

D.C. Circuit Decision Limits Flexibility for the Eight-Hour Ozone Standard

January 11, 2007

The U.S. Court of Appeals for the District of Columbia Circuit gave the Environmental Protection Agency (EPA) a lump of coal on Christmas Eve with its long-awaited decision reviewing EPA's revision of the National Ambient Air Quality Standard (NAAQS) for ozone. *South Coast Air Quality Management District, et al. v. EPA*, No. 04-1200 (Dec. 24, 2006). Judge Rogers, writing for a unanimous court, upheld EPA's decision to replace the existing one-hour standard with the new eight-hour standard. But in doing so, the court reversed EPA's decision to allow states greater flexibility for some areas that currently do not meet the new eight-hour standard. The court also rejected EPA's withdrawal of a number of State Implementation Plan (SIP) requirements that the Clean Air Act (CAA or Act) imposes on all areas designated nonattainment for the one-hour ozone standard. The court's rejection was based on its conclusion that this withdrawal would violate the "anti-backsliding" provisions of the Act.

Overview

The CAA requires EPA to establish and from time to time revise National Ambient Air Quality Standards, which are to be met through a combination of state and federal control requirements. States implement these requirements through SIPs. Faced with continuing difficulty in meeting the NAAQS on the original CAA time frames, Congress has revised the CAA several times, mandating more rigorous requirements for areas having difficulty achieving the air quality standards and also adding more time to achieve those standards. For the one-hour ozone NAAQS in particular, Congress established a specific set of classifications, controls, and deadlines, which are set forth in Subpart 2 (42 U.S.C. §§ 7511-7511f). NAAQS for other air pollutants are subject to Subpart 1 (42 U.S.C. §§ 7501-7509a), which offers EPA relatively greater discretion in establishing requirements.

In 1997, EPA revised the ozone standard from a one-hour to an eight-hour metric. In the Agency's judgment, the new standard is more protective of human health both because it has a more stringent numeric limit and is measured over a longer exposure time.

Two parts of the D.C. Circuit decision are particularly problematic for EPA's effort to implement the new eight-hour standard. First, the court set clear limits on EPA's discretion in determining deadlines and control requirements for areas not meeting the new eight-hour standard. Second, with respect to the mandatory SIP control provisions that previously applied for the one-hour standard, the court adopted a very broad interpretation of the anti-backsliding provision under the Act¹. As discussed below, the court's interpretation prohibits the relaxation of SIP controls "[e]ven if EPA set[s] requirements that prove[] too stringent and unnecessary to protect public health."

The Decision

The D.C. Circuit court held that the purpose of the 1990 CAA amendments was to constrain EPA's discretion and to impose, legislatively, more rigorous requirements for areas with air quality that fails to meet the level of health projection provided under the one-hour ozone standard – even if EPA later revokes that standard. When it revised the ozone standard, EPA proposed that areas that do not meet the new eight-hour standard but that meet the old one-hour standard should be subject to the more flexible programs outlined in Subpart 1. The court disagreed. It held that EPA's approach violates the Act insofar as it applies Subpart 1 to eight-hour nonattainment areas that fail to meet the old one-hour

¹Section 172(e) of the CAA (requiring that EPA "provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation").

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standard *as measured on the eight-hour scale* – which is a more stringent metric. The court reasoned that the detailed statutory scheme Congress created for the one-hour ozone standard limits agency discretion in all cases in which the air quality in an eight-hour ozone nonattainment area is “at least as unhealthful as Congress contemplated” when enacting the 1990 amendments to the CAA. This means, according to the court, that EPA has authority to apply the less prescriptive Subpart 1 requirements only to those areas where “ozone levels are greater than the new [eight hour] standard (and thus nonattaining) but less than the approximation of the old [one-hour] standard.”

The court’s decision implies that many of the eight-hour nonattainment areas that EPA intended to regulate under the more flexible Subpart 1 requirements likely will have to comply with the more prescriptive and onerous provisions of Subpart 2. (Notably, EPA had proposed to apply the Subpart 1 requirements to 76 of the 122 areas designated nonattainment for the eight-hour ozone standard.) The court provided little guidance, however, as to the way EPA should differentiate between areas subject to the more flexible Subpart 1 requirements and areas subject to the prescriptive Subpart 2 requirements. It is likely that EPA will have to develop new methodology and specify air quality data that it will use in making its new classifications.

With respect to the anti-backsliding requirements, the court interpreted the statute to mean that once the air quality level of an area is safe, that area is not allowed to retreat from that level. Thus, EPA is forbidden from releasing states from the requirements that lead to improved air quality: “No mandatory controls could be removed and nothing could be done that would hinder an area’s ability to achieve prescribed annual incremental emissions reductions.”

Notably, EPA had interpreted certain measures as not being the type of “controls” that the CAA requires to be retained after revocation of a standard. These include the New Source Review (NSR) provisions for the one-hour standard, monetary penalties that CAA Section 185 imposes on major sources in areas classified “severe” or “extreme” under the pre-existing one-hour standard, rate of progress milestones, contingency plans, and motor vehicle conformity demonstrations. The court disagreed with EPA’s assessment of what is considered a “control” under the statute: “We conclude that each of these measures is a ‘control’ and that withdrawing any of them from a SIP would constitute impermissible backsliding.”

The Impact

Facilities located in areas that will be designated nonattainment under the new eight-hour standard face substantial uncertainty and higher regulatory burdens given this new opinion. It is unclear what data EPA will use to classify areas under the new standards, and the old classifications will no longer be controlling. Moreover, penalties for sources in “severe” and “extreme” nonattainment areas may be imposed (pursuant to Section 185) at levels exceeding \$5,000/ton for VOC or NOx emissions above the prescribed baseline levels. NSR permitting requirements also will be in a state of flux.

This decision also limits federal and state flexibility to adjust control programs. Although there may be modest adjustments to the control programs that reflect maintenance versus attainment of the NAAQS, the core ozone nonattainment controls prescribed in Subpart 2 of the Act must be retained despite an area’s attainment of the old one-hour standard. Industries and regulators who anticipated some relaxation of regulatory requirements in areas close to attaining the new eight-hour ozone standard face a more fixed regulatory landscape than they might previously have anticipated.

For Additional Information

If you would like additional information regarding the new EPA standards for ozone or other air quality matters, please contact Stephen Fotis, Bill Frick, Dick Penna, Britt Fleming, or any other member of the firm’s Environmental practice at (202) 298-1800.

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