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ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

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Governor

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TO: The Honorable Jane Dee Hull, Governor

FROM: Jacqueline E. Schafer, Director
Steven J. Burr, Special Counsel, Assistant Attorney General SJB

SUBJECT: Designation of Nonattainment Areas for the 8-Hour Ozone National Ambient Air Quality Standards

DATE: May 9, 2000

Introduction and Summary of Conclusions

This memorandum addresses the obligation of the United States Environmental Protection Agency (EPA) to promulgate nonattainment area designations for the eight-hour ozone national ambient air quality standards (NAAQS) after the Supreme Court's decision in *Whitman v. American Trucking Ass'ns*, No. 99-1257 (slip op. Feb. 27, 2001). As discussed in greater detail below:

1. As a result of enactment of the Transportation Equity Amendments for the 21st Century (TEA-21), Pub. L. No. 105-178, § 6103, 112 Stat. 463, in 1998, and the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act (VA-HUD), Pub. L. No. 106-377, 114 Stat. 1441, in 2000, EPA is no longer subject to a specific deadline for promulgating final non-attainment designations for the eight-hour ozone NAAQS. EPA therefore has discretion to determine the appropriate date for making the designations.

2. Promulgating the designations before issuing implementation guidance in compliance with the Supreme Court's decision would place the states in an untenable position. The designations arguably would trigger a three-year deadline for submitting state implementation plans providing for attainment of the eight-hour NAAQS. Until EPA issues implementation guidance, however, the states will not know whether that deadline in fact applies and will have an inadequate basis to develop their plans if it does. A number of other open questions also should be resolved before the agency promulgates designations.

EPA therefore should defer making nonattainment designations until it has issued implementation guidance conforming to the *American Trucking* decision.

The Effect of Recent Legislation on the Clean Air Act's Designation Deadline for the Eight-Hour Ozone NAAQS

Statutory Language

Section 107(d)(1)(A) of the Clean Air Act, 42 U.S.C. § 7407(d)(1)(A), directs the Governors to submit designations of all areas of their states as attainment, nonattainment or unclassifiable for a NAAQS within one year after the NAAQS promulgation. EPA has two years after promulgation to issue the final designations. *Id.* § 7407(d)(1)(B)(i). Had the law remained unchanged, EPA would have been obligated to publish final nonattainment area designations for the eight-hour ozone NAAQS by no later than July 18, 1999, two years after the NAAQS' promulgation.

Congress modified this deadline in TEA-21. Section 6103 of that act provided that:

> (c) The Governors shall be required to submit the designations referred to in section 107(d)(1) of the Clean Air Act within *2 years* following the promulgation of the July 1997 ozone [NAAQS].
>
> (d) The Administrator shall promulgate final designations no later than 1 year after the designations required under subsection (a) are required to be submitted.

(Emphasis added.) After TEA-21, the deadline for promulgation was July 18, 2000.[1]

Congress made another change to the designation timetable after the Supreme Court granted certiorari in *American Trucking*, this time in the form of a rider to HUD-VA:

> *None of the funds made available in this Act may be used for the designation*, or approval of the designation, of any area as an ozone nonattainment area under the Clean Air Act pursuant to the 8-hour national ambient air quality standard for

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[1]The purpose of this extension was "to ensure that the Governors have adequate time to consider implementation guidance from EPA on drawing area boundaries prior to submitting area designations . . . ." *Id.* § 6101(b)(2). EPA therefore should have issued guidance well in advance of the Governors' July 1999 deadline for submitting *proposed* designations. Instead, EPA failed to issue the guidance until March 28, 2000, less than four months before the agency's own deadline for promulgating *final* designations. *See* Memorandum from John S. Seitz to Air Directors, Regions I-X, *Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards* (March 28, 2000).

> ozone that was promulgated by the Environmental Protection Agency on July 18, 1997 and remanded by the District of Columbia Court of Appeals on May 14, 1999, in the case, American Trucking Ass'ns. v. EPA *prior to* June 15, 2001 or final adjudication of this case by the Supreme Court of the United States, whichever occurs first.

HUD-VA, App. A—H.R. 5482, § 427, 114 Stat. at 1441A-56 (emphasis added). Thus, before the Supreme Court reached its decision in *American Trucking*, HUD-VA prohibited EPA from promulgating designations "prior to" the Court's decision or June 15, 2001, whichever occurred earlier. Since EPA could not comply with both this prohibition and TEA-21's July 2000 deadline, HUD-VA eliminated that deadline.

Now that the Supreme Court has ruled, HUD-VA no longer *prohibits* EPA from promulgating nonattainment designations, but it also does not *require* EPA to promulgate designations by any particular date. There is therefore no longer any statutory deadline for the promulgation of nonattainment designations for the eight-hour ozone NAAQS. The date for making the designations lies within EPA's discretion.

Legislative History

This straightforward reading of HUD-VA is consistent with the enactment's legislative history. For example, the Conference Committee Report for the bill noted that the conference amendment:

> Modifie[d] language proposed by the House and stricken by the Senate *prohibiting* the use of funds for the designation of any area as an ozone nonattainment area. The conferees agree to *limit the prohibition until* the Supreme Court rules on this issue or June 15, 2001, whichever occurs first.

H.R. Rep. No. 106-988, at 170 (Oct 18, 2000) (emphasis added). The report makes it clear that the rider's purpose is to prohibit designations before, not require designations by, a particular date.[2]

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[2]The Senate removed this provision by adopting an amendment offered by Senator Boxer to delete both the ozone nonattainment rider and a rider delaying implementation of the new Safe Drinking Water Act standard for arsenic. The Safe Drinking Water Act rider was the primary focus of debate on the Senate floor. *See* 106 Cong. Reg. 10296-302 (Oct. 12, 2000). Thus it is not clear that the Senate would have approved the amendment had it dealt solely with the ozone issue. In any case, the Senate ultimately concurred in the House version with an amendment establishing an outside date for terminating the prohibition against area designations.

In the House floor debate, the focus of the successful proponents of the rider was on preventing precipitous action by EPA. For example, one of the sponsors of the bill noted that:

> Last year [1999], a federal appeals court . . . ruled EPA acted unconstitutionally in proposing the new NAAQS in 1997, because Congress had not empowered EPA to act unilaterally on the matter. The Supreme Court has agreed to hear the case, but it may not issue a decision until early 2001.
>
> The resulting situation is one of increasing uncertainty. First, communities already out of attainment are left shooting at a moving target, because they have no idea whether the changes they are making today will conform to the standards of tomorrow. Secondly, EPA may end up including additional regions of the state in the non-attainment area, in an effort to force them to change zoning and development practices before the Court issues a ruling. Obviously, either situation is extremely unfair, especially since EPA lost the first round of litigation in court.
>
> The Linder-Collins amendment simply states that *EPA cannot enforce the new standard until* the Court determines whether the federal agency acted constitutionally. By passing this amendment, we can ensure that reasonable, common sense development practices are not supplanted by a last-ditch effort by EPA to enforce its unconstitutional mandates in the face of judicial and congressional opposition.

106 Cong. Rec. H4886 (June 21, 2000) (emphasis added).[3]

In short, the intent of the rider proponents was to delay designations, not to establish a new deadline.

Conclusion

VA-HUD instructs EPA on the earliest date by which it may promulgate designations but provides no instruction on the latest date by which designations are required. That omission appears to have been intentional. EPA is therefore not subject to any deadline for promulgating designations but instead has discretion to choose a suitable date.

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[3]*See also id.* at H4883 (remarks of Representative Bishop) ("[d]ue to this legal uncertainty, I truly believe that the EPA should delay further implementation of the standards in order to allow time for the Supreme Court to rule on the pending appeal"); *id.* at H4884 (remarks of Representative Blunt) ("[t]axpayers should not be burdened by premature enforcement of an agency's standard that cannot be enforceable and should not be issued").

The Effect on the States of Making Designations Before Issuing Implementation Guidance

The Supreme Court's finding that EPA's ozone NAAQS implementation policy was unlawful leaves many perplexing questions open. Until EPA responds to the Court's mandate to "develop a reasonable interpretation of the nonattainment implementation provisions insofar as they apply to revised ozone NAAQS," *American Trucking*, slip op. at 26, EPA should not designate eight-hour ozone nonattainment areas. Any other course will put the states in the untenable situation of having to guess whether and if so how they must implement the new NAAQS without guidance from EPA.

Background on American Trucking *Decision*

The NAAQS implementation issues center on the relationship between Subparts 1 and 2 of Title I, Part D of the Clean Air Act, 42 U.S.C. §§ 7501-7511f. Part D governs state implementation plans (SIPs) for nonattainment areas. Subpart 1 of Part D establishes general requirements for these areas, and Subpart 2 establishes the specific requirements for areas designated nonattainment for ozone. There are also specific subparts for carbon monoxide, particulate matter, nitrogen dioxide and sulfur dioxide nonattainment areas.

As the Supreme Court noted, Subpart 1 is extremely general and therefore gives EPA broad discretion in establishing requirements for nonattainment areas subject to its provisions. Subpart 2, in contrast, is highly specific and sharply curtails EPA's discretion. *American Trucking*, slip op. at 24-25. For example, Subpart 1 authorizes EPA to devise a system for classifying nonattainment areas and to extend attainment deadlines by up to seven years from the initial five years established in the Act.[4] Subpart 2, in contrast, establishes a specific classification scheme based on the amount by which the concentration of ozone in an area exceeds the one-hour standard on the designation date.[5] It also specifies varying attainment deadlines and highly specific SIP control measures for each classification.

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[4]42 U.S.C. § 7502(a)(2)(A) ("attainment date shall be . . . as expeditiously as practicable, but no later than 5 years" after designation as nonattainment, except that EPA may extend the deadline "for a period no greater than 10 years from the date of designation"); *id.* § 7502(a)(2)(C) (EPA may grant up to two one-year extensions after expiration of deadline established under (A), if certain conditions are met). The Supreme Court stated that EPA could "extend attainment dates for as long as 12 years" under Subpart 1 but for only two years under Subpart 2, which erroneously treats the initial five-year deadline as an extension. Nevertheless, the Court's observation that Subpart 1 provides EPA with more discretion than Subpart 2 was accurate.

[5]42 U.S.C. § 7511(a)(1). The concentration used to make this determination is the fourth highest concentration measured at any monitor over the previous three years, which is known as the "design value." *See id.*

Subpart 1 states that its provisions relating to classification and attainment deadlines "shall not apply with respect to nonattainment areas for which classifications [or attainment dates] are specifically provided under other provisions of" Part D. 42 U.S.C. § 7502(b)(1)(C), (b)(2)(D). EPA's 1997 implementation guidance asserted that "Subpart 1 alone . . . controls the implementation of the revised ozone NAAQS in nonattainment areas" and that Subpart 2's classifications and attainment dates did not apply at all. *American Trucking*, slip op. at 16. The D.C. Circuit adopted the opposite view and held that the revised NAAQS could be enforced "only in conformity with Subpart 2." *American Trucking Ass'ns v. EPA*, 195 F.3d 4, 10 (D.C. Cir. 1999) (decision on rehearing).

The Supreme Court's Decision

The Supreme Court adopted a middle ground between these two extremes. The Court held that Subpart 2's classifications and attainment dates unquestionably applied at least in part to the revised ozone standard. *American Trucking*, slip op. at 22. On the other hand, the Court acknowledged that exclusive application of Subpart 2 to the revised NAAQS would create "gaps" in implementation. For example, Subpart 2's classification system "fails to classify areas whose ozone levels are greater than the new standard (and thus nonattaining) but less than the . . . old standard codified by Table 1." *Id.* at 23. In addition, "Subpart 2's method for calculating attainment dates–which is simply to count forward a certain number of years from November 15, 1990 . . . , depending on how far out of attainment the area started–seems to make no sense for areas that are classified under a new standard after November 15, 1990." *Id.* at 23-34.

The Court concluded that:

> 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.

Id. at 24 (emphasis added). These gaps, however, could not "be thought to render Subpart 2's carefully designed restrictions on EPA discretion utterly nugatory once a new standard has been promulgated." *Id.*

Thus, EPA's task after the Supreme Court's decision is to develop guidelines for implementing the revised ozone standard that integrate Subpart 1 and Subpart 2 without violating the restrictions that Subpart 2 places on EPA's discretion.

Open Questions

The Supreme Court's mandate leaves open a number of difficult questions. In many instances, EPA will need to answer these questions before states can know how to respond to nonattainment designations. Proceeding with designations before issuing implementation guidance therefore would place the states in an impossible position.

For example:

- Subpart 1 requires the submission of nonattainment plans within three years after an area is designated nonattainment. Will that requirement apply to an area that continues to be nonattainment for the one-hour standard? If so, what must be included in the SIP submission? The development of a SIP for a nonattainment areas is an arduous process, and three-years is none to long for its completion. EPA effectively would reduce this time period, if it promulgated designations before making implementation guidance available.

- What attainment deadlines will apply to an area that is nonattainment for both the one-hour and the eight-hour standard? As the Supreme Court noted, if Los Angeles had been designated nonattainment for the eight-hour standard in 2000, its deadline for attaining both the one-hour and the more stringent eight-hour standard would have been the same: 2010. Depending on how EPA reconciles Subparts 1 and 2, promulgating designations this year could give Los Angeles only until 2011, one year after its Subpart 2 deadline, to attain the eight-hour NAAQS. Would this be consistent with the limits placed on EPA's discretion by Subpart 2?

- The problem of potentially conflicting deadlines is not limited to Los Angeles. Areas that fail to attain by the Subpart 2 deadline are subject to reclassification and the extension of attainment dates to as late as 2007. 42 U.S.C. § 7511(a)(1), (b)(2). Subpart 2 also establishes specific requirements that apply to these areas if they fail to attain by the extended deadline. *Id.* § 7511(b)(4). How will EPA reconcile the potentially conflicting requirements of Subpart 1 and 2 as they apply to these areas?

- How will newly designated nonattainment areas comply with transportation conformity requirements? EPA developed a preliminary proposal for resolving some of the problems that rural areas would face when confronted for the first time with meeting transportation conformity requirements and stated that the agency would propose rule revisions in December 1998. *See* Memorandum from Kathryn Sargeant to Conformity Stakeholders, *New Staff Paper for Transportation Conformity in Transitional Ozone Areas* (July 28, 1993). No proposal, however, was ever issued, possibly because of the May 1999 decision in *American Trucking*.

- How will the requirements of Subpart 1 and 2 apply to areas, such as Phoenix, that have attained the one-hour standard but have not yet been formally redesignated to attainment status? Will EPA renew its approach of finding that the one-hour standard no longer applies to these areas? Or will the agency adopt some other method of making the transition from the one-hour standard to the eight-hour standard?

Conclusion

Proceeding with eight-hour nonattainment designations at this time will create enormous uncertainty for the states. EPA should at a minimum wait until it has published implementation guidance, before promulgating those designations.

JANE DEE HULL
GOVERNOR
STATE OF ARIZONA

June 4, 2001

Ms. Christine Todd Whitman, Administrator
United States Environmental Protection Agency Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Designation of Nonattainment Areas for Eight-Hour Ozone National Ambient Air Quality Standards (NAAQS)

Dear Ms. Whitman:

On January 19 of this year, Felicia Marcus, departing Regional Administrator for EPA Region IX, sent me a letter asking that I submit a recommendation on the eight-hour ozone nonattainment area boundary for the Phoenix area. At that time, the Supreme Court had not yet decided the appeal from the decision of the United States Court of Appeals for the D.C. Circuit holding that the standard had been adopted in violation of the non-delegation doctrine and that EPA could enforce the new eight-hour standard only "in conformity with" Title I, Part D, Subpart 2 of the Clean Air Act. I did not do so because I thought it would be premature to make a recommendation on nonattainment boundaries for a standard with such an uncertain future.

The Supreme Court has now ruled in favor of EPA on the non-delegation issue and has upheld the D.C. Circuit's (and EPA's) long-standing interpretation of the Clean Air Act as prohibiting the consideration of cost in setting national ambient air quality standards. At the same time, the Court has recognized that the D.C. Circuit was correct to recognize the limitations that Subpart 2 places on EPA's authority to implement the eight-hour standard.

After consulting with the Arizona Department of Environmental Quality on the implications of the Court's opinion, I am prepared to offer my recommendations on how to proceed with the designation process.

Arizona recommends that EPA delay making final a nonattainment designation for the Phoenix area until two necessary prerequisites -- one national and one local -- are completed:

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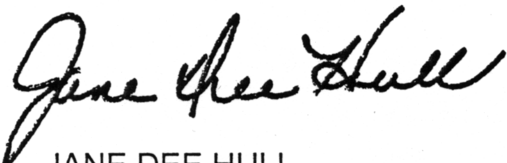
1. EPA develops implementation guidance consistent with the Supreme Court's admonishment that enforcement of the eight-hour standard must be consistent with the timetables and requirements established in Subpart 2. As discussed in greater detail in the attached memorandum from the Arizona Department of Environmental Quality (ADEQ), proceeding with designations before EPA develops this guidance is unnecessary under legislation passed by Congress in the Transportation Equity Act for the 21st Century ("TEA-21") and in last year's Appropriations Act for the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies (including EPA). Moreover, an unduly precipitous designation will place the states in the untenable position of possibly being subject to nonattainment area requirements before they know what those requirements are.

2. Additional monitoring is undertaken to define the full extent of nonattainment of the eight-hour ozone standard in the Phoenix area. The current monitoring network was designed for the one-hour standard. The eight-hour nonattainment problem appears to be much more widespread, but because of the limitations on the current network, we do not know how widespread it is. Until we have better information, we will not be able to give an intelligent response to EPA's request for a boundary recommendation.

I believe this is the only workable approach to implementing the 8-hour NAAQS in the Phoenix area and hope you will give it serious consideration. I would welcome the opportunity to discuss this issue with you and your staff, as would ADEQ management.

Sincerely,



JANE DEE HULL
Governor

cc: Laura Yoshii, Acting Administrator, EPA Region IX
Jacqueline Schafer, Director, Arizona Department of Environmental Quality
Mary Peters, Director, Arizona Department of Transportation