Order Code RL32345

Implementation of EPA's 8-Hour Ozone Standard

April 20, 2004

-name redacted-
Specialist in Environmental Policy
Resources, Science, and Industry Division

Implementation of EPA's 8-Hour Ozone Standard

Summary

On April 15, 2004, the U.S. Environmental Protection Agency (EPA) designated areas in 32 states and the District of Columbia (474 counties in all) as "nonattainment areas" for a new ozone air quality standard. This standard was promulgated by EPA in 1997, but because of court challenges and other delays is just now being implemented. Designation begins a process in which the areas must adopt emission control programs sufficient to bring air quality into compliance. Deadlines will vary depending on the severity of the measured pollution. Areas failing to adopt adequate plans or failing to demonstrate that their highway and transit construction programs "conform" to approved emission budgets, are subject to sanctions, including a possible lapse in the provision of federal highway funds.

While much attention has been placed on the challenges that new nonattainment areas will face in implementing the new ozone standard, less attention has been paid to the impact of the new standard on areas not yet in attainment of the *old* (1-hour) ozone standard. Many of these areas, especially the most severely polluted, appear likely to be given as many as 16 additional years to reach attainment under EPA's implementation plan. In the many explanations of EPA's new "tougher" standards, this apparent relaxation of the Act's requirements for the most severely polluted areas has gone largely unnoticed.

This report, which will be updated as developments warrant, provides information on the designation process for nonattainment areas, describes EPA's implementation plan, and discusses issues that have been raised as EPA, the states, and potential nonattainment areas develop implementation strategies. These issues include how the boundaries of nonattainment areas should be set, how areas can improve air quality sufficiently to attain the standard, what the timelines will be for attainment, whether areas affected by upwind pollution can be granted extra time to comply, what grants might be available to assist areas in reaching attainment, and whether designation will have a negative impact on economic activity in the affected areas. In response to some of these concerns, Congress is considering legislation that might alter the implementation process. The courts may also be asked to review whether the Agency's implementation of the standard meets the statutory requirements of the Clean Air Act.

Contents

Implementation of EPA's 8-Hour Ozone Standard

Background

On April 15, 2004, EPA designated areas in 32 states and the District of Columbia as "nonattainment areas" for a new ozone air quality standard.[1] This standard (and a separate standard for fine particulates) was promulgated by EPA in 1997, but because of court challenges and other delays is just now being implemented. Designation begins a process in which the nonattainment areas must adopt emission control programs sufficient to bring air quality into attainment by an EPA deadline.

Some of the areas being designated have not previously been considered nonattainment for ozone or for any other EPA air quality standard. This has raised numerous questions about the process in these areas, including: when and why the standard was established; what criteria are used to determine nonattainment; how boundaries of the nonattainment area are established; whether special provisions can be made for areas affected by pollution from upwind; what the deadline will be for reaching attainment; what grants might be available to assist areas in reaching attainment; and how designation might affect economic development and transportation investments in an area. How areas already designated nonattainment for EPA's existing 1-hour ozone standard will be affected by implementation of the new standard presents additional questions.

This report attempts to answer these questions and provides links to sources of additional information. It also discusses legislation introduced in this Congress that would alter the implementation process.

National Ambient Air Quality Standards

Under the Clean Air Act, EPA has set National Ambient Air Quality Standards (NAAQS) for six pollutants: ozone, particulate matter (PM), carbon monoxide, sulfur dioxide, nitrogen dioxide, and lead. The standards for these pollutants are health-based: the statute requires that EPA set them at levels necessary to protect the public health with an adequate margin of safety, based on a review of the scientific literature.

---

[1] For information on the designation process, including a list of the affected areas, see [http://www.epa.gov/ozonedesignations/].

From time to time (every 5 years according to the statute, but less frequently in practice), the Agency reviews the latest scientific studies and either reaffirms or modifies the standards. The most recent changes (a strengthening of the ozone and PM standards) were promulgated in 1997. Due to legal challenges and other delays, the new standards have not yet been implemented, but in a November 2002 consent decree, EPA committed to designating ozone nonattainment areas by April 15, 2004.[2]

The New Ozone Standard

Why There's a Standard. Ozone is a lung irritant. Prolonged exposure to it "can make people more susceptible to respiratory infection, result in lung inflammation, and aggravate pre-existing respiratory diseases such as asthma,"[3] according to EPA. Chest pain, cough, premature aging of the lungs, and chronic respiratory illnesses are other potential effects. Studies conducted in the northeastern United States and Canada indicate that ozone air pollution is associated with 10-20 percent of all summertime respiratory-related hospital admissions.[4]

The Latest Revision. EPA established a standard for short-term (1-hour) concentrations of ozone in the early 1970s, and relaxed the standard (but retained the 1-hour format) in 1979. In recent years, however, research has indicated that readings below (i.e., in compliance with) the 1979 standard produced symptoms in moderately exercising adults, especially over longer periods of exposure. Thus, in 1997, after reviewing 190 scientific studies, the Agency revised the standard again. The new standard is more stringent (0.08 parts per million vs. the previous 0.12), but, for reasons explained below, it averages the ozone concentrations measured over 8 hours rather than 1 hour.

Determining Compliance. The method of determining compliance (or attainment) was also modified in the latest revision. Under the 1-hour standard, areas were allowed three exceedances of the standard in a 3-year period. The fourth highest measurement in the 3-year period (termed the "design value" by EPA) determined whether an area was in attainment.

This method of determining attainment struck some as arbitrary and potentially unrepresentative of prevailing levels of pollution, particularly in areas that were close to attaining the standard. Ozone forms in the atmosphere when volatile organic compounds and nitrogen oxides react in the presence of heat and sunlight. Thus, the concentrations of pollution are affected not only by emissions, but also by the

---

[2] American Lung Association v. EPA, No. 1:02CV02239 (D.D.C. entered November 13, 2002).

[3] U.S. EPA, Office of Air Quality Planning and Standards, *Latest Findings on National Air Quality, 2002 Status and Trends*, August 2003, p. 8, available at [http://www.epa.gov/airtrends/2002_airtrends_final.pdf].

[4] U.S. EPA, Office of Air Quality Planning and Standards, "EPA's Revised Ozone Standard, Fact Sheet," July 17, 1997, available at [http://www.epa.gov/ttn/oarpg/naaqsfin/o3fact.html].

weather, with high temperatures, sunlight, and stagnant air masses contributing to high ozone concentrations. Under the three-exceedance method, a single heat wave in a three-year period could produce design values exceeding the standard.

Under the new 8-hour standard, an area averages the fourth highest reading for *each of the three years* to determine whether the area is in attainment. The longer averaging time and the averaging of three years' data reduce the influence of unusual meteorological conditions in any given year, making the design value more accurately reflect recurring pollution levels.

Determining the Boundaries of Nonattainment Areas

The Clean Air Act establishes a process for designating nonattainment areas and setting their boundaries, but it allows the EPA Administrator some discretion in determining what the final boundaries of the areas will be. In Section 107(d)(1)(A) [42 U.S.C. 7407], the statute states that Governors shall submit a list to EPA of all areas in the state, "designating as ... nonattainment, any area that does not meet (*or that contributes to ambient air quality in a nearby area that does not meet*)" an air quality standard. [emphasis added]

Following a Governor's submission, the EPA Administrator has discretion to make modifications, including to the area boundaries. The Agency has generally used this discretion to expand the size of nonattainment areas, or to combine areas that a state listed as separate areas into a single larger unit. In several cases, for example, EPA has combined nonattainment counties across state lines into the same nonattainment area, if the counties are part of the same metropolitan area. The states are to be notified of any proposed modifications and given an opportunity to demonstrate why a proposed modification is inappropriate, but the final determination rests with EPA.

The Act is not specific in requiring that neighboring counties be combined in the same nonattainment area, but it does require the use of metropolitan statistical area boundaries in the more severely polluted areas (Section 107(d)(4)(A)(iv)). Echoing this requirement, EPA recommended that Metropolitan Statistical Areas or Consolidated Metropolitan Statistical Areas serve as the "presumptive boundary" for ozone nonattainment areas under the 8-hour standard.[5] As a result, metropolitan areas are generally treated as units, even where part of the area lies in a separate state or where part of the area does not have readings exceeding the standard. In the latter case, even though a specific county may not exceed the standard, the pollution generated there is likely to influence ozone readings elsewhere in the metropolitan

---

[5] The Agency also identified 11 factors that States or tribes could use to justify larger or smaller nonattainment area boundaries. See "Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards," Memorandum from John S, Seitz, Director, Office of Air Quality Planning and Standards, to All Directors, Regions I-X, March 28, 2000, pp. 3-5, available at [http://www.epa.gov/ttn/naaqs/ozone/ozonetech/des00328.htm].

Table 1: Timeline for New Ozone Nonattainment Areas

- April 2004: EPA finalizes implementation rule
- April 15, 2004: EPA finalizes designations
- ~ June 2004: Designations appear in Federal Register
- ~ June 2005: Areas must begin demonstrating conformity of transportation programs with emissions budgets
- ~ June 2007: State Implementation Plans (SIPs) must be submitted to EPA
- 2007-2021: Attain standards

---

area. In addition, by including the entire metropolitan area, one avoids the creation of additional incentives for sprawl development on the fringes of urban areas.

EPA designated 124 areas nonattainment under the new standard. These areas include 297 counties that have monitors showing nonattainment. By including other counties that are within these metropolitan areas or that, in EPA's judgment, influence air quality in the nonattaining counties, the Agency included 474 counties in all in the 124 nonattainment areas. More information on the specific areas, including lists of the counties, is at [http://www.epa.gov/ozonedesignations/].

Timelines for Reaching Attainment

As indicated in Table 1, the ultimate deadline for attaining the 8-hour standard can vary widely, from 2007 to 2021, depending on the severity of pollution in the nonattainment area and its status under the old 1-hour standard. Roughly two-thirds of the areas (82 of 124) were considered attainment under the old standard, and are governed by sections of the Clean Air Act referred to as "Subpart 1."[6] (These areas are labeled "Basic" in EPA's nonattainment area charts.) Most of these areas face a deadline of 5 years after designation (June 2009), with a possible extension to 2014 if the area would have difficulty attaining the standard in five years.

Some of the areas volunteered for EPA's Early Action Compact program, which is described below on page 10. These areas signed enforceable agreements to meet the standard by December 2007, in return for flexibility regarding specific regulatory requirements. If they fail to meet the standard by that date, their designation as Basic nonattainment areas will become effective April 15, 2008, presumably with a 2013 deadline.[7]

---

[6] The Subpart 1 provisions are found in Sections 171-179B of the Act.

[7] For additional information, see Fact Sheet, Clean Air Ozone Rules of 2004 at (continued...)

The other 42 areas not designated as "Basic" are mostly areas that are currently nonattainment under the 1-hour standard in addition to the new 8-hour standard. The Agency expects to revoke the 1-hour standard one year after implementing the new standard, but as a result of a 2001 Supreme Court decision,[8] it is required to adapt the detailed statutory requirements of "Subpart 2" of the Act to these areas.[9]

In Subpart 2, Congress established separate deadlines and specific control requirements for five categories of 1-hour ozone nonattainment areas, depending on the degree to which they exceeded the standard (i.e., their design value). The five groups were referred to as Marginal, Moderate, Serious, Severe, and Extreme, and they were given attainment deadlines that ranged from 3 years to 20 years after the date of enactment.[10] EPA will use these terms to categorize the 8-hour areas that are also currently in nonattainment of the 1-hour standard, with deadlines stretching from 3 years to 17 years after designation. These areas initially have been given deadlines of 2007, 2010, 2013, or 2021, depending on their design value. Over the years, those that fail to attain the standard by their deadline will be bumped up to the next category with an extension of their deadline. Thus, ultimately, all these areas can be given until 2021 to reach attainment.

The net effect of this will be that areas that currently have deadlines ranging from 2005-2010 (under the 1-hour standard) may eventually be allowed until 2021 to attain the new standard. For example, Washington, D.C. was recently designated as a Severe ozone nonattainment area under the 1-hour standard, with an attainment deadline of 2005. Under the 8-hour standard, it has been redesignated as Moderate with a 2010 attainment deadline. If the area does not attain the standard by that date, it would presumably be bumped up into the Serious category, with a 2013 deadline. or eventually into the Severe category with 2019 or 2021 deadlines. Few additional requirements would be mandated by the statute in connection with these deadline extensions, as the area is already subject to most of the requirements for Severe areas now and would remain so under EPA's implementation plan.[11]

---

[7](...continued)
[http://www.epa.gov/ozonedesignations/finrulefs.htm].

[8] Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001). See CRS Report RS20860, *The Supreme Court Upholds EPA Standard-Setting Under the Clean Air Act: Whitman v. American Trucking Ass'ns*.

[9] The Subpart 2 provisions are found in Sections 181-185B of the Act.

[10] For additional discussion, see CRS Report RL30853, *Clean Air Act: A Summary of the Act and Its Major Requirements*.

[11] In a section of its implementation plan for 8-hour areas entitled "2. What Requirements That Applied in an Area for the 1-Hour NAAQS Continue to Apply After Revocation of the 1-Hour NAAQS for that Area?", EPA states, "All areas designated nonattainment for the 8-hour ozone NAAQS and designated nonattainment for the 1-hour ozone NAAQS at the time of designation for the 8-hour NAAQS remain subject to control measures that applied by virtue of the area's classification for the 1-hour NAAQS." These obligations include major source thresholds, inspection and maintenance (I/M) programs and fuel programs. Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard – Phase 1, p. 118, available at [http://www.epa.gov/ozonedesignations/finalrule.pdf]. (The rule had (continued...)

In all, EPA lists 51 areas with a combined population of 110 million as being in nonattainment of the 1-hour standard.[12] All of these areas are likely to receive extra time – potentially up to 16 years – to reach attainment under the new standard. In the many explanations of EPA's new "tougher" standard, this apparent relaxation of the Act's requirements for the most severely polluted areas has gone largely unnoticed.

Demonstrating Attainment: the State Implementation Plan

The main requirement that follows designation of an area as nonattainment is for the area to develop a State Implementation Plan (SIP) that demonstrates how it will reach attainment. The SIP sets forth pollution control measures that will be implemented by federal, state, and local governments. It relies on models of the impact on air quality of projected emission reductions to demonstrate attainment. To be approved, a SIP must demonstrate that the area will reach attainment of the standard by its deadline.

EPA has concluded that in the majority of cases, attainment will be reached as the result of new federal standards on cars, light trucks, and heavy duty diesel engines that are scheduled to be implemented between 2004 and 2010, and by controls on coal-fired electric power plants (the "NOx SIP Call" and the proposed "Interstate Air Quality Rule") to be implemented between 2004 and 2015, without any additional local controls.[13] Of 297 monitored counties that exceeded the 8-hour standard in 2002, only 35 would remain in nonattainment after implementation of these federal regulations, according to EPA.[14]

In reality, however, all areas will require some local controls because of the requirements of the statute. In addition to submitting a SIP, each of the areas will be required to conduct an emissions inventory and must meet three regulatory requirements: 1) impose Reasonably Available Control Technology (RACT) on major stationary sources of pollution; 2) require new stationary sources to "offset" their emissions by arranging for the reduction of equivalent or greater emissions at existing sources; and 3) demonstrate that any new highway or transit projects "conform" to the emissions budget used in their State Implementation Plan.[15] These measures are described in more detail below.

---

[11](...continued)
not been published in the Federal Register as of April 20.)

[12] For information on these areas, see the ozone section of U.S. EPA's "Green Book," at [http://www.epa.gov/oar/oaqps/greenbk/oindex.html#List1].

[13] For a further discussion, see CRS Report RL32273, *Air Quality: EPA's Proposed Interstate Air Quality Rule*.

[14] Personal communication, Office of Air Quality Planning and Standards, U.S. EPA, April 7, 2004.

[15] A table summarizing these and other requirements for ozone nonattainment areas is available at [http://www.epa.gov/ozonedesignations/ozonesamplerequirements.htm].

The number of areas requiring local controls may also be higher than EPA's projections would suggest, because of a mismatch between the nonattainment area deadlines and the timetable for implementation of the Interstate Air Quality Rule (IAQR). The IAQR, as proposed by EPA in January 2004, would be implemented in two phases, with deadlines of 2010 and 2015. The Subpart 1 nonattainment areas, however, must demonstrate attainment by 2009 or 2014. The upshot is that reductions achieved under IAQR may not be useable in demonstrating attainment. This has led some to argue that EPA should modify the IAQR deadlines to ease local areas' task of demonstrating attainment.

Nonattainment areas unable to demonstrate attainment through federal measures and the three basic requirements alone can adopt a wide range of local measures to reduce emissions. The most common affect motor vehicles, fuels, stationary sources of pollution, and consumer products.

Regarding motor vehicles, for example, most current nonattainment areas have adopted what are called "inspection and maintenance" programs. These programs require owners to bring their vehicles to testing facilities or local garages for emissions tests, and to repair the emission control system or engine if the vehicle fails. Many areas also require that gasoline sold in the area be cleaner burning "reformulated" gasoline, and that gas stations install equipment to capture evaporative emissions from refueling.

Stationary sources (industrial and commercial facilities) will be subject – as noted earlier – to reasonably available control technology in nonattainment areas. Depending on the severity of an ozone nonattainment area's pollution, RACT is required at sources that emit more than 10, 25, 50, or 100 tons of pollution per year. New stationary sources are also required to "offset" their emissions by arranging for the reduction of equivalent or greater emissions at existing sources. Again, depending on the severity of an area's pollution, the required offset may be as low as 1 ton for each new ton of pollution emitted, or as high as 1.3 tons for each new ton of pollution.

In extreme cases, consumer products, such as lawn and garden equipment, paint, gasoline storage cans, air fresheners, and personal care products may be subject to regulation in nonattainment areas. Many of these products are sources of volatile organic compounds, which combine with nitrogen oxides to form ozone in the atmosphere.

Areas Affected by Upwind Pollution

One of the more frequent issues raised in nonattainment areas is whether any special consideration can be given to areas whose air quality is adversely affected by pollution from upwind areas. In recent years, EPA has attempted to extend the deadlines for attainment in at least seven such areas (all of them regulated under Subpart 2), but its attempts to do so have been overturned by court decisions in three separate circuits. (The cases involved St. Louis, Washington, D.C., and Beaumont-Port Arthur, Texas.) As a result, the Agency is unable to provide deadline extensions

under Subpart 2, except when it bumps an area into a more severe category and imposes additional pollution control requirements.

Subpart 1 of the Act is more flexible, however. Under its provisions, EPA may "classify the area for the purpose of applying an attainment date" and may consider such factors as "the availability and feasibility of pollution control measures" in doing so. This language might give the Administrator sufficient authority to allow an extra 5 years to reach attainment under Subpart 1 in areas affected by upwind pollution.

Areas classified under either subpart may also petition the Agency under Section 126 of the Act to impose controls on upwind sources that significantly contribute to their nonattainment of the standard.[16] The Agency has also recently imposed additional controls on sources of nitrogen oxides (which contribute to ozone formation downwind) through its "NOx SIP Call,"[17] and has proposed additional NOx controls in its Interstate Air Quality Rule and Regional Haze Rule.[18]

Economic Impacts of Nonattainment Designation

Another concern over nonattainment designation is that it will have a negative impact on an area's economic development. Potential economic impacts are among the most frequently voiced concerns raised by local business and political leaders.

Nonattainment designation does add requirements that make investment in an area more complicated. As noted earlier, it requires major sources of pollution (generally those that emit more than 100 tons per year of volatile organic compounds) to offset their pollution by equivalent or greater emission reductions from existing sources when obtaining permits to operate new or modified facilities. And it requires highway and transit planners to demonstrate that new projects "conform" to the area's State Implementation Plan.[19]

---

[16] A number of such petitions have been filed with the Agency. The most well-known are those that were filed in August 1997 by 8 northeastern states, 4 of which were granted by the Agency in January 2000. For additional information on these, see CRS Report 98-236, *Air Quality: EPA's Ozone Transport Rule, OTAG, and Section 126 Petitions – A Hazy Situation?*

[17] The NOx SIP Call requires electric utilities in 22 Eastern states and the District of Columbia to reduce transport of ozone across state lines by limiting emissions of NOx. Phase 1 of the regulations goes into effect in May 2004. For information, see [http://www.epa.gov/ttn/naaqs/ozone/rto/sip/index.html].

[18] As noted earlier, for a discussion of the IAQR, see CRS Report RL32273, *Air Quality: EPA's Proposed Interstate Air Quality Rule*. The Regional Haze Rule (specifically, a rule establishing Best Available Retrofit Technology at stationary sources in 26 industrial categories) is available at [http://www.epa.gov/visibility/actions.html].

[19] For additional information on conformity, see CRS Report RL32106, *Transportation Conformity Under the Clean Air Act: In Need of Reform?*

It does not amount to a "standstill order on growth," however, as has frequently been charged.[20] A recent EPA analysis found that 6.5 million jobs were created in ozone nonattainment areas from 1990 to 1998, and that "over 55 percent of ozone nonattainment areas had average annual employment growth rates greater than that of their region of the country." Personal income growth in nonattainment areas essentially matched the national average between 1990 and 1998, according to the Agency (38.5% vs. 38.9%).[21]

Grants for Nonattainment Areas

EPA does not have a grant program designed to assist nonattainment areas, although it does provide grants to state air pollution agencies in support of their programs. But many nonattainment areas have benefitted from a program administered by the Department of Transportation: the Congestion Mitigation and Air Quality Improvement program (CMAQ). CMAQ's purpose is to reduce emissions from highway travel as a means of assisting states in complying with the National Ambient Air Quality Standards for ozone, carbon monoxide, and particulate matter.

CMAQ is funded by the Highway Trust Fund, out of which Congress has authorized $8.1 billion to the states over the last 6 years (FY1998 - FY2003). Projects eligible for funding include: (1) mass transit; (2) traffic flow improvements; (3) rideshare programs; (4) traffic demand management programs; (5) bicycle and pedestrian projects; (6) public education; (7) vehicle inspection and maintenance programs; and (8) conversion of vehicles to burn alternative fuels. According to the Federal Highway Administration, 44% of total CMAQ funds have been obligated for mass transit projects since the program's inception in FY1992.

CMAQ funds are distributed based on a formula that takes into account population and severity of pollution. (In addition, each state is guaranteed 0.5% of the total, even if it has no nonattainment areas.) The formula currently in use (which was established by statute) determines the severity of ozone pollution by using the area's categorization under the 1-hour ozone standard.

Because "Basic" areas are not part of the old categorization scheme, there is currently not a factor in the funding formula to provide CMAQ funds for the new ozone nonattainment areas. Providing funds to these areas would require amendments to the authorizing legislation. The surface transportation bill passed by

---

[20] This phrase was used by the EPA Administrator, Mike Leavitt, in a January 9, 2004 speech to the Edison Electric Institute. But the Administrator subsequently reversed his position. In a speech April 14, he said: "Did non-attainment designation mean that we couldn't grow our economy or build highways? No. Did it mean we had to have a plan and take action to clean our air? Yes." For the full speech, see [http://yosemite.epa.gov/administrator/speeches.nsf/b1ab9f485b098972852562e7004dc686/393855f25023abdb85256e7600589dbe?OpenDocument].

[21] U.S. EPA, Office of Air and Radiation, "The Historical Record: Nonattainment Status and Economic Growth," February 26, 2002.

the Senate, S. 1072, would amend the funding formula to include 8-hour ozone nonattainment areas (as well as areas to be designated nonattainment for a new fine particulate standard). The bill passed by the House, H.R. 3550, would not do so. The Senate bill would also provide a substantial increase in CMAQ funding, to $13.4 billion over the 6 years FY2004-FY2009, a $5.3 billion (65%) increase above the previous authorization. The House bill would provide a smaller increase, to $9.4 billion (16%). Both bills would expand the types of projects eligible for assistance, although in different ways.

Other Legislative and Regulatory Actions

Concern over the potential impacts of the new ozone and particulate standards has led to several attempts to modify the implementation requirements. Legislative attempts have generally been attached to larger pieces of legislation, and (with the exception of an amendment clarifying the schedule for implementation in the late 1990s) have not been enacted.

Section 1443 of the energy bill (H.R. 6), for example, would extend attainment deadlines in areas affected by upwind pollution to the date on which the last reductions in pollution necessary for attainment in the downwind area are required to be achieved in the upwind area. Section 970 of the bill would require a demonstration project to address the effect of transported ozone and ozone precursors on air quality in southwestern Michigan, and would prohibit EPA from imposing any requirements or sanctions during the two years pending the project's completion. The conference report on H.R. 6 passed the House November 18, 2003. The Senate began debate on it November 19, but a cloture vote on November 21 failed to achieve the 60 votes necessary to end debate on the bill, leaving its future uncertain.

The Administration has proposed an additional modification of the requirements for areas not meeting the new ozone and fine particle standards in its Clear Skies bill (H.R. 999 / S. 485). In Section 3, Clear Skies would allow EPA to avoid designating 8-hour ozone and $PM_{2.5}$ areas as nonattainment until 2016, provided that the area demonstrates that it will attain the standards by December 31, 2015. Areas fitting into this new "transitional" category could avoid additional regulatory controls, including the requirement to demonstrate conformity, if they could demonstrate that attainment would be achieved through the imposition of federal controls on utilities, diesel engines, automobiles, and other sources. No action has been taken on this bill.

EPA has also modified the implementation requirements for a number of areas in response to an initiative from the State of Texas. In 2002, EPA approved a protocol suggested by the state under which areas can avoid most ozone nonattainment area requirements (including transportation conformity) until December 31, 2007, if they voluntarily commit to enforceable Early Action Compacts with their state and EPA. The protocol sets out a number of milestones that areas must meet to qualify. Thirty areas (mostly in the southeastern states) have met

the first requirements and were identified as eligible for the program on April 15, 2004.[22]

Conclusion

The 8-hour ozone standard will affect numerous areas that have not previously been designated nonattainment for a National Ambient Air Quality Standard. This has raised concern in these areas regarding the potential impacts, and triggered numerous questions regarding the specifics of the implementation process.

In many – perhaps a majority of – cases, it appears that new nonattainment areas will have little difficulty demonstrating attainment: EPA projects that federal measures, such as new auto and truck emission standards and controls on power plants, will be sufficient to demonstrate attainment in 88% of monitored nonattainment counties by 2015.

In areas currently designated nonattainment under the 1-hour ozone standard, the principal effect of the new standard is likely to be more time to reach attainment – as many as 16 years more, in some cases. For officials facing deadlines under the old standard as early as 2005, this may be welcome news.

In any event, the implementation plan (like most EPA rules) may be challenged in the courts. The Agency's first attempt at an implementation plan was among the issues remanded by the Supreme Court in a 2001 decision that addressed a number of issues related to the setting of the 8-hour standard.[23] It would not be surprising if interested parties returned to the courts in the months ahead as the Agency attempts to implement a new version of its implementation plan. Thus, we may not know the final form of implementation or its effects for some time.

---

[22] For information on the Early Action Compacts, see EPA's Early Action Compact website at [http://www.epa.gov/ttn/naaqs/ozone/eac/].

[23] Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001). See CRS Report RS20860, *The Supreme Court Upholds EPA Standard-Setting Under the Clean Air Act: Whitman v. American Trucking Ass'ns*, pp. 4-5.