Before the United States Environmental Protection Agency

Draft Regulatory Text for Proposed Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard,
68 Fed. Reg. 46536 (August 6, 2003), EPA Docket No. OAR 2003-0079

and

Proposed Rule For Implementation of the 8-Hour Ozone NAAQS
DRAFT REGULATORY TEXT
(July 31, 2003 version)

COMMENTS OF:

CLEAN AIR TASK FORCE
CONSERVATION LAW FOUNDATION
ENVIRONMENTAL DEFENSE
NATURAL RESOURCES DEFENSE COUNCIL
SOUTHERN ALLIANCE FOR CLEAN ENERGY
SOUTHERN ENVIRONMENTAL LAW CENTER
U.S. PUBLIC INTEREST RESEARCH GROUP

Submitted: September 5, 2003

Clean Air Task Force, Conservation Law Foundation, Environmental Defense, Natural Resources Defense Council, Southern Alliance for Clean Energy, Southern Environmental Law Center, and U.S. Public Interest Research Group submit these comments in response to the notice published at 68 Fed. Reg. 46536 (Aug. 6, 2003), and the draft rule text referenced in that notice.

The comments we filed on August 1 in response to 68 Fed. Reg. 32802 (June 2, 2003) demonstrated that EPA's approach to implementing the eight-hour ozone NAAQS violates the Clean Air Act, is arbitrary, and fails to follow proper procedures. Unfortunately, the regulatory text does not correct these flaws, but instead implements the flawed approach described in the June 2 notice -- in many cases going beyond it to add additional flaws. Moreover, EPA still has not offered a coherent proposal sufficient to permit informed public comment. *See* Introduction to proposed regulatory text at 1 ("The June 2 proposal set forth for comment several options for certain features or plan elements; the draft regulatory text below provides the regulatory text for only one of the options being proposed for each feature or element to demonstrate how the regulatory text would appear for that set of options. Selection of a particular option was generally based on the preferences stated in the June 2, 2003 proposal; however, this selection should not be interpreted as a decision by EPA to proceed with that option in final rulemaking, since comments are still being received on the June 2 proposal.") (emphasis added).

Our comments in response to the August 6 notice and rule text include both our August 1 comments, which are hereby incorporated by reference, and the present comments. As with our August 1 comments, we incorporate by reference all documents cited herein.

Applicable Requirements. EPA proposes to define "applicable requirements" as a list of ten items. *See* CAA § 51.900(f). This list does not purport to include all statutorily applicable requirements, and indeed omits some of the items included in the list published in the June 2 proposal. *See* Appendices A and B, 68 Fed. Reg. 32864-67.

Notably, Appendix A cautioned: "This is only an outline of the general requirements of subparts 1 and 2 and should not be relied on for regulatory purposes." 68 Fed. Reg. 32864. *A fortiori*, proposed regulatory text that includes fewer statutory requirements than this non-regulatory outline must not "be relied on for regulatory purposes."

As the Supreme Court made clear in *Whitman*, EPA lacks authority to shunt aside textually applicable provisions of the Clean Air Act. The proposal's attempt to do so is unlawful.

Among the provisions omitted from the list are the attainment demonstration requirements of CAA §§ 182(b)(1)(A) and 182(c)(2)(A). Those requirements, central to the Act's program to achieve health-based air quality standards, are textually applicable requirements that EPA lacks discretion to abrogate.[1]

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[1] In an apparent attempt to substitute for the attainment demonstration, the proposal provides for a 10% reduction in VOC and/or NOx to be achieved by 2007. § 51.905(a)(1)(ii). For reasons stated in the text and in our August 1 comments, EPA lacks authority to abrogate the statutory

Likewise omitted are the conformity requirements of CAA § 176(c) which apply to areas that are designated nonattainment for the pollutant ozone or that were designated nonattainment for ozone but that were later redesignated by the Administrator as an attainment areas. The omission of conformity requirements from the list of applicable requirements for any area that is designated as nonattainment or attainment (maintenance) for ozone pursuant to either NAAQS violates the Act. In further support hereof, we incorporate by reference applicable arguments filed in the litigation challenging EPA's initial revocation of the 1-hour ozone NAAQS. See attached briefs in D.C. Cir. No. 98-1363.

Definition of "Reasonable Further Progress." This definition (§ 51.900(o)) must make clear that the term "reasonable further progress" as used in CAA § 172(c)(2) is defined by CAA § 171(a), and that the term as used in CAA § 182(c)(2)(B) is subject to the NOx substitution provisions authorized by CAA § 182(c)(2)(C).

Subparts A-W. EPA proposes: "The provisions in subpart(s) A-W of part 51 apply to areas for purposes of the 8-hour NAAQS to the extent they are not inconsistent with the provisions of this subpart." § 51.901 (emphasis added). Subparts A through W contain a broad array of requirements governing the submission, review and approval of SIP revisions. The implication of this text is that EPA intends to exempt SIP revisions submitted to implement the 8-hour NAAQS from some provisions of these SIP-approval requirements. EPA's proposal falls far short of giving adequate notice concerning which of these requirements EPA proposes to amend, what the amended requirement would be, why such an amendment is needed, and whether the amendment is consistent with the Act. Thus, EPA has failed to offer up sufficient information to permit informed public comment.

The proposed rule text fails to give notice to the States and the affected public of the manner and extent to which their legal rights and duties would be affected by amending existing legal requirements. Without such notice and providing an opportunity to comment, EPA cannot later argue that specific requirements now in effect have been repealed or waived. *See, e.g.*, *Paralyzed Veterans v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to 'repeals' or 'amendments.'"; moreover, "[t]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements") (emphasis in original). Persons notified for the first time (by a future notice proposing action on a SIP) that the operation of §51.901 has eliminated the applicability of a regulation that appears on its face to apply to an EPA SIP decision, cannot be legally deprived of an opportunity to comment at that future time.

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attainment demonstration requirement in favor of an agency-devised alternative approach. Assuming *arguendo* that EPA does have authority to establish a surrogate for the attainment demonstration, however, that surrogate (in this case, the 10% emission reduction prescribed by § 51.905) would need to be in addition to the RFP percentage reductions prescribed by § 51.910. Any other approach would contravene the Act, which requires nonattainment area SIPs to provide both for attainment and RFP.

Furthermore, future judicial review, based on a record in which notice is provided that a facially applicable provision does not apply, cannot be barred by reliance on the regulatory language contained in § 51.901.

Moreover, because EPA has not offered any reasoned explanation that could justify such amendments (especially ones representing a change in course from previously applicable requirements), adoption of amendments that effectively repeal various regulatory provisions that EPA has found necessary to implement the SIP provisions of the Act since 1971 would be arbitrary and capricious. *See, e.g., Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983).

Finally, it bears emphasis that many of the Subpart A-W provisions implement statutory requirements -- such as those governing SIP content, submission, the adequacy of attainment demonstrations, enforceability of measures adopted to reduce emissions, the adequacy of motor vehicle emissions budgets, public participation at the state level, and EPA processing of submissions by a State. *See, e.g.*, CAA § 110 and Part D. EPA lacks authority to abrogate these requirements, and any regulation that purports to do so is unlawful.

EPA's Classification Scheme Violates the Clean Air Act. EPA's proposal regulates certain 8-hour ozone nonattainment areas under subpart 1 of the Act, and classifies and regulates others under subpart 2. As previously indicated in our August 1 comments, EPA is not authorized by the Act to avoid subpart 2 classification and regulatory requirements for nonattainment areas with design values below those on Table 1 as it appears on the statute.

EPA's proposed regulatory text, in § 51.902, provides some further detail about this aspect of the proposal, particularly with respect to the assignment of 8-hour nonattainment areas to subpart 1 regulation. Furthermore, the proposed regulatory text includes a procedure for "bump down" to lower subpart 2 classifications for areas that predict attainment within three years. The unlawfulness of that procedure as described in the June 2 notice (which we explain in our August 1 comments) is compounded by the language of the regulatory text. Each of these points is made in further detail below.

- **The Clean Air Act Precludes EPA from Relegating Ozone Nonattainment Areas to Subpart 1.** Proposed § 51.902 regulates areas under subpart 1 for the 8-hour standard if they have a design value for the 1-hour NAAQS less than 0.121 at the time of designation. As indicated in our August 1 comments, however, CAA § 181(a)(1) requires that "each" ozone nonattainment areas "shall" be classified under Subpart 2, not Subpart 1. *Accord*, CAA § 172(a)(1)(D) (Subpart 1's classification scheme "shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of [Part D]" of the Clean Air Act) (emphasis added).

- **The Clean Air Act Precludes EPA from Relegating Areas to Subpart 1, or Reclassifying Areas Downward Within Subpart 2, Based on Current Design Values**. The classification of an area designated nonattainment for ozone pursuant to CAA § 107(d) under the 1-hour standard was to be based on the design value "at the time of such designation." § 181(a)(1). The "time of designation" prescribed by CAA § 107(d)(4)(A)(i) and (ii) was 240

days after November 15, 1990. Areas that were designated at that time, or that were subsequently redesignated to nonattainment pursuant to CAA § 107(d)(3) acquired a classification based on the design value determined by EPA at the initial time of designation.

The Clean Air Act does not allow these areas to be relegated to regulation under Subpart 1, or reclassified to lower categories in Subpart 2, based on current design values. The first of these two approaches (i.e., regulation under Subpart 1) violates the Act for reasons already explained. Both approaches violate the Act for another reason as well. Specifically, the Act carefully defines the circumstances in which changes in the initial Subpart 2 classification may occur, *see* CAA §§ 181(a)(4) and 181(b), and further prescribes carefully circumscribed authority to redesignate an area to attainment. *See* CAA § 107(d)(3). In particular, an area may be redesignated to attainment for the pollutant ozone only if it satisfies the requirements of § 107(d)(3)(E) and 175A with respect to each ozone NAAQS in effect at the time of redesignation. EPA lacks authority to administratively amend the Act by inserting additional agency-created reclassification mechanisms.

Moreover, the proposed § 51.902(c) design value test would produce results that are anomalous and in conflict with § 182(a)(1)'s directive to eliminate unhealthful ozone as expeditiously as practicable. Under section 51.902, 1-hr nonattainment areas can abandon the more rigorous subpart 2 ozone controls that were required of them prior to the promulgation of the revised 8-hour ozone standard -- a standard based on the need for increased protection from ozone's adverse health effects.

Arguments further supporting this interpretation of the Act were made in the briefs filed in D.C. Cir. No.98-1363, which are appended to these comments and incorporated here by reference.

- **The Clean Air Act Precludes EPA from "Bumping Down" Area Classifications Based on Predictions of Near-Term Attainment.** We have already explained why EPA's proposal to "bump down" areas that predict attainment within three years is unlawful and arbitrary. August 1 Comments at 31-35. EPA's regulatory text retains the flaws of the approach described in the June 2 notice, and compounds them by stating: "In reclassifying an area under this paragraph, the Administrator will take into account the extent to which the area significantly contributes to nonattainment or interferes with maintenance in a downwind area." § 51.903(b). The reference to "tak[ing] into account" downwind impacts fails to specify how EPA will take them into account. For example, it fails to require (or indeed, to expressly authorize) EPA to deny bump-down, even where an area would have significant downwind impacts. Assuming *arguendo* EPA has authority to promulgate a bump-down provision, that provision could not lawfully be applied in situations where it would adversely affect downwind areas -- for example, by erasing upwind area control requirements addressing pollution that impacts downwind areas. *See, e.g.*, § 110(a)(2)(D).

Subpart 1 attainment dates. EPA's proposal contains this provision concerning areas the agency proposes to classify solely under Subpart 1: "For an area subject to section 51.902(b), the Administrator will approve an attainment date consistent with the attainment date timing provision of section 172(a)(2)(A) at the time the Administrator approves an attainment

demonstration for the area." § 51.904(b)(1) (emphasis added). As shown in our August 1 comments, EPA lacks authority to excuse eight-hour nonattainment areas from the requirements of Subpart 2. But even if that were not the case, the quoted sentence would be unlawful and arbitrary. Section 172(a)(2)(A) provides: "The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section [107(d)], except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures." (Emphasis added.) Thus, the Act prescribes an attainment deadline, measured from the nonattainment designation. While EPA has authority (upon meeting applicable requirements) to postpone that outer deadline for up to an additional five years, the agency lacks authority to treat the self-executing five-year statutory deadline as inapplicable to the state's development of the SIP in the first instance.

Moreover, the "as expeditiously as practicable" requirement of the Act requires that a state demonstrate attainment within the initial five-year period, or sooner. The authority to extend the attainment deadline is limited to an extension of the attainment date, and not the date for submission of a complete SIP revision that includes all the measures needed for "reasonable further progress" as defined in section 171(a) and to demonstrate attainment as expeditiously as practicable. This authority also does not allow exemptions from the requirement of CAA § 172(c)(1) that measures be implemented "as expeditiously as practicable." Thus all the measures necessary to demonstrate attainment must be submitted no later than the submission deadline established pursuant to CAA § 172(b).

The applicable statutory tests for granting an extension beyond five years require a showing that attainment cannot be achieved within the initial five-year period, "considering the severity of nonattainment and the availability and feasibility of pollution control measures." EPA has not provided any interpretation regarding how this provision will be applied. Commenters submit that the "as expeditiously as practicable" provision of the Act controls how this provision must be applied. To the extent that attainment can be achieved within the first five years by applying available or feasible measures, no extension can be granted. If EPA cannot identify sufficient available or feasible measures to provide for attainment, then attainment must achieved using measures that require technology-forcing, the shut-down of processes that can be replaced with clean alternatives, or source re-location. An extension of the 5-year deadline can be granted only if EPA concludes that new technology, innovative process substitutions, or source re-locations cannot be developed or implemented within the initial five-year deadline.

Moreover, CAA § 172(a)(2)(A) requires any extension beyond five years to be based on site-specific factors ("the severity of nonattainment and the availability and feasibility of pollution control measures") -- a requirement not met by a nationwide blanket regulation broadly preventing initial applicability of deadlines in numerous areas, without consideration of site-specific factors.

Furthermore, EPA must make clear that any state seeking an extension of the attainment date beyond the initial five-year period must demonstrate that all available and feasible measures will be implemented within the initial five-year period, and that only the schedules for implementation of those additional measures needed for attainment that cannot be developed and implemented during the initial five years may be extended. Such measures and schedules must be submitted with the initial SIP. States may revise the measures relied upon in their control strategies if they can satisfy the requirements of CAA § 110(l), but EPA cannot lawfully approve SIPs that rely upon enforceable commitments except in areas where the provisions of CAA § 182(e)(5) apply.

In addition to violating the Act, EPA's approach to setting attainment deadlines is arbitrary. EPA has not and could not offer a reasoned explanation for not letting states know upfront what each area's attainment deadline is, so that they have a target to work towards in their planning.

Erasing One-Hour Requirements in Eight-Hour Nonattainment Areas Based on Eight-Hour Ozone Classification. EPA's proposal concerning one-hour nonattainment areas that are also nonattainment under the eight-hour standard provides: "If the area has a classification for the 8-hour NAAQS that is the same as or higher than it had for the 1-hour standard, it must meet the requirements for the 8-hour classification." § 51.905(a)(1)(i). Initially, we note that this language appears in a section that presupposes revocation of the one-hour standard. For reasons stated in our August 1 comments, such revocation would be unlawful and arbitrary.

Even if that were not the case, the quoted language unlawfully and arbitrarily relieves areas of the obligation to meet one-hour requirements, based on the severity of their eight-hour classification. Whether or not the one-hour standard can be revoked, the textually applicable requirements of the Act -- including Subpart 2 -- cannot be revoked by EPA.

Moreover, the quoted language would allow major backsliding. Many of the one-hour SIP submission and implementation deadlines have expired, and indeed SIPs have been put in place pursuant to those requirements. In some areas, SIPs remain to be put in place to implement those expired deadlines. Allowing areas to restart the clock by shunting aside those statutory requirements and SIP provisions would effectively repeal the initial obligations imposed on the states, and slow efforts to achieve the emissions reductions needed for timely attainment of both ozone NAAQS. Such an outcome contravenes the statutory provisions establishing those requirements, and constitutes an anomalous and arbitrary approach to implementation of a revised NAAQS premised on the need for <u>greater</u> protection from ozone's effects.

Erasing One-Hour Requirements in Eight-Hour Nonattainment Areas Based on One-Hour Ozone Levels. EPA's proposal provides: "A State remains subject to the obligations under paragraphs (a)(1)(i), (a)(2), and (a)(3)(i) of this section until the area attains the level of the 1-hour NAAQS. After the area attains the level of the 1-hour NAAQS, the State may request such obligations be shifted to contingency measures, consistent with section 110(l) of the Act; however, the State cannot remove the obligations from the SIP." CAA § 51.905(b). First, the phrase "attains <u>the level</u> of the 1-hour NAAQS" raises questions concerning EPA's intent. Three

years of data are needed to determine whether an area's air quality meets the one-hour standard. Part 50, App. H. Thus, mere short-term occurrences of air quality at or below "the level" of the standard does not demonstrate air quality meeting the standard.

Second, even if an area does have three years of air quality data meeting the one-hour standard, EPA lacks authority to jettison the one-hour requirements. Those requirements are textually applicable, and also serve an important role in achieving compliance with the eight-hour standard. As EPA itself has recognized, areas meeting the one-hour standard may still have air quality violating the eight-hour standard.

Amending Conformity SIPs. EPA's proposal states: "Upon revocation of the 1-hour NAAQS for an area, conformity determinations pursuant to section 176(c) of the Act are no longer required for the 1-hour NAAQS. At that time, any provisions of applicable SIPs that require conformity determinations in such areas for the 1-hour NAAQS will no longer be enforceable pursuant to section 176(c)(5) of the Act." CAA § 51.905(e)(3) (emphasis added).

This provision relies upon a false reading of the Act. Conformity is not measured solely against a NAAQS. The Act requires conformity with a SIP. CAA § 176(c)(1), (c)(2). Revocation of a NAAQS does not revoke the SIP that was approved to implement the NAAQS. As long as the SIP contains estimates of motor vehicle emissions and required emissions reductions, then CAA § 176(c)(2)(A) requires that conformity determinations be based on those provisions of the SIP. EPA cannot amend a SIP. Only a State can amend its SIP if EPA approves a SIP revision "submitted by a State" pursuant to CAA § 110(l). EPA can promulgate a FIP, but only when one or more of the statutory triggering events specified in CAA § 110(c)(1) has occurred. EPA's proposal falls into neither of these categories, and is thus unlawful. See also the more extensive discussion of this issue in the August 1 comments.

Extensions of Attainment Deadlines. Concerning attainment date extensions, EPA's proposal states:

> For purposes of applying sections 172(a)(2)(C) and 181(a)(5) of the Act, an area will meet the requirement of section 172(a)(2)(C)(ii) or 181(a)(5)(B) of the Act pertaining to 1-year extensions of the attainment date if:
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> (a) for the first 1-year extension, the area's 4th highest daily 8-hour average in the attainment year is 0.084 ppm or less.
>
> (b) for the second 1-year extension, the area's 4th highest daily 8-hour value, averaged over both the original attainment year and the first extension year, is 0.084 ppm or less."

CAA § 51.907. In at least two ways, this formulation unlawfully relaxes the Act's required prerequisites for attainment date extensions. First, the Act bases the availability of an extension on the number of "exceedances." CAA § 181(a)(5) ("no more than 1 exceedance"); CAA § 172(a)(2)(C) ("a minimal number of exceedances"). EPA's proposal unlawfully shunts aside the statutory approach in favor of reliance on averages.

Second, even if an averaging approach were permissible for the first year, its use for the second year would be unlawful. Under the proposal, an area whose second-year air quality is too poor to allow an extension under the exceedance tests of CAA § 181(a)(5) or CAA § 171(a)(2)(C) could nonetheless obtain a second extension by averaging together those disqualifying results with more favorable results from the previous year. This approach violates CAA § 181(a)(5) and CAA § 171(a)(2)(C).

Attainment Demonstration Requirements. EPA requires that areas classified as serious and above must submit an attainment demonstration that satisfies the requirements of CAA § 182 which requires that "the plan, as revised, will provide for attainment of the ozone national ambient air quality standard by the applicable attainment date." This provision of the Act, together with CAA § 172(c)(1) and (6), CAA § 110 and EPA's SIP regulations in 40 C.F.R. §§ 51.111, 51.112 and 51.281, requires that the state where the nonattainment area is located must adopt and submit enforceable measures sufficient to provide for attainment by the submission deadline. This language has been relied upon by reviewing courts to reject EPA's downwind extension policy which EPA attempted to use as a basis for approving attainment demonstration SIPs that would not achieve emissions reductions sufficient to provide for attainment based upon the notion that EPA could allow those states to rely on future emissions reductions from sources in upwind states. It is clear from these cases, that EPA may not allow states to avoid their obligation to adopt SIPs containing all the measures needed for attainment prior to the attainment date. This must be made clear in EPA's attainment guidance and the regulation.

EPA has also recently released modeling results showing that most nonattainment areas of the US will not attain based on the implementation of measures required by national rules governing motor vehicle emissions, non-road emissions and stationary source reductions required by the NOx SIP call. See attached EPA OAQPS presentation showing "Local vs Upwind Contribution to Residual Ozone Nonattainment (ppb)." EPA, The Interstate Transport Rule Update for Government Partners 21-22 (July 29, 2003). These results of national modeling runs also demonstrate that a large number of areas will either not be able to demonstrate attainment in a SIP that contains only local controls because even reducing local emissions to zero cannot demonstrate attainment (e.g., New Haven and Middlesex CT, Ocean NJ), or that extremely large reductions in local emissions would be necessary to attain (e.g., Fairfield CT, Middlesex, Gloucester, and Camden NJ).

Knowing that some areas will not be able to demonstrate attainment based upon SIPs adopted pursuant to CAA § 182, EPA must make it clear to the States that if they intend to rely upon out-of-state controls to demonstrate attainment, they must include the emissions reductions they believe are necessary for attainment in the modeling analyses they submit as part of their attainment demonstration, and include a petition pursuant to CAA § 126 and CAA § 110(a)(2)(D) as part of their SIP submission. To rely on the emissions reductions requested in such a petition, the State must identify the sources to be controlled, the extent of the emissions reduction needed to attain based on the modeling analyses submitted with the attainment demonstration, and a request that the needed reductions be required pursuant to CAA § 126 and CAA § 110(a)(2)(D) no later than the applicable attainment date. EPA must be clear with the States that EPA will not be able to approve SIP revisions that rely upon out-of-state controls if

the State fails to submit a demonstration that shows the out-of-state sources to be controlled and requests timely action by EPA to require the needed reductions.

It is important that downwind states also do their part to reduce emissions. Congress partially addressed this question of equitable allocation of control obligations by requiring that areas subject to CAA § 182 achieve "at least 3%" annual reductions pursuant to CAA § 182(c)(2)(B). States should be held to this requirement, which must apply in all ozone nonattainment areas pursuant to Subpart 2. Of course, in addition to petitioning upwind states, downwind states also must apply local controls to achieve additional annual reductions where necessary to secure local ozone attainment.

Modeling guidance. In CAA § 51.908(d) EPA proposes to require that modeling analyses "shall be consistent with Appendix W of this part and EPA's most recent modeling guidance at the time the modeled attainment demonstration is performed." Appendix W has been adopted by notice and comment rulemaking, but EPA's unspecified guidance has not. This rule purports to make legally binding guidance that EPA has issued prior to this notice and future guidance that has yet to be issued. EPA cannot legally bind the states or the public to guidance that is not identified or specified in the rule. In the preamble, EPA stated that it has announced draft modeling guidance for demonstrating attainment of the 8-hour NAAQS, but that comment was not being requested at this time. EPA stated that comments on the modeling guidance would be accepted until final guidance is issued. The draft guidance for ozone modeling identified in the preamble is also cited in a footnote to the Appendix W promulgated on April 15, 2003. Based on these notices and the fact that more specific requirements have not been included in this proposed rule text, commenters understand that they will have a further opportunity to comment of the appropriateness of the provisions in the modeling guidance.

As a general matter, we object to procedures that minimize the role of photochemical grid modeling in the attainment demonstration. Congress required that the attainment demonstration must be based on "photochemical grid modeling" or any other analytical method determined by the Administrator "to be at least as effective." CAA § 182(c)(2)(A). The draft guidance referenced in the preamble allows attainment to be demonstrated based upon the use of the relative reduction factor ("RRF") analysis which is not itself a photochemical grid model. This appears to conflict with Part 51, Appendix W, which states that:

> Models for ozone are needed primarily to guide choice of strategies to correct an observed ozone problem in an area not attaining the NAAQS for ozone. Use of photochemical grid models is the recommended means for identifying strategies needed to correct high ozone concentrations in such areas. ¶ 6.1(c).

EPA has made no determination that the RRF method is at least as effective as a photochemical grid model for establishing a relationship between emissions and ambient ozone concentrations. Indeed, EPA has performed no studies to verify the RRF method. While EPA's modeling guidance requires that grid models be validated against actual ambient air quality data in the field, no such validation has been undertaken for the RRF method. Until EPA can demonstrate that the method is as statistically robust, and as sensitive to the key variables that contribute to

ozone formation as the photochemical grid model, EPA may not substitute RRF for a modeling analysis that complies with EPA's guidance for applying a photochemical grid model.

Commenters will provide additional comments on the draft guidance at a later date.

Delayed Implementation of Attainment Measures. EPA's proposal provides: "For each nonattainment area, the State must provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season." CAA § 51.908(e) (emphasis added). Attainment of the eight-hour standard is based on analysis of three years of data. Part 51, App. I ¶ 2.3(a) ("The primary and secondary ozone ambient air quality standards are met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm.") (emphasis added). Thus, to meet the statutory requirement that SIPs provide for attainment,[2] the rule must require SIPs to provide for implementation of all control measures needed for attainment no later than three years before the attainment date.

Erasing RFP, RACT and RACM. Several portions of EPA's proposal provide that, in order to comply with RFP, RACT and RACM, a SIP need only show that it will provide for attainment by the attainment date. *See, e.g.*, §§ 51.910(b)(1), 51.910(b)(2)(i), 51.912(c), 51.912(d). Under this approach, however, the statutory RFP, RACT and RACM provisions add nothing to the statutory attainment mandate -- an approach that violates basic canons of statutory interpretation. Indeed, the attainment mandate appeared in the 1970 Act, but Congress decided -- based on the inadequacy of that mandate standing alone -- to enact 1977 and 1990 amendments adding additional requirements (including RFP, RACT and RACM) to increase specificity and ensure more aggressive action in the early years -- thus precluding the discredited approach of backloading reductions in the late years near the attainment deadline.

In addition to ensuring an early start on reductions needed to attain, RFP, RACT and RACM also help reduce the public's exposure to health-threatening pollution during the years preceding attainment. *See* CAA § 176(c)(1) (SIPs are designed *inter alia* to "reduc[e] the severity and number of violations" of the NAAQS). By erasing these requirements, EPA contravenes that aspect of the Act as well.

Section 51.910(a) establishes provisions requiring moderate areas to adopt measures sufficient to attain in the first six years after the baseline year, and for serious and severe areas to achieve a 3% annual reduction averaged over the six year period, followed by 3% annual reductions averaged over each 3 year period thereafter until the attainment date. The rule incorrectly interprets the Act as requiring reductions to be averaged over the first six years. The Act requires "such specific annual reductions in emissions of volatile organic compounds and oxides of nitrogen as necessary to attain the [NAAQS]." CAA § 182(b)(1). The rule should be revised to require annual reductions and not allow all reductions to be postponed until the attainment date or the sixth year.

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[2] CAA §§ 182(b)(1)(A)(i), 182(c)(2)(A), 172(c)(1).

The provisions of CAA § 182(c)(2)(B) require reductions of "at least 3%." The legislative history confirms that this provision extends the requirement of CAA § 182(b)(1) for annual emissions reductions sufficient to attain, except that reductions could not be less than 3% per year. This regulation should therefore require that serious and above areas determine the annual rate of progress needed for attainment, and if greater than 3%, adopt measures sufficient to achieve the annual reductions that would lead to attainment no later than the applicable attainment date.

EPA also does not specify in § 51.910(a)(4) that in areas where the 3% annual reduction is required, those reductions must be achieved within the statutorily defined baseline "area." CAA § 182(b)(1)(B). EPA issued initial NOx substitution guidance in 1993 that required RFP reductions to be achieved from sources within the designated nonattainment area. Subsequently, EPA attempted to unlawfully allow RFP reductions to be obtained from sources within the modeling domain. EPA must clarify that the Act requires creditable reductions to be obtained only from sources within the designated nonattainment areas.

EPA must not allow emissions reduction credit for all emissions reductions occurring after the baseline year. Emissions reductions to satisfy the RFP requirements of CAA §§ 182(b)(1) and 182(c)(2)(B) are required to be achieved by submitting "a revision to the applicable implementation plan to provide for…emissions reductions." Emissions reductions already required by, or accounted for in, the applicable implementation plan may not be credited toward the new RFP requirements. For example, reductions that were required to be achieved by SIP or other requirements, but which were not achieved in practice prior to the baseline year, should not be credited toward meeting the new RFP reductions required after the baseline year. Only new measures submitted with the new SIP revision may be credited for this purpose.

Revision of control obligations approved into SIP: Proposed section 51.905(d) purports to allow relaxation of SIP requirements "consistent with sections 110(l) and 193 of the Clean Air Act if such requirement is not addressed for that area under paragraph (a) of this section." As discussed in our prior comments, EPA cannot lawfully authorize relaxation of SIP commitments in this manner – either for 1-hour or 8-hour nonattainment areas. The agency has no authority to allow SIP revisions that result in failure of the SIP to comply with express requirements of the Act, whether or not the revision also interferes with requirements relating to attainment and RFP.

NSR Transition. In its August 6 notice of availability, EPA states that "[i]n the draft regulatory text, we are not yet addressing the options concerning new source review, *i.e.*, the transitional program and the Clean Air Development Communities program." 68 Fed. Reg. at 46536/2. As the comments we submitted on August 1 make clear, any action promulgating the transitional provisions or the Clean Air Development Communities ("CADC") provisions described in EPA's June 2 notice of proposed rulemaking would violate the Clean Air Act and would be arbitrary and capricious. Accordingly, we urge EPA not to proceed further with rulemaking on such provisions.

If EPA nevertheless does decide to proceed, an opportunity for notice and comment prior to promulgation will be required as a matter of law. The opening paragraph of EPA's August 6

notice seems to indicate that if the agency adopts "approaches other than those reflected by the draft regulatory text," it will do so only after "notice and comment." *Id.* at 46536/1. Consistent with that indication, the introduction and fact sheet that EPA released on July 31 along with a pre-publication copy of the proposed regulatory text both state that, "[f]or the Clean Air Development Communities program, EPA wants to review comments on the June 2 proposal before crafting a more specific supplemental *proposal* and regulatory text." Introduction to Proposed Rule for Implementation of the 8-Hour Ozone NAAQS Draft Regulatory Text ("Introduction") and Fact Sheet, June 31, 2003, published at http://www.epa.gov/ttn /naaqs/ozone/o3imp8hr/proprule.html (emphasis added). With respect to the transitional program, however, the Introduction declares that "[o]nce EPA decides among the various options we will provide regulatory language and, *if necessary*, a supplemental proposal." Introduction at 2. This statement implies that EPA might promulgate regulatory text effectuating some version of a transitional program without first subjecting that language to notice and public comment. Such an approach would be unlawful. EPA has not yet even provided rule text embodying these provisions.

Moreover, EPA's description, in the Introduction, of the three options that it says it is now considering for a transitional program confirms that notice and comment would be required before promulgating any of them. In particular, to the extent the outlines of those options are even visible in the three short, cryptic paragraphs describing them in the Introduction, the options do not appear to be logical outgrowths of the transitional program that EPA described in the June 2 Notice.

Under "Option 1," EPA states that it might "[r]evise the Offset Interpretative Ruling (40 CFR Part 51, appendix S) by either (1) modifying section VI of this appendix or (2) including the appropriate language in a major rewrite of this appendix." Introduction at 1. A "major rewrite" of Appendix S would not be a logical outgrowth of the June 2 notice, which indicated the agency's intention to make two revisions only. *See* 68 Fed. Reg. at 32848/1-2 (proposing to replace a "general exemption" with "the transitional approach" and "revise the language of section VI to apply only in areas qualifying for the transitional NSR program").

Under Option 2, EPA declares that it might promulgate federal nonattainment NSR regulations that would apply to any 8-hour nonattainment area not expressly subjected to state nonattainment NSR regulations. Introduction at 1. This approach differs fundamentally from the approach announced in the June 2 notice (which, as indicated above, involved amendments to Appendix S), and indeed would obviate Appendix S altogether. Moreover, while the transitional program that EPA proposed on June 2 would not apply in any area for more than six months,[3] the program described in Option 2 apparently would apply for as long as the area remained uncovered by state nonattainment NSR regulations – a period that could last indefinitely. Under no stretch of the imagination, then, could Option 2 be perceived as a logical outgrowth of the transitional program described in the June 2 notice.

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[3] "A state may continue implementing transitional NSR under appendix S, section VI for six months following submission of its attainment plan, or until its attainment plan is approved, whichever is earlier." 68 Fed. Reg. at 32848/1.

The paragraph that describes Option 2 ends with EPA's assertion that such a rule "could also be used in areas that fail to amend their existing nonattainment NSR rules to conform to the December 31, 2002 rulemaking." Introduction at 2. EPA believes, in other words, that it could use Option 2 as a means of imposing its weakened NSR rules on states whose existing, approved NSR regulations are more protective of air quality, public health, and the environment. Such action by EPA would violate the Clean Air Act's 'no backsliding' provisions, and its preservation of State authority to regulate more protectively. *See, e.g.*, CAA §§ 193 ("No control requirement in effect . . . before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions for such pollutant."), 116. If the agency promulgated Option 2 prior to 2006, the action would also arbitrarily and capriciously renege on EPA's promise -- embodied in the regulations promulgated last December -- to give states with approved NSR programs three years to revise their SIPs to accord with the new, weaker federal NSR rules. *See* 67 Fed. Reg. 80186, 80240/3-41/1 (December 31, 2002); *id.* at 80260/1 (40 C.F.R. § 51.166(a)(6)(i)).

Finally, under "Option 3," EPA states that it might "[u]se the PSD federal program by revising 40 CFR part 52.21 so that it applies in newly designated nonattainment areas." Introduction at 2. Such a rule would not be a logical outgrowth of the June 2 proposal for the same reasons that Option 2 would not be. More importantly, Option 3 would blatantly violate several Clean Air Act provisions. For example, it would violate the mandate that the ozone nonattainment provisions apply in an area as soon as it is designated nonattainment under an ozone standard, CAA § 181(b)(1), and the prohibition against backsliding. CAA § 193. Also, it would flout the Congressional intent manifest in section 172(e) of the Act, discussed at pages 75-76 of our August 1 comments.

APPENDIX: Contact Information for the Organizations Submitting These Comments

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