or modified sources offset their emissions by more than 1:1, without setting specific offset ratios of 1.1:1 up to 1.5:1 under Subpart 2-since local ozone may be mainly a problem of pollution transport, this avoids over-regulating local sources without any clear benefit for local ozone levels,
- Subpart 1 has higher mandatory major source threshold of 100 tons per year than the 50 tons per year, 25 tons per year, and 10 tons per year for areas that would be classified as serious, severe, or extreme under Subpart 2, which enables states the ability to focus most of its resources on those sources contributing the most to local ozone pollution,
- Subpart 1 does not include specific mandatory control measures like Stage II Vapor Recovery or Clean Fuel Fleet, which may have been appropriate for reducing peak ozone levels in urban areas in 1990 but have become obsolete because of technology and are ineffective at reducing regional ozone levels, or for expensive mandatory inspection and maintenance programs that would provide very few emission reductions in some areas,
- Subpart 1 does not contain specific requirements for RACT rules for every source covered by a Control Technique Guideline, which can require lots of staff resources at state agencies with little to no benefit on local ozone levels, and
- Since Subpart 1 does not contain all of the same onerous provisions for each county in a nonattainment area (RFP requirements, mandatory control measures that may have no local ozone benefit, specific new source review offsets), states might be encouraged to look more at the regional pollution problems and make designation recommendations that are more precautionary than they would under subpart 2, where most states seek to keep the nonattainment area as small as possible.