

US EPA ARCHIVE DOCUMENT

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IMPLEMENTATION  
OF THE 8-HOUR OZONE  
NATIONAL AMBIENT AIR QUALITY STANDARD -  
PHASE 1: RECONSIDERATION  
PUBLIC HEARING  
18 FEBRUARY 2005

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BEFORE: Tom Helms, U.S. EPA  
John Silvasi, U.S. EPA

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Held at: U.S. EPA - Research Triangle Park  
Room C114  
Research Triangle Park, North Carolina  
February 18, 2005  
Reported by: Susanne M. Newman,  
Court Reporter

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1 P R O C E E D I N G S

2 MR. HELMS: Good morning. Welcome to the  
3 public hearing on the reconsideration of the Phase 1  
4 ozone implementation. I'm Tom Helms. We welcome all  
5 of you to the hearing. I have with me today John  
6 Silvasi, who will assist on the hearing panel. John  
7 and I will be conducting the hearing.

8 We have a contractor managing logistics from  
9 E.H. Pechan. The staff present are Barbara Bauer and  
10 Kara Syversten. Susanne Newman is our court reporter.  
11 She will be taking a verbatim transcript of our session  
12 today. The transcript will be placed in the Docket  
13 No. OAR-2003-0079.

14 Let me give you some background today on the  
15 topics that we'll be discussing, the topics that you  
16 will be discussing. Back on April 30 of 2004, EPA  
17 published the final Phase 1 portion, the first part, if  
18 you will, of our 8-hour implementation rule. We  
19 received three petitions to reconsider several of these  
20 Phase 1 issues.

21 Then in September of last year, 2004, EPA  
22 granted reconsideration of three issues of the many  
23 that were in the Phase 1 rule. Two are the subject of  
24 this public hearing today. Then in January of 2005,  
25 EPA granted an additional reconsideration of the

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1 additional issue but that is not the subject of this  
2 public hearing today.

3 Let's review what Phase 1 of the 8-hour ozone  
4 implementation rule covered. In the way of background,  
5 there are four items I'd like to mention.  
6 Classifications for the 8-hour standard designations,  
7 that's the first topic. The second dealt with the  
8 revocation of the old 1-hour national ambient air  
9 quality standard for ozone and the associated  
10 anti-backsliding provisions of our rule. The third  
11 item dealt with attainment dates and attainment date  
12 extensions. And the fourth item dealt with the timing  
13 of emission reductions needed for attainment of this  
14 8-hour ozone national ambient air quality standard.

15 Our reconsideration proposal, what we'll be  
16 talking about today, was published on February 3 of  
17 this year. We have a public comment period open until  
18 March 21 of this year. And we will not, we do not plan  
19 on extending the public comment period or responding to  
20 all the comments on the issues that were not addressed  
21 in this proposal. We plan to take action on these  
22 issues today on or before May 20, 2005.

23 Again, let me remind you, the purpose of this  
24 public hearing is to take comments on four issues. Two  
25 of the issues were raised by the environmental group

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1 Earthjustice in their petition for reconsideration. At  
2 EPA, we are also proposing to revise the Phase 1  
3 implementation rule in two respects.

4 First, we proposed in our Phase 1 rule that the  
5 Section 185 fee provisions would not be triggered for  
6 the 1 hour, old 1-hour ozone standard once that  
7 standard is revoked, and the schedule for revocation is  
8 June of this year. The EPA also proposed to change the  
9 timing for determining what is an applicable  
10 requirement for the purposes of anti-backsliding from  
11 April 15 of 2004 or June 15, 2004. That's what we're  
12 taking comments on, because applicable requirements  
13 will derive or spin off that date.

14 Two items, additional items, now of the four,  
15 the last two items, we propose that the contingency  
16 measures for failure to make reasonable further  
17 progress or attain by the applicable attainment date  
18 for this old 1-hour standard are no longer required.  
19 You do not have to do them once the 8-hour standard is  
20 revoked. Finally, we propose to revise the definition  
21 of applicable requirement to include 1-hour attainment  
22 demonstration.

23 This overhead right here contains a detailed  
24 listing from our rule of the applicable requirements.  
25 I will not go through that other than to note there are

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1 many of them. The record will have a list of them, if  
2 you follow up on it. These are the applicable  
3 requirements that stand today.

4 Are there any questions? If there are no  
5 questions, we'll move to the first speaker. And we'll  
6 go off the record.

7 (A recess was held from 9:20 a.m. until  
8 9:33 a.m.)

9 MR. HELMS: Our first speaker is Howard  
10 Feldman representing the American Petroleum Institute.  
11 Howard, the floor is yours.

12 MR. FELDMAN: Thank you very much,  
13 Mr. Helms. Thank you for the opportunity to speak here  
14 today. My name is Howard J. Feldman. I'm here on  
15 behalf of the American Petroleum Institute. API is a  
16 national trade association representing all aspects of  
17 the oil and natural gas industry, including exploration  
18 and production, refining, marketing, pipeline, marine,  
19 and the associated industries. API members have  
20 invested a significant amount of money, billions of  
21 dollars, since the passage of the Clean Air Act of 1990  
22 to install and operate air emissions controls and to  
23 modify refineries to produce cleaner fuels.

24 API will be submitting written comments on each  
25 of the issues discussed in the February 3 Federal

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1 Register notice. In my remarks today, I will address  
2 two of those issues: The applicability of the  
3 Section 185 penalty provisions on the former 1-hour  
4 standard in nonattainment areas -- on former 1-hour  
5 nonattainment areas after that standard is revoked and  
6 secondly, contingency measures in SIPs for the 1-hour  
7 standard. On both issues, API supports EPA's  
8 positions.

9 As noted in our comments on the proposed 8-hour  
10 NAAQS implementation rule, API believes that  
11 Section 185 penalties should no longer apply to  
12 attainment of the 1-hour standard after that standard  
13 is revoked. At that point, states will be focusing  
14 their finite resources on attainment of the 8-hour  
15 standard. It makes no sense to carry over penalty  
16 provisions applicable to attainment of a standard that  
17 has been revoked and superceded by a more stringent  
18 standard.

19 The 8-hour ozone NAAQS has been upheld by the  
20 courts. It is time now to focus on the attainment of  
21 the standard. EPA promulgated the 8-hour standard  
22 because it believes it to be more productive -- more  
23 protective of human health and the environment than the  
24 1-hour standard. EPA's 8-hour implementation rule  
25 carefully continues to keep in place those 1-hour



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1 standard provisions that will help areas attain and  
2 maintain the 8-hour NAAQS while eliminating those that  
3 do not serve that purpose. The 8-hour implementation  
4 rule requires areas to submit new SIPs and demonstrate  
5 attainment with 8-hour NAAQS. Once the 1-hour standard  
6 is revoked in June of this year, EPA no longer will  
7 make findings of failure to attain the 1-hour standard  
8 or reclassify those areas to a higher nonattainment  
9 classification. Thus, it is appropriate that the 185  
10 no longer -- Section 185 no longer apply with regard to  
11 the 1-hour standard.

12 Further, as API indicated in its comments,  
13 effective strategies to attain the 1-hour standard may  
14 not be effective to -- as strategies to attain the  
15 8-hour standard. Areas need to be able to develop  
16 effective attainment strategies for meeting the 8-hour  
17 standard without having to consider whether these  
18 strategies may impede their ability to meet a revoked,  
19 less protective standard and result in penalties being  
20 assessed against major sources in their areas.

21 As API pointed out in its written comments on  
22 the proposed 8-hour implementation rule, attainability  
23 analyses done by API indicate that an effective  
24 strategy to attain the 1-hour standard may not be the  
25 most effective for attaining the 8-hour standard. For

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1 example, in the San Joaquin Valley, either reduction  
2 VOCs or No<sub>x</sub> or a combination of the two could  
3 theoretically bring Fresno into attainment for the  
4 1-hour standard. However, modeling indicates that for  
5 the 8-hour standard, the minimal benefits of VOC  
6 reductions are overwhelmed by the major benefits of NO<sub>x</sub>  
7 reductions. Thus, devoting resources to reducing VOCs  
8 in this case would be an effort that would not be  
9 productive and it would be -- and it would be, really,  
10 an effort to attain the 1-hour superseded standard.  
11 And it would be a misallocation of resources that would  
12 be better focused on expeditious attainment of the  
13 8-hour standard. This one hour or eight hour dichotomy  
14 is not unique for the San Joaquin Valley. It was  
15 observed in modeling for the eastern U.S. for some  
16 places, as well.

17 Finally, Section 185 would impose millions of  
18 dollars in penalties on the very same refineries and  
19 other major stationary sources that invested the most  
20 resources on the installation of control technology  
21 responsible for a significant part of the tremendous  
22 improvement in air quality nationwide since the passage  
23 of the Clean Air Act Amendments of 1990. Refineries  
24 not only have spent billions of dollars since 1990 to  
25 reduce their own emissions in an effort to attain the

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1 1-hour standard, they will spend more than 17 billion  
2 by 2012 to modify refinery processes to produce  
3 cleaner, lower sulfur fuels for use by cars, trucks,  
4 and nonroad engines in an effort to attain the 8-hour  
5 standard.

6           Regarding contingency measures, API agrees with  
7 EPA's proposed approach. Consistent with moving  
8 forward to implement the more stringent 8-hour NAAQS  
9 and eliminate provisions that are not directed as  
10 timely at -- not directed at timely attainment of the  
11 standard, contingency measures that were developed as  
12 part of the effort to attain and maintain the 1-hour  
13 standard should no longer be required once that  
14 standard has been revoked, as they will have been  
15 replaced by contingency measures designed to attain and  
16 maintain the more protective 8-hour NAAQS. And since  
17 EPA will no longer make findings that an area has  
18 failed to attain or maintain the superceded 1-hour  
19 standard, there's no reason to keep in place provisions  
20 that will be triggered only when such findings were  
21 made.

22           Thank you for this opportunity to testify on  
23 EPA's reconsideration of these important provisions of  
24 the 8-hour ozone implementation rule.

25           MR. HELMS: You will be sending, you will

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1 be sending additional comments in for the record?

2 MR. FELDMAN: Yes.

3 MR. HELMS: On all the issues or --

4 MR. FELDMAN: On all four.

5 MR. HELMS: All four, okay. We'll wait  
6 for those. Thank you, Howard. John, do you have any  
7 questions?

8 MR. SILVASI: No questions.

9 MR. HELMS: Thank you, Howard. We'll go  
10 off the record now.

11 (A recess was held from 9:39 a.m. until  
12 10:45 a.m.)

13 MR. HELMS: Our next speaker is Ted  
14 Michaels representing Integrated Waste Services  
15 Association. Ted, it's yours.

16 MR. MICHAELS: Good morning. Thank you  
17 for the opportunity to be here. My name is Ted  
18 Michaels, and I serve as president of Integrated Waste  
19 Services Association. IWSA is the national trade  
20 association representing the waste-to-energy industry.  
21 The waste-to-energy industry is made up of 89  
22 waste-to-energy facilities in 27 states that generate  
23 approximately 2800 megawatts of power, renewable  
24 energy, through combustion of nearly 30 million tons of  
25 municipal solid waste annually. This represents

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1 15 percent of the disposal capacity of municipal solid  
2 waste in the United States.

3 The municipalities and companies that comprise  
4 our association are proud of waste-to-energy's  
5 environmental track record. Through investments  
6 totaling \$1 billion, the waste-to-energy industry  
7 retrofitted its facilities to comply with the maximum  
8 achievable control technology standards for municipal  
9 waste combustors. The results achieved by these  
10 investments have been well-documented and highly  
11 praised.

12 I appreciate the opportunity to provide  
13 comments today on the reconsideration of the final rule  
14 to implement the 8-hour ozone national ambient air  
15 quality standard Phase 1. IWSA is concerned about the  
16 potential imposition of fees under Section 185 of the  
17 Clean Air Act. If not for the provisions of this rule,  
18 17 municipal waste combustors potentially would be  
19 subject to Section 185 fees for -- excuse me -- because  
20 they are located in nonattainment areas currently  
21 classified as severe or extreme under the 1-hour NAAQ  
22 standards.

23 In today's dollars, the municipalities and  
24 owners of these facilities, these 17 facilities, have a  
25 potential exposure of approximately \$25 million per

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1 year in Section 185 fees. The potential imposition of  
2 these fees has already had a chilling effect on plans  
3 to expand capacity of facilities. An example of this  
4 effect is Covanta Energy's Babylon facility on  
5 Long Island in New York. Long Island has severe waste  
6 disposal challenges and waste-to-energy plays a  
7 critical role. Despite its four waste-to-energy  
8 facilities, Long Island still sends fleets of garbage  
9 trucks onto already crowded highways every day for  
10 disposal at faraway sites.

11 To accommodate the local trash needs, Covanta  
12 has proposed to construct an additional unit at their  
13 Babylon facility, which would double the available  
14 disposal capacity annually. In order to generate  
15 enough offsets to expand this facility, Babylon will  
16 aggressively reduce emissions at existing units.  
17 Because Long Island is in severe nonattainment under  
18 the 1-hour ozone standard, this facility would have to  
19 reduce emissions by 20 percent from baseline under  
20 Section 185. The Babylon facility simply cannot reduce  
21 emissions another 20 percent beyond the reductions made  
22 to comply with MACT and beyond the reductions being  
23 proposed to offset the expansion of the facility. The  
24 risk and uncertainty associated with the provisions of  
25 Section 185 has forced Covanta to withhold its

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1 application to add the new unit.

2 IWSA was relieved when EPA promulgated the  
3 Phase 1 rule that terminated the Section 185 fees in  
4 conjunction with the revocation of the 1-hour NAAQS.  
5 We support EPA's conclusion that Section 185 fees for  
6 failure to attain the 1-hour NAAQS cannot be imposed  
7 once the 1-hour NAAQS have been revoked. EPA's  
8 position is consistent with a statutory trigger for the  
9 imposition of Section 185 fees as set forth in the  
10 Clean Air Act, Section 181(b)(4) and Section 185(a).  
11 If a NAAQS has been revoked, it follows that there  
12 cannot be failure to attain that NAAQS unless the  
13 deadline for attainment was prior to the date of  
14 revocation of the standards. Since attainment dates  
15 for severe-15, severe-17, and extreme nonattainment  
16 areas all occur after the date of revocation of the  
17 1-hour standard, it is logical that no fees can be  
18 imposed.

19 Opponents criticize EPA for tying the  
20 imposition of Section 185 fees to EPA's finding of  
21 nonattainment. Although Sections 185 and 181 do not  
22 use the term "finding," attainment designations are not  
23 self-effectuating. Congress expressly required that  
24 EPA determine whether an area has failed to attain a  
25 standard using a specific process. EPA's role in

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1 assessing failures to attain a standard is consistent  
2 with the Act's overall approach to nonattainment  
3 designations and classifications. Ultimately, EPA  
4 cannot make a finding of nonattainment for failure to  
5 meet a standard that has been revoked. Furthermore, if  
6 EPA is unable to make a determination of nonattainment,  
7 EPA is also unable to impose fees based on such  
8 nonattainment.

9 In addition, we believe that opponents are  
10 wrong when they contend that EPA's Section 185  
11 conclusion is inconsistent with requiring states to  
12 meet current 1-hour nonattainment obligations, such as  
13 submitting attainment designations. There is no  
14 inconsistency in EPA's position. In contrast to a  
15 state's existing obligation to submit a 1-hour  
16 attainment demonstration, states currently are under no  
17 obligation to impose Section 185 fees for failure to  
18 attain the 1-hour NAAQS, nor will they ever be  
19 obligated to do so because the NAAQS will be revoked  
20 before that obligation could ever be triggered.

21 The waste-to-energy industry is not a  
22 significant contributor to NO<sub>x</sub> emissions, as illustrated  
23 by EPA's estimate that our industry will emit less than  
24 0.7 percent of total NO<sub>x</sub> emissions in the CAIR region by  
25 2010. EPA recognized in the 1988 -- I'm sorry, 1998 NO<sub>x</sub>



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1 SIP call that municipal waste combustors should not be  
2 required to reduce emissions beyond levels already  
3 required by NAAQS -- by MACT for NO<sub>x</sub>.

4 If, following the reconsideration, EPA  
5 determines that states must impose Section 185 fees  
6 based on the 1-hour standard, IWSA believes that the  
7 baseline used to determine reductions must take into  
8 consideration the fact that municipal waste combustors  
9 have already implemented and are in compliance with  
10 MACT standards. We believe that it would be unfair to  
11 establish baseline emissions for the industry after it  
12 has implemented the maximum achievable control  
13 technologies. The result would be a decrease in the  
14 volume of waste being processed through our facilities  
15 at a time when our environmentally-friendly disposal  
16 services and our clean renewable energy are desperately  
17 needed.

18 For the reasons outlined in these comments, we  
19 respectfully urge EPA to finalize the 8-hour ozone  
20 national ambient air quality standard Phase 1 rule  
21 without the imposition of the Section 185 fees. Thank  
22 you very much.

23 MR. HELMS: John, do you have any  
24 questions?

25 MR. SILVASI: No. No questions.

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1 MR. HELMS: I have no questions for you,  
2 either. Thank you for coming.

3 MR. MICHAELS: Thank you very much for  
4 your time.

5 MR. HELMS: We will now recess the hearing  
6 until additional speakers arrive.

7 (A recess was held from 10:52 a.m. until  
8 2:02 p.m.)

9 MR. HELMS: Thank you, everyone, for  
10 attending. I want to remind you that there will be a  
11 public hearing transcript. Our court reporter will  
12 complete it. We will post it in the docket at Docket  
13 No. OAR-2003-0079. Are there any other questions?  
14 Hearing none, this concludes our public hearing. Thank  
15 you.

16 (The hearing concluded at 2:03 p.m.)  
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STATE OF NORTH CAROLINA

COUNTY OF DURHAM

C E R T I F I C A T E

I, Susanne M. Newman, Notary Public/  
Court Reporter, before whom the foregoing public  
hearing was conducted, do hereby certify that the  
witnesses' unsworn testimony which appears in the  
foregoing public hearing was taken down by me to the  
best of my ability and thereafter transcribed under my  
supervision and that I am neither counsel for nor  
employed by the agency conducting this hearing.

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Susanne M. Newman, Notary Public

My commission expires: September 24, 2005