

Guidance on Extension of Attainment Dates for Downwind Transport Areas

Preface

The purpose of this guidance is to set forth EPA's current views on the issues discussed herein. EPA intends soon to set out its interpretation in an advance notice of proposed rulemaking on which the Agency will take comment.

While EPA intends to proceed under the guidance that it is setting out today, the Agency will finalize this interpretation only when it applies in the appropriate context of individual rulemakings addressing specific attainment demonstrations. At that time and in that context, judicial review of EPA's interpretation would be available.

Introductory Summary

A number of areas in the country that have been classified as moderate or serious nonattainment areas for the 1-hour ozone standard are affected by pollution transported from upwind areas. For these downwind areas, transport from upwind areas has interfered with their ability to demonstrate attainment by the dates prescribed in the Clean Air Act (Act). As a result, many of these areas find themselves facing the prospect of being reclassified, or "bumped up," to a higher nonattainment classification in spite of the fact that pollution that is beyond their control contributes to the levels of ozone they experience. In the policy being issued today, EPA is addressing this problem by planning to extend the attainment date for an area that is affected by transport from either an upwind area with a later attainment date or an upwind area in another State that significantly contributes to downwind nonattainment, as long as the downwind area has adopted all necessary local measures, and has submitted an approvable attainment plan to EPA which includes those local measures. (By "affected by transport," EPA means an area whose air quality is affected by transport from an upwind area to a degree that affects the area's ability to attain.) EPA intends to initiate rulemaking for each area seeking such relief and contemplates providing such relief to those who qualify. If after consideration of public comments EPA acts to approve an area's attainment demonstration and extend its attainment date, the area will no longer be subject to reclassification or "bump-up" for failure to attain by its otherwise applicable attainment date.

Background

The Act may be interpreted to allow a later attainment date than generally applicable to a

particular ozone nonattainment area if transport of ozone or its precursors (nitrogen oxides (NO_x) and volatile organic compounds (VOCs)) prevents timely attainment. This principle has already been advanced in EPA's Overwhelming Transport Policy, which allowed a downwind area to assume the later attainment date if it could meet certain criteria, including a demonstration that it would have attained "but for" transport from an upwind nonattainment area with a later attainment date. See Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, entitled, "Ozone Attainment Dates for Areas Affected by Overwhelming Transport," September 1, 1994. In the four years since the issuance of that memorandum, the history of the efforts to analyze and control ozone transport has led EPA to believe that it should expand the policy's reach to ensure that downwind areas are not unjustly penalized as a result of transport.

In March 1995, EPA called for a collaborative, Federal-State process for assessing the regional ozone transport problem and developing solutions, and the Ozone Transport Assessment Group (OTAG) was subsequently formed. See Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, entitled "Ozone Attainment Demonstrations," March 2, 1995. The OTAG was an informal advisory committee with representatives from EPA, thirty-seven states in the Midwestern and eastern portions of the country, and industry and environmental groups. OTAG's major functions included developing computerized modeling analyses of the impact of various control measures on air quality levels throughout the region and making recommendations as to the appropriate ozone control strategy. Based on OTAG's modeling analyses, it developed recommendations concerning control strategies. These recommendations, issued in mid-1997, called upon EPA to calculate the specific reductions needed from upwind areas.

In November 1997, using OTAG's technical work, EPA issued a proposed NO_x State implementation plan (SIP) call, directing certain States to revise their SIPs in order to satisfy section 110(a)(2)(D) by reducing emissions of NO_x to specified levels, which in turn will reduce the amounts of ozone being transported into nonattainment areas from upwind areas. 62 FR 60318 (November 7, 1997). In July 1997, the EPA promulgated a revised 8-hour ozone NAAQS. 62 FR 38856 (July 18, 1997). That promulgation included regulations providing that the 1-hour NAAQS would be phased out, and would no longer apply to an area once EPA determined that the area had air quality meeting the 1-hour standard. 40 CFR section 50.9(b). Until the 1-hour standard is revoked for a particular area, the area must continue to implement the requirements aimed at attaining that standard.

The Current Problem

The Act called on areas classified as moderate ozone nonattainment areas to submit SIPs that demonstrate attainment by 1996 (unless they receive an extension), and called on serious nonattainment areas to demonstrate attainment by November 1999 (unless they receive an extension). Section 181 and 182(b) and (c). For many of these areas, EPA has preliminarily determined in the proposed SIP call that transport from upwind areas is contributing to their nonattainment problems. Such transport also appears to be interfering with their ability to

demonstrate attainment by the statutory attainment dates.

The graduated control scheme in sections 181 and 182 of the Act expressed Congress's intent that areas be assigned varying attainment dates, depending upon the severity of the air quality problem they confront. Sections 181 and 182 provide for attainment "as expeditiously as practicable," but establish later deadlines for attainment in more polluted areas, and additional control measures that the more polluted areas must accomplish over the longer time frame. Thus, many of the upwind areas have later attainment dates than the downwind areas which are affected by emissions from the upwind States. On the other hand, section 110(a)(2)(D)(i)(I) of the Act requires SIPs to prohibit "consistent with the other provisions of [title I]," emissions which will "contribute significantly to nonattainment in...any other State." The EPA interprets section 110(a)(2)(A) to incorporate the same requirement in the case of intrastate transport. Sections 176A and 184 provide for regional ozone transport commissions that may recommend that EPA mandate additional regional control measures to allow areas to reach timely attainment in accordance with section 110(a)(2)(D)(i)(I).

These provisions demonstrate Congressional intent that upwind areas be responsible for preventing interference with timely downwind attainment. They must be reconciled with express Congressional intent that more polluted areas be allotted additional time to attain. As EPA pointed out in its overwhelming transport policy, Congress does not explicitly address how these provisions are to be read together to resolve the circumstance where more polluted upwind areas interfere with timely attainment downwind, during the time provided for those upwind areas to reduce their own emissions.

In the 1994 overwhelming transport policy, EPA stated that it would harmonize these provisions to avoid arguably absurd or odd results and to give effect to as much of Congress' manifest intent as possible. The EPA struck a balance in the overwhelming transport policy by requiring that the upwind and downwind areas reduce their contribution to the nonattainment problem while avoiding penalizing the downwind areas for failure to do the impossible.

In the 1994 policy, EPA reasoned that Congress did not intend the section 110(a)(2)(D)(i)(I) obligation to supersede the practicable attainment deadlines and graduated control scheme in sections 181 and 182, especially since section 110(a)(2)(D)(i)(I) specifically applies only "to the extent consistent with the provisions of [title I]." The same rationale applies in the intrastate context under section 110(a)(2)(A).

Developments since the issuance of the overwhelming transport policy in 1994 have prompted EPA once again to interpret these provisions so that they can be reconciled in light of existing circumstances. Since the issuance of that policy, EPA and the States, through OTAG, have made significant progress in addressing interstate transport in the eastern United States, and have worked to analyze the flow of transport and to allocate among the States their respective responsibilities for control. During the period required for this effort, which took longer than was anticipated, the resolution of the regional transport issue was held in abeyance. The effort to

address regional transport recently resulted in EPA's proposed NO_x SIP call, expected to be finalized in the next few months. For areas in the OTAG region affected by transport, the conclusion of the OTAG and SIP call processes in September 1998 will result in assignments of responsibility that will assist in the design of SIPs and the formation and implementation of attainment demonstrations.

Because EPA had not previously determined how much to require upwind States in the OTAG region to reduce transport, downwind areas were handicapped in their ability to determine the amounts of emissions reductions needed to bring about attainment. While operating in this environment of uncertainty, many of these downwind areas confronted near-term attainment dates. Moreover, as described in the NO_x SIP call proposal, the reductions from the proposed NO_x SIP call will not likely be achieved until at least 2002, well after the attainment dates for many of the downwind nonattainment areas that depend on those reductions to help reach attainment.

The Solution

The EPA believes that a fair reading of the Act would allow it to take these circumstances into account to harmonize the attainment demonstration and attainment date requirements for downwind areas affected by transport both with the graduated attainment date scheme and the schedule for achieving reductions in emissions from upwind areas. Thus, EPA will consider extending the attainment date for an area that:

- (1) has been identified as a downwind area affected by transport from either an upwind area in the same State with a later attainment date or an upwind area in another State that significantly contributes to downwind nonattainment. (By "affected by transport," EPA means an area whose air quality is affected by transport from an upwind area to a degree that affects the area's ability to attain);
- (2) has submitted an approvable attainment demonstration with any necessary, adopted local measures and with an attainment date that shows that it will attain the 1-hour standard no later than the date that the reductions are expected from upwind areas under the final NO_x SIP call and/or the statutory attainment date for upwind nonattainment areas, i.e., assuming the boundary conditions reflecting those upwind reductions;
- (3) has adopted all applicable local measures required under the area's current classification and any additional measures necessary to demonstrate attainment, assuming the reductions occur as required in the upwind areas. (To meet section 182(c)(2)(B), serious areas would only need to achieve progress requirements until their original attainment date of November 15, 1999);
- (4) has provided that it will implement all adopted measures as expeditiously as practicable, but no later than the date by which the upwind reductions needed for attainment will be achieved.

EPA contemplates that when it acts to approve such an area's attainment demonstration, it will, as necessary, extend that area's attainment date to a date appropriate for that area in light of the schedule for achieving the necessary upwind reductions. The area would no longer be subject to reclassification or "bump-up" for failure to attain by its original attainment date under section 181(b)(2).

Legal Rationale

The legal basis for EPA's interpretation of the attainment date requirements employs and updates the rationale invoked in the Agency's overwhelming transport policy. By filling a gap in the statutory framework, EPA's interpretation harmonizes the requirements of sections 181 and 182 with the Act's requirements (sections 110(a)(2)(D)(i)(I), 110(a)(2)(A), 176A and 184) on inter-area transport. It reconciles the principle that upwind areas are responsible for preventing interference with downwind attainment with the Congressional intent to provide longer attainment periods for areas with more intractable air pollution problems. It also takes into account the amount of time it will take to achieve emission reductions in upwind areas under the NO_x SIP call, which EPA expects to finalize in September 1998.

The EPA's resolution respects the intent of sections 181 and 182 to provide longer attainment dates for areas burdened with more onerous air pollution problems, while allowing reductions from upwind areas to benefit the downwind areas. Under EPA's interpretation, upwind areas will be required to reduce emissions to control transport, but should not find that the requirements imposed upon them amount to an acceleration of the time frames Congress envisioned for these areas in sections 181 and 182. Downwind areas will be provided additional time to accommodate the delayed control contributions from upwind areas, while at the same time being held accountable for all measures required to control local sources of pollution.

The EPA's interpretation of the Act allows it to extend attainment dates only for those areas which are prevented from achieving timely attainment due to a demonstrated transport problem from upwind areas, and which submit attainment demonstrations and adopt local measures to address the pollution that is within local control. The EPA believes that Congress, had it addressed this issue, would not have intended downwind areas to be penalized by being forced to compensate for transported pollution by adopting measures that are more costly and onerous and/or which will become superfluous once upwind areas reduce their contribution to the pollution problem.

This interpretation also recognizes that downwind areas in the OTAG region have been operating in a climate of uncertainty as to the allocation of responsibility for controlling transported pollution. Section 110(a)(2)(D) is not self-executing and, until the NO_x SIP call rulemaking, downwind areas in the OTAG region could not determine what boundary conditions they should assume in preparing attainment demonstrations and determining the sufficiency of local controls to bring about attainment. By allowing these areas to assume the boundary conditions reflecting reductions set forth in the NO_x SIP call and/or reductions from the

requirements prescribed for upwind nonattainment areas under the Act, EPA will hold upwind areas responsible for reducing emissions of transported pollution, and downwind areas will be obliged to adopt and implement local controls that would bring about attainment but for the transported pollution.

The EPA's interpretation harmonizes the disparate provisions of the Act. It avoids accelerating the obligations of the upwind States so that downwind States can meet earlier attainment dates, which would subvert Congressional intent to allow upwind areas with more severe pollution longer attainment time frames to attain the ozone standards. In addition, EPA's interpretation of the Act takes into account the fact that, under the SIP call, upwind area reductions will not be achieved until after the attainment dates for moderate and serious ozone nonattainment areas. To refuse to interpret the Act to accomplish this would unduly penalize downwind areas by requiring them to compensate for the transported pollution that will be dealt with by controls adopted in response to the requirements of the No_x SIP call or to achieve attainment in an upwind area. The EPA is thus interpreting the requirements to allow the Agency to grant an attainment date extension to areas that submit their attainment demonstrations and all adopted measures necessary locally to show attainment. This solution preserves the responsibility of these downwind areas to prepare attainment demonstrations and adopt measures, but does not penalize them for failing to achieve timely attainment by reclassifying them upwards, since such attainment was foreclosed by transport beyond their control.

Under this policy, once EPA has acted to approve the attainment demonstration and extend the area's attainment date, the area would no longer be subject to reclassification or "bump-up" for failure to attain by its original attainment date under section 181 (b)(2).