

DC COURT OF APPEALS INVALIDATED MAJOR SECTIONS OF U.S. EPA OZONE STANDARD

On December 22, 2006, the Court of Appeals for the District of Columbia invalidated major sections of U.S. EPA's 2004 rule governing the transition from a 1-hour to an 8-hour ozone standard. In particular, the Court held that the anti-backsliding provisions of Section 172(e) apply and that traditional ozone non-attainment programs (such as new source review, rate of progress milestones, transportation and contingency plans) all are controls that are required to remain in place. The Court's decision will likely result in a significant change in the regulation of ozone precursors in ozone non-attainment areas and may put back in place many of the burdensome restrictions imposed under the 1990 Amendments to the Clean Air Act.

Background

During the late 1990s, U.S. EPA reassessed the national ambient air quality standard for ozone. For years, the ambient attainment level was set at 0.12 ppm ozone averaged over one hour. A review of the scientific information showed that a standard based on an 8-hour average was preferred from a health perspective. Converting the 1-hour standard to an 8-hour value resulted in a value of 0.09 ppm ozone. However, U.S. EPA decided to set the level at 0.08 ppm, thus making the 8-hour standard more stringent than the prior 1-hour standard.

U.S. EPA's change to an 8-hour ozone standard led to issues over the application of the stringent ozone requirements of the 1990 Clean Air Act Amendments (which were based on the prior 1-hour approach). In 2004, U.S. EPA sought to resolve the issue by promulgating a rule phasing out the old 1-hour standard and its accompanying requirements over a 1-year period. Various interest groups challenged U.S. EPA, and it was the issue raised in these challenges which became the central focus of the Court's decision.

Key Points of the Decision

The holding of the D.C. Circuit continued the Court's approach of looking to the specific statutory language adopted by Congress and rejecting any U.S. EPA's interpretations that differ from that language. Here, the Court vacated key portions of the 2004 ozone rule based on:

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- (1) specific Congressional mandates imposed in the 1990 Clean Air Act Amendments that require specific programs be implemented in ozone non-attainment areas; and
- (2) the anti-backsliding provision of Section 172(e) of the Clean Air Act.

With respect to the 1990 Congressional mandates, the Court held that these provisions could not be ignored by U.S. EPA. Rather, the mandates still applied to any area that did not meet 0.09 ppm ozone – the 8-hour equivalent of the old 1-hour standard. For these areas, all of the applicable 1990 Congressional mandates must be enforced, and as such, U.S. EPA did not have the discretion to issue a rule that permitted the removal of these provisions from a state's State Implementation Plan ("SIP").

As to anti-backsliding, the Court rejected U.S. EPA's approach of only applying the anti-backsliding requirements to what U.S. EPA defined as "mandatory control measures that can be quantified and relied on in . . . modeling . . ." Instead, the Court held that the word "control," as set forth in Section 172(e), means "something designed to constrain ozone" and includes programs such as new source review, rate of progress milestones, transportation planning and contingency measures. Thus, the Court held that U.S. EPA violated the anti-backsliding provisions when it allowed states to remove these requirements from the SIP.

Implications of the Court's Ruling

Reinstating the prior ozone requirements and programs such as new source review is likely to raise significant issues. For example, what is the effect of ruling on decisions, including permitting determinations, made by states under the now vacated 2004 U.S. EPA rule? How will states account for "1-hour" offset credits that may have been held by a facility prior to the transition to the 8-hour requirement and where will offsets come from for future projects going through the permitting system? In addition, the Court's holding that the new source review rules are "controls" under the anti-backsliding provisions raises other potential issues with respect to the implementation of U.S. EPA's new source review reforms in non-attainment areas.

It is likely that these and many other issues resulting from the Court's ruling will take time to address. U.S. EPA indicated it may issue guidance by March 2007, but with the signing of Executive Order 12866 (January 18, 2007), it is likely that any direction from U.S. EPA will be delayed. In the meantime, it will be important to make sure any ongoing permitting activities (such as those that may have required offsets in the past) are carefully reviewed and take into account the Court's decision, in order to avoid subsequent legal challenges and potential rejection of the project.

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