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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 10 2005

OFFICE OF THE
ADMINISTRATOR

Mr. David Baron
Earthjustice
1625 Massachusetts Avenue, N.W., Suite 702
Washington, D.C. 20036

Dear Mr. Baron:

On June 29, 2004, you filed a Petition for Reconsideration of our Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard – Phase 1 (“Petition”). The Petition was filed on behalf of American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, Conservation Law Foundation, and Southern Alliance for Clean Energy (collectively referred to as “American Lung Association”). On September 23, 2004, we granted reconsideration of three of the issues raised in your petition (I.A. regarding New Source Review; I.C. regarding section 185 fees; and III.B. regarding the timing for determining applicable requirements). By this letter, we are denying your Petition as to the issues regarding Reformulated Gasoline and Future Nonattainment of Areas Initially Designated Attainment for the 8-Hour NAAQS. We are granting reconsideration of the issue regarding the Overwhelming Transport Classification. The basis for these actions is set forth below.

Reformulated Gasoline (RFG)

In Section I.B of the Petition, American Lung Association interprets the Phase 1 Rule to determine that RFG is not an applicable requirement and that it does not remain in effect after the 1-hour ozone NAAQS is revoked. American Lung Association states that this is a change from our proposed rule and draft regulatory text which identified RFG as an applicable requirement under subpart 2 of the Clean Air Act (CAA). We are denying this portion of your request for reconsideration because it is a misinterpretation of the Phase 1 Rule. We clearly stated that we were deferring action on the applicability of RFG and would address it in the future; thus our final rule did not conclude that RFG would not remain in effect after the 1-hour NAAQS is revoked.

In our Phase 1 Rule we clarified that RFG is required under Title II of the CAA and is administered by EPA. The CAA mandates that certain areas are subject to the RFG program and allows States to request that it apply in other areas (i.e., the States may request to “opt-in” to the program). Thus, RFG differs significantly from the other programs on the list of applicable requirements, which are required to be developed and adopted by States for inclusion in the state implementation plan (SIP). In the Phase 1 Rule, we recognized that the RFG program raises

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various issues regarding the scope and applicability of the program during and after implementation of the 8-hour ozone NAAQS and that these issues need further clarification. Consequently, we stated that we are still considering how to address the continued applicability of RFG and that we would provide our views in an action separate from the April 2004 final rule. Thus, while it is correct that we did not include RFG in the list of applicable requirements under subpart 2 in the Phase 1 Rule, it is incorrect that by doing so we concluded that RFG will no longer apply after the 1-hour standard is revoked.

Future Nonattainment of Areas Initially Designated Attainment for the 8-Hour NAAQS

In Section III.A of the Petition, American Lung Association interprets section 51.905(a)(3)(ii)(B) of EPA's final rule as constraining EPA's authority to redesignate an attainment area to nonattainment if the area violates the 8-hour ozone standard in the future. In addition, American Lung Association claims that this provision was not proposed as part of the June 2003 proposal nor was it part of the draft regulatory text made publicly available in August 2003. We are denying this portion of your request for reconsideration because it is based on a misinterpretation of the rule. Furthermore, this provision of the final rule is consistent with the preamble text in the June 2003 proposal and with the draft regulatory text made available for comment in August 2003.

We believe that you are misconstruing the regulatory provision at issue. This provision does not address what action EPA may take in the future regarding redesignation of an area for purposes of the 8-hour standard. Rather it is part of a larger section (section 51.905(a)) addressing which requirements that applied to an area for purposes of the 1-hour standard continue to apply after the 1-hour standard is revoked (i.e., one year following the effective date of the designation for the area). This section does not explicitly or implicitly constrain EPA's authority to redesignate an area from attainment to nonattainment for the 8-hour standard if there is a future violation of the 8-hour standard. A determination of whether to redesignate an area from attainment to nonattainment would be based on the criteria in section 107(d)(3)(A).

Subsection 51.905(a)(3) applies to areas that were designated nonattainment for the 1-hour standard as of the effective date of the area's 8-hour designation and that were designated attainment for the 8-hour standard in the April 30, 2004 Designation Rule.¹ The sole purpose of section 51.905(a)(3)(ii) is to address what happens with respect to any outstanding 1-hour

¹The list of areas that were designated nonattainment for the 1-hour standard as of the effective date of the area's 8-hour designation and that were designated attainment for the 8-hour standard in the April 30, 2004 Designation Rule includes: Cheshire County, NH, Salem, OR, Crawford County, PA, Juniata County, PA, Lawrence County, PA, Northumberland County, PA, Pike County, PA, Schuylkill County, PA, Snyder County, PA, Susquehanna County, PA, Warren County, PA, Wayne County, PA, Sunland Park, NM, Reno, NV, Smyth County (White Top Mountain), VA, and El Paso, TX. (69 FR 23858, April 30, 2004).

attainment demonstration or rate-of-progress ("ROP") plans that these areas may have. The regulation provides that the area's obligation to address any outstanding attainment demonstration or ROP plan is linked to two criteria: whether the area violates the 8-hour standard at a future date and whether the area has an approved 8-hour maintenance plan as required under section 51.905(a)(3)(iii) at the time of the violation.² If the area has an approved 8-hour maintenance plan, then the area no longer has an obligation to address the outstanding 1-hour attainment demonstration or ROP plan (51.905(a)(3)(ii)(A)(2)). However, if the area does not have an approved 8-hour maintenance plan, then the area is required to address any outstanding ROP emission reductions (51.905(a)(3)(ii)(B)(3)) and is given two options for addressing the outstanding attainment demonstration (51.905(a)(3)(ii)(B)(1)). First, the area could adopt and submit a "modeled" maintenance plan for the 8-hour NAAQS. Alternatively, the area could submit a SIP achieving a 3% increment of progress from the area's 2002 emissions baseline.

While the selected options for the outstanding attainment demonstration vary somewhat from what was proposed, the adopted approach fits within the parameters of what was considered at the time of proposal and throughout the rulemaking process. In the proposed rule, we proposed that the attainment demonstration and ROP plans requirements would not continue to apply for so long as the area remains in compliance with the 8-hour NAAQS (68 FR at 32823). We also proposed that if the area violates the 8-hour standard prior to having an approved maintenance plan, then the outstanding 1-hour attainment demonstration and ROP plan requirements would once again apply. The draft regulatory text provided that such an area would be required to submit a 10 percent increment of progress in lieu of the outstanding 1-hour attainment demonstration and would be required to submit any outstanding ROP emission reductions. Thus, the overall approach we adopted in the final rule is consistent with the proposal.

Overwhelming Transport Classification

In Section III.C of the Petition, American Lung Association states that the Phase 1 Rule relies on guidance that was not publicly available during the comment period, that the guidance is still unavailable and that the final language in section 51.904(a) is not a logical outgrowth of the proposal. In the preamble to the Phase 1 Rule, we stated that we are revising the overwhelming transport guidance. Our proposed implementation rule did include special treatment for subpart 1 "overwhelming transport areas" for purposes of implementing the 8-hour standard; however, we stated in the Phase 1 Rule that we are considering the comments received on the issue of applicable requirements for areas that receive the overwhelming transport classification and that we would address those comments during our development of the revised overwhelming transport guidance.

² Under section 51.905(a)(3)(iii), these areas are required to submit a section 110(a)(1) maintenance plan for the 8-hour NAAQS no later than three years following the area's designation as attainment for the 8-hour standard.

