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The 2005 Clean Air Act Severe Ozone Nonattainment Deadline: A Prime Opportunity to Realize the Goals of the Clean Air Act

by Ami M. Grace

I. Introduction

The Clean Air Act (CAA) has been appropriately heralded as one of the greatest environmental laws ever established.[1] The intractable problem of ozone pollution, however, continues to affect nearly one-half of all Americans. Critics of recent clean air programs contend that a child in first grade today will continue to suffer health effects due to inadequately controlled ozone pollution throughout the child's high school career. As the 2005 statutory deadline for ozone severe nonattainment areas approaches, now is the opportune time to posit the fate of such deadlines as well as the fate of millions of Americans suffering from respiratory problems and other ailments due to elevated ozone levels.

In 1970, the U.S. Congress required all states to meet clean air standards for photochemical oxidants (commonly known as smog or ozone) by 1975. Thirty years, or a full generation later, many parts of the country continue to violate national ozone standards. While the six pollutants identified as criteria pollutants under the Act have decreased since 1970 and continued to decrease in the 1990s, ozone is the only criteria pollutant that did not decrease in the 1990s although most areas not meeting the ozone standard were required to attain the standard by 1999.

The cost we all pay for not meeting ozone standards is a dramatic increase in asthma, especially amongst children for whom asthma rates have doubled since 1985,[2] decreases in respiratory functions, and increased susceptibility to respiratory infections. New studies show that ozone pollution actually causes asthma.[3] Increases in the number of strokes amongst elderly populations and birth defects in newborns are also linked to unsafe levels of exposure to ozone pollution.[4]

A variety of factors account for this increase in ozone-related health problems and the steady rate of ozone pollution. Nearly one-half of all nitrogen oxides (NO_x), which contribute to ozone pollution, emanate from the automobiles most Americans drive to work and school every day.[5] States, however, are hesitant to control personal automobile use and the U.S. Environmental Protection Agency (EPA) and Congress are reluctant to push states into this political minefield. Instead, Congress continues to grant states billions of dollars for highway construction each year. Moreover, since the 1970s, Congress and EPA have been reluctant to impose real consequences on the states for not meeting CAA requirements.

According to the CAA, by 2005 areas in severe nonattainment of the one-hour ozone standard must achieve the standard. The goals of this Article are to predict whether or not areas in severe nonattainment will be able to meet the 2005 statutory deadline and, if not, to propose what actions must be taken to meet these critical pollution goals.[6] This Article forecasts that most of these areas will not meet this deadline. There is no indication from either EPA or Congress, however, that areas failing to meet the statutory deadline will suffer the statutorily mandated consequences. Instead, EPA is attempting to revoke the one-hour ozone standard by June 2005, before the November 2005 deadline for severe nonattainment areas, in favor of a new eight-hour standard. In addition, Congress expressed a strong desire to aggressively combat ozone pollution in the 1990 Amendments to the CAA; however, since 1990 Congress has perpetuated nonattainment of the standard by passing legislation to ease some 1990 requirements and to prevent EPA from imposing sanctions against nonattainment areas. EPA, as well, often has a larger bark than its actual bite.

Working under intense political pressure, EPA often flip-flops on ozone pollution issues. For example, after being asleep at the wheel of the Act's new source review (NSR) program for decades, EPA began enforcing the program in the mid-1990s, only to then begin weakening the program at the end of the 1990s. In addition, the new eight-hour ozone standard and the new standard for particulate matter that

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1. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
2. U.S. EPA, AMERICA'S CHILDREN AND THE ENVIRONMENT 69 (2003), *available at* http://www.epa.gov/envirohealth/children/ace_2003.pdf [hereinafter U.S. EPA, AMERICA'S CHILDREN].
3. EARTHJUSTICE, TALKING POINTS ON EPA'S RULE IMPLEMENTING SMOG STANDARD (2004) (on file with author).
4. *Id.*
5. U.S. EPA, *NO_x: What Is It? Where Does It Come From?, at* http://www.epa.gov/air/urbanair/nox/what.html (last modified Sept. 30, 2003).
6. Note that some areas in severe nonattainment have an attainment deadline of 2007 as mandated by the Act based on the area's 1988 ozone design value. This Article only considers areas with a 2005 deadline. CAA §181(a), 42 U.S.C. §7511(a).

were EPA's and environmentalists' priorities in the early 1990s are now considered by some to be a procrastination program for the states and a giveaway to polluters. This wave of pollution, procrastination, and delay is about to hit the beach of ozone nonattainment deadlines as these deadlines will come to pass, perhaps without any ramifications for the states or the federal government, but with serious consequences for the American public.

II. Ozone Pollution and the History of the CAA

Our country has made good efforts toward reducing ground-level ozone pollution, but great strides are necessary. Ozone levels nationwide decreased by 22% from 1983 to 2002 measured by the one-hour standard, and 14% during the same time period measured by the eight-hour standard.[7] Nevertheless, ground-level ozone pollution remains one of the most tenacious pollution problems. National average ozone levels under the eight-hour ozone standard have remained relatively stable throughout the 1990s according to EPA.[8] Nearly one-half of the U.S. population suffers from ozone pollution in their community: 138 million Americans lived in an area that exceeded the eight-hour ozone standard in 2002, and over 100 million people lived in such an area in 2003.[9] This estimate is probably lower than the number of people actually experiencing asthma or other health effects due to ozone pollution because EPA has only been able to analyze data from counties where ozone monitors have recorded three consecutive years of data.[10]

Ground-level ozone forms most often during hot summer days when volatile organic compounds (VOCs) react with NO_x in the presence of heat and light.[11] VOCs are ubiquitous, emanating from sources as variable as automobiles, refineries, and consumer and commercial products such as solvents.[12] Forty-nine percent of total NO_x emissions are emitted from automobiles, 27% from power plants, 19% from industrial, commercial, or residential combustion, and 5% of NO_x emissions come from other sources.[13] Although VOC emissions have decreased 54% since 1970, NO_x emissions only decreased by 25% in the same time period.[14] Therefore, EPA has determined that substantial reductions in NO_x are necessary to attain national ozone standards.[15]

Ozone presents significant short-term and long-term health effects including substantial decreases in lung function, aggravation of asthma, and increased susceptibility to respiratory infections.[16] Children are more likely to experience these health effects because they play outside in the summer; however, other at-risk groups include those who are active outdoors, the elderly, and persons with preexisting respiratory diseases such as asthma.[17] New studies reveal that ozone pollution not only aggravates asthma, it may actually cause asthma in children while insidiously causing strokes among the elderly population and birth defects in newborns.[18] Over 29 million children age 14 and under and 15 million adults age 65 or older live in counties with unhealthful ozone levels.[19] Ozone pollution has significantly contributed to the asthma epidemic in the United States. While children only make up 25% of the population, they account for 40% of all asthma cases[20] and the percentage of children with asthma has doubled since 1985.[21] Elevated levels of ozone also lead to reductions in agricultural crop and forest yields and increased plant susceptibility to stresses.[22]

The CAA directed EPA to create national ambient air quality standards (NAAQS) for pollutants that could reasonably be anticipated to endanger public health or welfare and are derived from numerous or diverse mobile or stationary sources.[23] By 1970, EPA had already promulgated NAAQS for photochemical oxidants (formed when VOCs combine with NO_x).[24] Under the Act, states are required to develop state implementation plans (SIPs) to control pollution emissions and meet NAAQS.[25] States were required to create a SIP capable of ensuring NAAQS attainment by late 1975.[26]

Regardless, by 1977 it was apparent that many urban communities would not be able to meet NAAQS for photochemical oxidants for two reasons.[27] First, states had not taken the steps that were undoubtedly necessary to address ozone pollution in the nation's largest cities.[28] Second, the science of ozone pollution and how best to minimize the VOC and NO_x emissions that contributed to photochemical oxidants was still evolving.[29] Therefore, in 1977 Congress amended the Act, creating a more specific, cumulative milestone nonattainment program for those areas that had not met primary ambient air quality standards.[30] States were required to submit a new SIP for nonattainment areas, demon-

7. U.S. EPA, Latest Findings on National Air Quality 10 (2003) [hereinafter U.S. EPA, Latest Findings].
8. *Id.* at 11.
9. American Lung Ass'n, State of the Air 2004 (2004), *available at* http://lungaction.org/reports/sota04_full.html; U.S. EPA, The Ozone Report: Measuring Progress Since 2003, at 5 (2004), *available at* http://www.epa.gov/air/airtrends/pdfs/2003ozonereport.pdf.
10. *Id.* at 10.
11. *Id.* at 8.
12. *Id.*
13. U.S. EPA, *supra* note 5.
14. U.S. EPA, Latest Findings, *supra* note 7, at 2.
15. U.S. EPA, *supra* note 5, at 8.
16. *Id.*
17. *Id.*
18. Earthjustice, *supra* note 3.
19. American Lung Ass'n, *supra* note 9, at 6.
20. U.S. EPA, *Health and Environmental Effects of Particulate Matter Fact Sheet*, *at* http://www.epa.gov/ttn/oarpg/naaqsfin/pmhealth.html (last updated July 11, 2002).
21. U.S. EPA, America's Children, *supra* note 2, at 69.
22. *Id.*
23. 42 U.S.C. §§7408-7409 (2004).
24. Robert V. Percival et al., Environmental Regulation: Law, Science, and Policy 502 (4th ed. 2003).
25. 42 U.S.C. §7410.
26. Clean Air Act of 1970, Pub. L. No. 91-604, §108, 1970 U.S.C.C.A.N. (84 Stat. 1676) 1954.
27. Thomas O. McGarity, *Missing Milestones: A Critical Look at the Clean Air Act's VOC Emissions Reduction Program in Nonattainment Areas*, 18 Va. Envtl. L.J. 41, 45 (1999).
28. *Id.*
29. *Id.* The mechanics of how VOCs and NO_x combined in the presence of sunlight to produce ozone was not well understood; therefore, whether states did not know if they should focus controls on VOCs or NO_x or both. *Id.* It was also discovered that some VOCs are generated from plants, and this generation could dramatically impact efforts to control VOCs. *Id.*
30. Clean Air Act of 1977, Pub. L. No. 95-95, §103, 1977 U.S.C.C.A.N. (91 Stat.) 685.

strating to EPA that they would attain primary NAAQS by the 1983 deadline.[31] Congress also required EPA to submit a federal implementation plan (FIP) if a state failed to submit an adequate SIP or attain NAAQS by the appropriate deadline.[32] Additionally, EPA was given the power to withhold federal highway construction funds from areas that did not meet their SIP and CAA requirements.[33]

Realizing the difficulty many urban areas were having in meeting ozone standards, Congress included an escape valve in the 1977 CAA Amendments. EPA could grant states an extension of the 1983 deadline to 1987 if the state could demonstrate that meeting the 1983 deadline was not possible, and the state promised to implement an automobile inspection and maintenance (I/M) program in nonattainment areas.[34] Major metropolitan areas requested the 1987 extension, prompting EPA in 1981 to create what was to be the first in a series of deadline extension policies. Working under the Reagan Administration, a pro-federalism administration concerned about granting states regulatory flexibility, EPA's SIP extension plan guidelines required state SIPs to demonstrate "reasonable further progress" via annual improvements that would lead to attainment of the standard by 1987 based on linear extrapolation from 1977 ozone levels.[35] More importantly, EPA stated that it was willing to approve an extension SIP (and avoid imposing sanctions on the state) if the state adopted other measures that would be implemented after 1987 to attain standards by "the earliest possible date."[36] Some critics believe that through this policy, EPA reinterpreted the statute to mean that all states were required to do was to create a SIP that looked sufficient on paper, regardless if the SIP would actually lead to attainment.[37]

Despite assurances from the states that they were making reasonable progress toward meeting the ozone NAAQS, by 1987 dozens of nonattainment areas still had not met the standard.[38] Many states produced "cheater SIPs" that they never intended to implement, while EPA often issued orders and compliance schedules that were more lenient than necessary to meet attainment goals.[39] For example, in 1987 the Houston/Galveston nonattainment area had the second worst ozone pollution in the country, but Texas had not even implemented the I/M programs that were a prerequisite to gaining the 1987 extension.[40]

Although many states did not meet the second ozone statutory deadline by 1983, EPA refused to impose the sanctions it was required to levy under the Act. Absent bad faith, EPA would not impose sanctions so long as the SIP projected NAAQS attainment by 1987.[41] When EPA proposed sanctions against 11 areas with insufficient SIPs in July 1987, Congress rushed to the aid of these areas by passing legislation prohibiting EPA from sanctioning the states, while also extending the 1987 deadline by a year.[42] A combination of signals from EPA and members of Congress representing nonattainment areas that the federal government would not hold state agencies' feet to the fire through sanctions or FIPs, as well as other practical realities such as ozone transport and a lack of emission inventories, all contributed to congressional action in 1990 to address ozone pollution through a strict, graduated program.

Congress enacted the 1990 Amendments to the CAA after three years of contentious debate focused on setting achievable, yet firm attainment deadlines.[43] In this next wave of amendments, Congress granted state requests for deadline extensions with the caveat that deadlines would be extended in exchange for more prescriptive requirements.[44] Environmental organizations played an especially predominant role in making the new amendments a reality.[45]

The 1990 CAA Amendments retained the basic NAAQS structure of the Act but mandated incremental, stricter controls based on an area's severity of ozone nonattainment.[46] Congress established five new nonattainment designations: marginal, moderate, serious, severe, and extreme nonattainment based on the gravity of an area's exceedance of the primary ozone NAAQS.[47] Each air quality control region in a state is required to meet explicit CAA mandates based on the severity of ozone pollution in that area.[48] For example, in marginal nonattainment areas states had to deliver to EPA an emissions inventory within two years of the 1990 CAA Amendments, implement "reasonably available control technology" for existing stationary sources as was required by the 1977 CAA Amendments, and provide EPA with de-

31. *Id.* §129.

32. *Id.* §§108, 110(c).

33. *Id.* §§129, 173, 176.

34. *Id.* §129.

35. McGarity, *supra* note 27, at 46-47.

36. State Implementation Plans: Approval of 1982 Ozone and Carbon Monoxide Plan Revisions for Areas Needing an Attainment Date Extension, 46 Fed. Reg. 7182, 7186 (1981) (to be codified at 40 C.F.R. pt. 51).

37. Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 Envtl. L. 1647, 1709 (1991). Some of these "paper SIPs" were challenged. The courts were reluctant to engage in extensive analyses of EPA's decision to approve a SIP, but some courts did strike down EPA's approval of deficient SIPs in circumstances of clear congressional intent. *See, e.g.*, Connecticut Fund for the Env't v. EPA, 672 F.2d 998, 1007-10, 12 ELR 20306 (2d Cir. 1982) (finding that the construction moratorium on nonattainment areas included in the 1977 CAA Amendments was a clear congressional mandate that EPA illegally circumvented when it lifted the moratorium for Connecticut).

38. McGarity, *supra* note 27, at 47.

39. Latin, *supra* note 37, at 1689.

40. McGarity, *supra* note 27, at 48 (citing U.S. EPA, National Air Quality Emissions Trends Report: 1990, tbl. 5-2 (1990)).

41. *Id.*

42. *Id.*; Pub. L. No. 100-202, 101 Stat. 1329 (1987).

43. McGarity, *supra* note 27, at 50-51.

44. Comments from American Lung Ass'n et al., to EPA Air & Radiation Docket (Aug. 2003) (on file with author).

45. Due to their influence and the expansive citizen suit provisions of the amendments, some members of Congress believed that these organizations were essentially writing and implementing the CAA. Sen. Steven Symms (R-Idaho) remarked:

> [M]any of the priority calls, the decisions that determine who gets fines where, what industry gets regulated first, or how burdensome the regulation will be, is not in the hands of Government professionals, nor in the hands of elected representatives of the people, but at the discretion of the national environmental special interest groups.

1990 Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990), *reprinted in* 1990 A Legislative History of the Clean Air Act Amendments of 1990, at 731, 764 (1993).

46. *Id.*

47. 42 U.S.C. §7511(a) (2004).

48. *Id.* §7511a.

tails of its NSR program within two years.[49] Comparatively, areas in severe nonattainment have to incorporate all measures required in marginal, moderate, and serious areas, as well as measures to offset pollution from vehicular transportation.[50] Failure to attain severe nonattainment deadlines may result in significant measures against the state.

In addition to specific pollution controls, the amendments also went beyond the "reasonable further progress" requirements of the 1977 CAA Amendments and set emission reduction milestones.[51] Specifically, states in moderate nonattainment or worse had to demonstrate that between 1990 and 1996, there would be a 15% reduction in anthropogenic VOC and NO_x emissions.[52] Areas classified as serious or worse are required to reduce their VOC and NO_x emissions by an additional 3% per year after 1996 until the ozone standard is attained.[53]

Congress also explicitly detailed the process that states and EPA were to undergo if the states failed to meet compliance demonstrations or attain ozone standards. If the EPA Administrator determines that areas classified as marginal, moderate, or serious did not meet their ozone attainment deadlines, those areas should be reclassified to the next higher classification.[54] States with serious or severe nonattainment areas that fail to submit a compliance demonstration, or that miss applicable deadlines, must elect to have the area reclassified to the next higher classification, implement specific controls determined by the EPA Administrator, or adopt an economic incentives program to reduce emissions.[55] Finally, areas in severe nonattainment that fail to meet their attainment deadlines face a number of additional hurdles. First, each major stationary source emitting VOCs shall pay a penalty fee to the state until the area is redesignated as an attainment area.[56] Second, the state must continue to demonstrate that it is meeting the 3% VOC and NO_x reductions; failure to make this showing will result in sanctions.[57] Third, in some circumstances, areas in severe attainment that do not meet their attainment deadline will have to adopt the NSR requirements pertaining to areas in extreme nonattainment.[58]

III. Recent State and Federal Actions Toward Ozone Attainment: Two Steps Forward, One Step Back

Passage of the 1990 CAA Amendments was a major, bipartisan effort to get the United States back on track toward a cleaner future. Needless to say, implementation of the 1990 ozone amendments has been relatively successful for less polluted areas. In 1990, EPA classified 1 area as extreme, 12 areas as severe, 13 serious areas, 30 moderate areas, and 43 marginal areas.[59] Since then, one-half (or over 50) of the areas that were in marginal, moderate, or serious ozone nonattainment in 1990 are now in attainment.[60] Comparatively, 49 areas are still in noncompliance with the one-hour ozone standard; 36 of these areas should have already attained the one-hour standard because they are in marginal (1993 attainment deadline), moderate (1996 nonattainment deadline), or serious nonattainment (1999 attainment deadline).[61] None of the areas that were listed in severe or extreme nonattainment in 1990 have demonstrated attainment of the one-hour ozone standard.[62]

A. The Politically Unpopular Problem of Mobile Source Pollution

To a large extent, the success of the 1990 CAA Amendments hinges on controlling emissions from mobile sources. The daily choice to drive an automobile rather than walk, bike, or take public transportation has a tremendous impact on ozone pollution. In southern and central California, an astonishing 70 to 80% of ozone pollution comes from mobile sources.[63] Although the entire country has been subject to mobile source controls since 1970, population increases as well as increased vehicle ownership have lead to dramatic increases in vehicle miles traveled per person. Such large increases in automobile use can cancel out reductions from stationary sources, as well as mobile source emission controls. President Richard M. Nixon predicted exactly such a scenario in his 1970 environmental address to Congress:

> Based on present trends, it is quite possible that by 1980 the increase in the sheer number of cars in densely populated areas will begin outrunning the technological limits of our capacity to reduce pollution from the internal combustion engine. [U]nless vehicles with an alternative, low-pollution power source are available, vehicle-caused pollution will once again begin an inexorable increase. Therefore, prudence dictates that we move now to ensure that such a vehicle will be available if needed.[64]

While the American population increased by 36% between 1970 and 2000, the number of vehicle miles traveled increased by 143% in that same time period.[65] The average American traveled 11,559 kilometers (km) in a vehicle in 1990 and only took 64 trips on public transportation.[66] Our

49. *Id.* §7511a(a); *see* McGarity, *supra* note 27, at 51.
50. 42 U.S.C. §7511a(d).
51. *Id.* §7511a
52. *Id.* §7511a(b)(1)(A)(i).
53. *Id.* §7511a(c)(2).
54. *Id.* §7511(b)(2).
55. *Id.* §7511a(g)(3-4). The economic incentives program may include state-established emission fees, marketable permits, and financial incentives to reduce vehicle emissions and vehicle miles traveled. *Id.*
56. *Id.* §7511d.
57. *Id.* §7511(b)(4)(A).
58. *Id.* §7511(b)(4)(B).
59. U.S. EPA, *1-Hour Ozone Nonattainment Area Summary History*, *at* http://www.epa.gov/oar/oaqps/greenbk/onsum2.html (last updated May 21, 2004).
60. U.S. EPA, *Ozone Maintenance Areas (Previous Classifications), at* http://www.epa.gov/oar/oaqps/greenbk/omc.html (last modified May 17, 2004).
61. U.S. EPA, *Classifications of One-Hour Ozone Nonattainment Areas, at* http://www.epa.gov/oar/oaqps/greenbk/onc.html (last modified May 17, 2004).
62. U.S. EPA, *Ozone Maintenance Areas (Previous Classifications), at* http://www.epa.gov/oar/oaqps/greenbk/omc.html (last modified May 17, 2004).
63. Steve Hymon & Mark Arax, *Tough New Smog Rules Get Long Deadlines*, L.A. Times, Apr. 16, 2004, at A1.
64. Percival et al., *supra* note 24, at 554 (quoting Richard Nixon, Public Papers of the President 101 (1970)).
65. Press Release, President George W. Bush, Executive Summary—The Clear Skies Initiative (Feb. 14, 2002), *at* http://www.whitehouse.gov/news/releases/2002/02/clearskies.html.
66. Peter Newman, *Transport: Reducing Automobile Dependence*, *in* The Earthscan Reader in Sustainable Cities 180, tbl. 8.2 (David Satterthwaite ed., 1999).

European counterparts traveled less than one-half that amount by vehicle in 1990 (4,754 km) and used public transportation nearly six times more often than Americans (359 trips per person).[67]

The CAA addresses mobile source pollution in numerous ways. For example, under the original 1990 CAA Amendments, companies employing 100 persons or more in severe nonattainment areas were required to implement programs to reduce work-related vehicle trips.[68] Today severe and extreme nonattainment areas must enforce transportation control strategies to offset any growth in emissions from vehicle miles traveled.[69] All areas in ozone nonattainment must implement vehicle I/M programs; serious, severe, or extreme nonattainment areas are also required to implement enhanced I/M programs that meet specific EPA requirements.[70]

Nevertheless, since 1990, a number of congressional actions have applied the brakes on efforts to control ozone emissions from mobile sources. After the 1994 elections produced a solidly Republican Congress, leaders in Congress adopted a regulatory reform agenda that included rolling back some of the 1990 CAA Amendments related to transportation.[71] In November 1995, the 104th Congress passed a rider to the National Highway System Designation Act, limiting EPA's ability to enforce a number of CAA mobile source provisions. The rider prohibited EPA from requiring a specific I/M test, forced EPA to accept any state's "good-faith" estimate of emissions reductions from decentralized I/M programs, and made the employer trip reduction program voluntary for all nonattainment areas.[72] Most states quickly eliminated their employer trip reduction programs.[73]

Moreover, diverting even insubstantial amounts of federal highway money to mass transportation is politically unpopular in Congress. This year's U.S. Senate transportation bill, for example, would have eliminated air quality protections related to transportation and increased federal funding for highways by 40%,[74] although EPA's own data shows that cars and trucks contribute more to ozone pollution than any other source in projected nonattainment areas under the eight-hour ozone standard.[75] By continuously increasing highway spending without adequately supporting sustainable mass transit, Congress perpetuates ozone pollution.[76] Twenty-two percent of the areas that EPA originally predicted would be designated ozone nonattainment areas under the eight-hour standard will violate the standard because pollution from cars and trucks represent more than 50% of total ozone precursors.[77] More than one-half of the areas that will become ozone nonattainment areas for the first time violate the ozone NAAQS primarily due to cars and trucks.[78]

B. Programs to Address Interstate Ozone Pollution

One of the more politically contentious issues that Congress attempted to address in the 1990 CAA Amendments was the interstate transport of ozone pollution. Some areas of the country will never achieve ozone NAAQS unless interstate ozone pollution is addressed.[79] Consequently, Congress created a number of mechanisms to reduce the upwind state's ozone emissions via partnerships between receiving states, upwind states, and EPA.

Under the Act, Congress created the Ozone Transport Commission (OTC) to study interstate transport of ozone in the Northeast and Mid-Atlantic and recommend to EPA what measures are necessary to maintain NAAQS in these regions.[80] The OTC adopted several memoranda of understanding to control ozone transport, including a regional NO_x market-based "cap-and-trade" program that has been in place since 1999.[81] Under this program, NO_x emissions are "capped" at a decreasing rate (219,000 tons of emissions in 1999 and 143,000 tons in 2003) and through state trading programs approved by EPA, stationary sources can trade the NO_x emission credits they have been allotted.[82] Trading programs grant businesses the flexibility to sell or purchase pollution credits depending on production requirements or economic outlooks while guaranteeing that the government won't impose new pollution controls.

Under the 1977 CAA Amendments, Congress enacted §110(a)(2)(E), which required states to regulate emissions that will significantly interfere with the attainment of NAAQS in another state.[83] Congress also created the §126 "SIP call"—a process by which states can petition EPA to control sources violating this prohibition against interstate pollution.[84] The Ozone Transport Assessment Group (OTAG), an EPA initiative, was created in May 1995 to address the needs of eastern states that could not meet the November 1994 SIP deadline for ozone.[85] Based on the recommendations from the OTAG, EPA granted OTAG members a §126 NO_x SIP call, setting stricter compliance measures for the 22 states east of the Mississippi contributing to nonattainment in these downwind eastern states.[86] EPA's NO_x SIP call was challenged in *Michigan v. U.S. Environ-*

67. *Id.*

68. 42 U.S.C. §7511a(d)(1)(B) (1994) (repealed 1998).

69. *Id.* §7511a(d) (2004).

70. *Id.* §§7511a(2)(B), 7511a(c)(3).

71. McGarity, *supra* note 27, at 73-75.

72. 42 U.S.C. §7511a(c) (Supp. 1998).

73. McGarity, *supra* note 27, at 75.

74. *See* Press Release, U.S. Public Interest Research Group, Southeast Cities Lead the Nation in Air Pollution From Cars and Trucks (Mar. 9, 2004), *at* http://uspirg.org/uspirg.asp?id2=12485&id3=USPIRG&.

75. *See* Natural Resources Defense Council & Surface Transportation Policy Project, *Transportation Sector Pollution Is a Leading Reason for Poor Air Quality Across the Country* (Apr. 16, 2004), *at* http://www.transact.org/nrdc/ozone.htm.

76. In a 2004 report, the U.S. Public Interest Research Group found that if an average, large American city expands its highway system by 14.6%, both VOC and NO_x emissions could increase by nearly 11%. U.S. Public Interest Research Group, More Highways, More Pollution 14 (2004), *available at* http://www.uspirg.org/reports/MoreHighwaysMorePollution3_04.pdf.

77. *Id.*

78. *Id.*

79. Roy S. Belden, *Clean Air Act*, 2001 ABA Sec. Env't Energy, & Resources 36.

80. *Id.* at 38.

81. *Id.*

82. *Id.* at 38-39.

83. Percival et al., *supra* note 24, at 541. Today this is §110(a)(2)(D). *Id.*

84. *Id.*

85. *Id.* at 39.

86. *Id.*

mental Protection Agency,[87] but the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit upheld EPA's requirement that 19 of the original 22 states (plus the Washington, D.C.) are required to meet new NO_x emission controls by May 2004, although the states can meet those standards by adopting EPA's NO_x "cap-and-trade" rule.[88]

Finally, in January 2004, the Bush Administration issued a rule to address interstate transport of ozone pollution—the Interstate Air Quality Rule (IAQR).

C. Court Responses to EPA's Failure to Reclassify Areas in Ozone Nonattainment

By 1999, all areas in marginal, moderate, or serious nonattainment were to have met their attainment deadlines.[89] As the attentive reader recalls, failure to meet the attainment deadline is supposed to result in an automatic "bump up" to the next higher nonattainment designation. EPA, however, took an official position in 1998 that it would not "bumpup" noncomplying states when many areas found it difficult, if not impossible, to attain ozone standards as a result of interstate ozone transport.[90] Specifically, EPA found that the May 2004 NO_x SIP call deadline, as well as the fact that upwind areas classified as severe have later attainment dates than downwind moderate or serious areas, gave them legally adequate authority to create the "Extension of Attainment Dates for Downwind Transport Areas" policy in July 1998.[91]

Under the policy, a nonattainment area would be granted an ozone deadline extension if the state could show: (1) an upwind area in the same state with a later attainment date significantly contributes to the nonattainment problem; or (2) an upwind area in another state significantly contributes to the nonattainment problem.[92] In addition, the state must adopt all local control measures required and submit an attainment demonstration to EPA showing that the area will attain ozone standards no later than when the upwind controls must be in place.[93]

EPA based its policy on overall congressional intent to vary ozone attainment deadlines based on the seriousness of an area's air pollution problems.[94] Specifically, EPA based its policy on three parts of the Act: (1) §110(a)(2)(A), which requires states to create SIPs that will not lead to nonattainment in another state; (2) §§181 and 182, which delineate attainment deadlines based on pollution severity, and grant those areas with the worst pollution the longest attainment deadline; and (3) §§176A and 184, which allow regional ozone transport commissions to recommend additional control measures.[95] EPA concluded that its policy filled a "gap in the statutory framework" by harmonizing all sections in the Act that adjusted an area's attainment dates based on the severity of pollution.[96]

Under this policy, EPA approved attainment date extensions for seven areas including three that otherwise must meet the severe ozone nonattainment deadline by 2005: Hartford, Connecticut; Atlanta, Georgia; Baton Rouge, Louisiana; Springfield, Massachusetts; St. Louis, Missouri; Beaumont-Port Arthur, Texas; and metropolitan Washington, D.C.[97]

At the beginning of the new millennium, environmental advocacy organizations began challenging EPA's extension policy. The advocates' successful legal argument was that under the plain meaning of the Act, areas not meeting their attainment deadline must be automatically "bumped up." They also pointed out that the policy was being applied to areas that were not "significantly affected" by interstate transport of ozone, nor were these areas necessarily facing impractical attainment deadlines. For example, EPA extended Atlanta's serious nonattainment deadline even though EPA found that upwind controls would reduce the number of days Atlanta exceeds its standard by only 9%.[98] An attorney with the Southern Environmental Law Center (SELC) testified at a congressional hearing that Atlanta's worst ozone days occur when local pollution stagnates in the city, not when the wind is blowing in out-of-state emissions.[99] SELC contends that although Atlanta's ozone problem is caused primarily by mobile sources, as of the summer of 2003, Georgia had not yet attempted to develop programs to reduce vehicle miles traveled and vehicle emissions.[100]

EPA's extension policy was first found to violate congressional intent in the D.C. Circuit. In 1991, EPA delineated the Washington, D.C., area as serious nonattainment.[101] The three states that compose this nonattainment area (Washington, D.C., Maryland, and Virginia) requested an extension from the 1999 serious nonattainment deadline, and EPA granted the request.[102] The Sierra Club sued EPA, claiming that it had no authority to extend the attainment deadline and that the SIP submitted to EPA was inadequate under the Act.[103] Based on the plain language of the Act and clear congressional intent, the D.C. Circuit agreed with the Sierra Club that EPA had no statutory authority to subvert the purposes of the Act through the extension policy.[104]

First, the court refused to defer to EPA's interpretation of the Act, finding that Congress explicitly stated that areas in serious nonattainment were required to meet the 1999 at-

87. 213 F.3d 663, 30 ELR 20407 (D.C. Cir. 2000).

88. Belden, *supra* note 79, at 40-41.

89. 42 U.S.C. §§7511-7511a (2004).

90. McGarity, *supra* note 27, at 85; *"Bump-Up" Policy Under Clean Air Act: Hearings Before the House Comm. on Energy and Commerce, Subcomm. on Energy and Air Quality*, 108th Cong. (2003) [hereinafter *House Hearings*] (statement of Hon. Jeffrey Holmstead, Assistant Administrator for Air and Radiation, U.S. EPA), *at* http://energycommerce.house.gov/108/Hearings/07222003hearing1025/hearing.htm (last visited July 31, 2004).

91. *House Hearings, supra* note 90 (testimony of Hon. Jeffrey Holmstead, Assistant Administrator for Air and Radiation, U.S. EPA).

92. *Id.*

93. *Id.*

94. Proposed Rule; Extension of Attainment Dates for Downwind Transport Areas, 64 Fed. Reg. 14441, 14442-43 (Mar. 25, 1999).

95. *Id.* at 14443.

96. *Id.*

97. *House Hearings, supra* note 90 (testimony of Hon. Jeffrey Holmstead, Assistant Administrator for Air and Radiation, U.S. EPA).

98. *Id.* (testimony of David Farren, SELC).

99. *Id.*

100. *Id.* SELC backs up its argument with a Journal of American Medical Association study conducted in Atlanta during the 1996 Olympic Games. *Id.* The city encouraged its citizens to use nonvehicular transportation, resulting in dramatic declines in the number of children requiring urgent or emergency care for asthma as well as a 28% decrease in ozone. *Id.*

101. Sierra Club v. EPA, 294 F.3d 155, 159, 32 ELR 20760 (D.C. Cir. 2002).

102. *Id.*

103. *Id.* at 158.

104. *Id.* at 158-62.

tainment deadline.[105] If the deadline is not met, EPA can only extend the deadline in limited circumstances or downgrade the area.[106] The appellate court considered the specific, limited circumstances under which Congress granted EPA the authority to extend nonattainment deadlines,[107] but determined that they did not pertain to Washington, D.C.[108] Additionally, because Congress deliberately described when EPA can extend attainment deadlines, the court found the absence of other exceptions to be intentional.[109]

Next, the court rejected EPA's contention that the literal meaning of the statute would result in actions that contradict the drafters' intentions.[110] The court stated that an agency cannot disregard a clear statutory mandate because the Agency believes its policy is a better rendering of the goal to be achieved.[111] Holding that attainment deadlines are the lynchpin in the ozone regulatory scheme, the court found that EPA's policy subverts the Act's purposes.[112]

A year later, the Sierra Club challenged EPA's conditional approval of the new SIP for the Washington, D.C., area, as well as some of the specific terms of the SIP.[113] The D.C. Circuit stated that EPA's decision to grant Washington, D.C., approval of its SIP even though the SIP was not complete "cannot be squared with the unambiguous statutory language."[114] While the CAA requires states to adopt specific enforceable measures in their SIPs, the court found that EPA's approval of the SIP based on commitment letters from the two states and Washington, D.C., violated the Act. The letters did not identify specific measures the states and Washington, D.C., would take, nor the deadline they would seek to remedy SIP deficiencies.

These two decisions from the D.C. Circuit are a harbinger of things to come. As Bush Administration proposals to delay nonattainment deadlines or exempt certain industries from clean air regulations are challenged by environmental organizations and states in the courts, the courts are highly likely to find that such substantial changes to the CAA are contrary to congressional intent. Since the Act was signed into law, through the present day, the judiciary has held firm that EPA and the states must take their clean air responsibilities seriously, including not diverging from specific congressional mandates. Should the eight areas of concern fail to meet the unambiguous mandate of achieving the one-hour ozone standard by 2005, there is no indication that the judiciary will hesitate to require EPA to impose sanctions or to "bump up" these areas.

Furthermore, within a year after the first D.C. Circuit Sierra Club decision on EPA's extension policy, the U.S. Court of Appeals for the Fifth Circuit, the U.S. Court of Appeals for the Seventh Circuit, and the U.S. Court of Appeals for the Eleventh Circuit all reached the same conclusion. The Fifth and Seventh Circuits agreed with the D.C. appellate court that Congress thoroughly addressed the issue of deadline extensions in the Act; thus, any extensions beyond those articulated were not authorized.[115] Furthermore, the Seventh Circuit aptly noted that Congress was well aware of ozone transport issues when it enacted the 1990 CAA Amendments and built in provisions to address these issues (such as the §126 petition mentioned above).[116] By the time the policy was challenged in the Eleventh Circuit, the policy was so thoroughly discredited by the other courts that the Eleventh Circuit spent less than a page describing its disapproval of EPA's policy.[117]

As a result of this litigation, EPA "bumped up" several cities: Washington, D.C., was upgraded from serious to severe nonattainment in 2003 as was Baton Rouge, Louisiana, in 2003 and Atlanta, Georgia, in 2004; St. Louis, Missouri, was upgraded from moderate to serious nonattainment in 2003, and Beaumont-Port Arthur, Texas, presumably will soon be upgraded to serious nonattainment as well.[118] This string of opinions is one of the many indications that the judiciary will not naively follow where the Administration leads them, especially if administrative actions flagrantly fly in the face of congressional intent.

D. EPA's New Eight-Hour Ozone Standard

Before the November 2005 severe nonattainment deadline established by Congress arrives, EPA will issue a regulatory extension of ozone nonattainment deadlines via the eight-hour standard. Although 49 areas still do not attain the one-hour standard, EPA plans to revoke the one-hour standard in favor of the more protective eight-hour standard.

Under pressure from the public health and environmental communities, on July 18, 1997, EPA promulgated its new eight-hour ozone standard[119] as required by §109(d) of the Act.[120] Data from the 1990s demonstrated that the one-hour standard did not adequately protect the public. EPA discovered not only that long-term exposure to elevated ozone levels was decreasing lung function and respiratory problems, but also that asthmatics in areas that met the one-hour ozone standard were still making emergency room visits for respiratory problems attributable to ozone pollution.

The new standard of 0.08 parts per million (ppm) measured over eight hours is more protective of public health than the previous standard of 0.12 ppm measured over one

105. *Id.* at 160.

106. *Id.*

107. These include exemptions for areas that are prevented from achieving attainment because of transported ozone from other countries and areas that do not include or are not adjacent to a Metropolitan Statistical Area. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 363.

111. *Id.*

112. *Id.*

113. Sierra Club v. EPA, 356 F.3d 296 (D.C. Cir. 2004).

114. *Id.* at 301.

115. Sierra Club v. EPA, 314 F.3d 735, 741, 33 ELR 20126 (5th Cir. 2002); Sierra Club v. EPA, 311 F.3d 853, 858-60, 33 ELR 20115 (7th Cir. 2002). The Seventh Circuit, however, considered an additional exception that the D.C. Circuit and Fifth Circuit did not mention—the Act gives EPA the authority to grant two years' worth of extensions to areas that implement all required measures if they only had one ozone exceedance in the previous year. *Sierra Club*, 311 F.3d at 858.

116. *Id.* at 859-60.

117. Southern Org. Comm. for Econ. & Soc. Justice v. EPA, 333 F.3d 1288 (11th Cir. 2003).

118. U.S. EPA, *Ozone Federal Register Notice Changes to a Higher Classification, at* http://www.epa.gov/oar/oaqps/greenbk/ofr2rpt2.html (last modified Jan. 6, 2004).

119. Proposed Rule to Meet the 8-Hour Ozone National Ambient Air Quality Standard, 68 Fed. Reg. 32802 (June 2, 2003).

120. Under §108 (d) of the Act, EPA is required to "complete a thorough review" of its air quality criteria and NAAQS at five-year intervals and to promulgate revisions as is necessary to protect public health and welfare. 42 U.S.C. §7409(d) (2004).

hour.[121] While the one-hour standard protects against peak ozone exposure, the eight-hour standard will protect against both ozone peaks and lower, chronic levels of ozone exposure.[122] EPA has estimated numerous health benefits under the new standard, including one million fewer cases of decreased lung function in children, hundreds of thousands of fewer instances of serious coughing and other respiratory problems, as well as thousands of fewer visits to emergency rooms and hospitals due to asthma complications.[123] EPA predicts that 111 million people live in the 290 counties that currently exceed the eight-hour standard.[124]

Numerous industry groups challenged EPA's new ozone standard in the D.C. Circuit.[125] These groups won a finding from the court that EPA's creation of the eight-hour standard violated the nondelegation doctrine because EPA did not promulgate the standard under any "intelligible principle."[126] EPA, two states, and the American Lung Association appealed the court's decision to the U.S. Supreme Court, which upheld the eight-hour standard.[127]

The Court stated that the Act's standard of protecting the public health was not an unconstitutional delegation because the Court has never required from Congress a specific determination of "how much [of the regulated harm] is too much."[128] The Court did, however, remand the case to EPA to develop a revised implementation plan for the eight-hour NAAQS.[129] EPA was directed to create a plan that included Congress' intentions to utilize the 1990 CAA Amendments to address all ozone nonattainment issues, not just nonattainment under the one-hour standard.[130]

Six years after EPA established the eight-hour ozone standard, the health benefits expected to be imparted upon millions of Americans have not yet become a reality. A coalition of environmental and health organizations used the courts, once again, to prod EPA into designating nonattainment areas.[131] Under court order, EPA released Phase I of the Agency's final rule implementing the eight-hour standard on April 30, 2004, and expects to release Phase II of the final rule in mid-2004.[132] As anticipated, EPA has designated more areas in nonattainment under the eight-hour standard than are currently designated as nonattainment areas under the one-hour standard because the eight-hour standard is more protective of public health.

In its proposed rule, EPA articulated the two ways it was considering classifying areas with regard to their eight-hour ozone attainment status as depicted in Table I. First, EPA could classify all air quality control regions based on the severity of ozone pollution using the classification scheme utilized for nonattainment areas in the 1990 CAA Amendments (Part D, Subpart 2).[133] EPA, however, chose the second option detailed in its proposed rule under which some areas must implement the standard under Subpart 1 of Part D of the Act, whereas other areas must implement the standard under Subpart 2, depending on the design value for the area.[134] All areas that meet or exceed the one-hour 0.121 ppm design value created by Congress under the ozone nonattainment provisions of the Act (Subpart 2) would have to meet the eight-hour standard under Subpart 2 of the Act.[135] Essentially, EPA is using the statutory framework of §181, or Subpart 2, of the Act, which applies to one-hour nonattainment areas and applying those same nonattainment responsibilities onto states under the new eight-hour obligations.[136]

All other eight-hour nonattainment areas would be required to meet the eight-hour standard under §172, or Subpart 1, of the Act.[137] These are known as basic nonattainment areas. Subpart 1 of the Act, which applies to all nonattainment areas except for ozone nonattainment areas, differs from Subpart 2 in many ways. Most notably, whereas Subpart 2 mandates particular actions and milestones to meet specific emission reductions, Subpart 1 requirements are not as specific and give more discretion to the states in determining how they will meet NAAQS.[138]

In the Agency's new rule, EPA addressed the very vocal concerns of states suffering from elevated pollution levels due to ozone transport. Air quality regions that can demonstrate they are affected by "overwhelming transport of ozone and its precursors" via interstate or intrastate transport, while also demonstrating that they are a rural transport area under §182(h) of the Act,[139] would receive an attainment deadline based on implementation of the eight-hour standard in upwind areas.[140]

Deadlines under EPA's preferred rule would be set as follows. Areas facing Subpart 2 requirements will be given the same attainment deadlines that Congress created for ozone nonattainment areas under §181 of the Act: areas in marginal nonattainment will have 3 years after the enactment of this rule to meet the standard, moderate areas will have 6 years, serious areas will have 9 years, severe areas will have 15 years, and extreme areas will have 20 years.[141] Subpart 1 areas would have to meet Subpart 1 requirements: attainment as "expeditiously as practicable" but no

121. 68 Fed. Reg. at 32804.

122. American Lung Ass'n, *supra* note 9.

123. *Id.*

124. U.S. EPA, Initial Results of Updated Clear Skies Analysis (2003), *available at* http://www.epa.gov/air/clearskies/pdfs/webpresentation.pdf [hereinafter U.S. EPA, Initial Results].

125. American Trucking Ass'n v. EPA, 175 F.3d 1027, 29 ELR 21071 (D.C. Cir. 1999).

126. *American Trucking*, 175 F.3d at 1034-37.

127. Whitman v. American Trucking Ass'n, 531 U.S. 457, 31 ELR 20512 (2001).

128. *Id.* (quoting *American Trucking*, 175 F.3d at 1034).

129. *Id.* at 919.

130. *Id.*

131. American Lung Ass'n, *supra* note 9.

132. Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1, 69 Fed. Reg. 23951 (Apr. 30, 2004) (to be codified at 40 C.F.R. pts. 50-51, 81).

133. 68 Fed. Reg. at 32812. This option would create a program very similar to the one-hour standard using Subpart 2 of Part D of the Act. Subpart 2 is the section addressing requirements for areas in ozone nonattainment areas. 42 U.S.C. §7511 (2004).

134. 69 Fed. Reg. at 23959.

135. *Id.*

136. *Id.*

137. *Id.*

138. 42 U.S.C. §§7501-7511f.

139. Areas that do not meet ozone standards but are not adjacent to or part of a Metropolitan Statistical Area or Consolidated Metropolitan Statistical Area may be designated by the EPA Administrator as a rural transport area. 42 U.S.C. §75119a(h). These areas are not subject to the majority of the nonattainment provisions of Act if the Administrator finds that the area's emissions do not make a significant contribution to the ozone nonattainment. *Id.*

140. 69 Fed. Reg. at 23959.

141. *Id*. at 23953-54; 42 U.S.C. §7511(a).

later than 5 years after designation, or 10 years after designation if the severity of the pollution, combined with the feasibility of pollution controls, shows attainment within 5 years is impossible.[142] Nevertheless, EPA believes that many Subpart 1 areas will meet the eight-hour NAAQS by 2007 because a number of important, new pollution controls, such as the NO_x SIP call, which is to be fully implemented in 2004, will lead to greater pollution reductions than were ever possible.[143]

Even though 49 areas still have not met their statutorily created ozone attainment deadlines, EPA plans to revoke the one-hour ozone standard in June 2005.[144] Areas that do not attain the one-hour standard by June 2005 must continue to meet one-hour mandatory control measures in their SIPs, although there are some major caveats.[145] If the state can prove attainment of the eight-hour standard even without one-hour discretionary control measures, then EPA may approve the revision or removal of such measures.[146] In addition, these nonattainment areas can choose which attainment demonstration they will give to EPA: (1) a one-hour attainment demonstration; (2) a 5% rate of progress plan toward the eight-hour standard; or (3) an eight-hour attainment demonstration ensuring early reasonable further progress toward attainment of the eight-hour standard.[147]

Table I: Deadlines and Standards Under EPA's New Eight-Hour Ozone Implementation Rule

	CAA authority	*Eight-hour deadline*	*One-hour standard*
Areas attaining one-hour standard but not eight-hour by June 2004	Subpart 1 (§172)	- "as expeditiously as practicable" but no later than 5 years after nonattainment designation (2009); or - 10 yrs. after designation (2014) if attainment within 5 years is not possible	- Will revoke in June 2005
Areas not attaining one-hour standard nor eight-hour standard by June 2004	Subpart 2 (§181)	- Deadlines based on one-hour nonattainment table §181: a. marginal areas 2007 b. moderate areas 2010 c. serious areas 2013 d. severe areas 2019 e. extreme areas 2024	- Will revoke in June 2005 - Mandatory measures remain in place; discretionary control measures remain in place unless state can show attainment without them - States can show attainment through one-hour demonstration; 5% increment of progress plan toward eight-hour standard; or showing of reasonable progress toward eight-hour attainment demonstration
Areas not attaining eight-hour standard that sign an Early Action Compact	No explicit statutory authority	EPA will not designate area as nonattainment as long as state implements controls two years early and promises to meet milestones to attain standard by 2007	N/A

Source: Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1, 69 Fed. Reg. 23951 (Apr. 30, 2004) (to be codified at 40 C.F.R. pts. 50-51, 81).

142. 69 Fed. Reg. at 23954; 42 U.S.C. §7502(a)(2).

143. 69 Fed. Reg. at 23963.

144. *Id*. at 23954.

145. *Id.*

146. *Id.* at 23974.

147. *Id.* at 23974-75.

As predicted, the eight areas of concern are also eight-hour nonattainment areas, although their designations are not as serious as their one-hour designations. Baton Rouge and Atlanta have been found to be in marginal nonattainment of the eight-hour standard.[148] Baltimore, Washington, D.C., Philadelphia-Wilmington-Trenton, and the majority of Ventura County are in moderate nonattainment.[149] The San Joaquin Valley and Sacramento are in serious nonattainment, and all other areas in serious nonattainment are located in California.[150] Unlike the designations under the one-hour standard, the only severe nonattainment area is the South Coast Air Basin in Los Angeles, and no areas are designated as extreme nonattainment.

Finally, as depicted in Table I, EPA is again providing an alternative way for states to meet the eight-hour standard through Early Action Compacts. If a state would be designated as a nonattainment area under the eight-hour standard, the state can sign an agreement with EPA to implement ozone controls two years earlier than required by the Act if they promise to meet certain milestones, including attainment of the eight-hour standard, by 2007.[151] EPA will defer designating the area as a nonattainment area as long as the promised actions are in effect.[152] For many cities and states, the political stigma of ozone nonattainment is enough of an incentive to sign an Early Action Compact. Both citizens and businesses may be reluctant to relocate to an unhealthy part of the country for both personal and economic well-being. Currently 14 states have agreed to implement Early Action Compacts, although none of the severe nonattainment areas of concern are involved in such a compact.[153]

Environmental and public health advocates welcomed the eight-hour designations as a critical step in protecting the public from the many health problems created by ozone pollution. At the same time, however, these organizations voiced strong opposition to EPA's refusal to list some counties as nonattainment areas even though they are in an air quality control region not meeting the eight-hour standard, in addition to the lengthy time frame EPA has granted states to comply with the new standard.[154] The American Lung Association stated that a child in first grade today will graduate high school before air pollution is cleaned up in his or her community.[155]

These critics contend that EPA has a statutory mandate to apply the specific, graduated goals and mechanisms under §181, or Subpart 2, of the Act to areas that fail to attain the eight-hour ozone standard, not just those that fail to attain the one-hour standard.[156] The Court in *American Trucking Ass'n v. Whitman*[157] unequivocally struck down an EPA attempt to ignore Subpart 2 of the Act in favor of Subpart 1 in the area of eight-hour implementation. Moreover, critics point out that EPA's classifications are more lenient than the distribution of nonattainment classifications created by Congress for the one-hour standard.[158] Table II compares the number of areas in nonattainment under the 1990 CAA Amendments with the number of areas still in nonattainment with the one-hour standard and EPA's eight-hour designations. Finally, environmental organizations have advocated that EPA cannot legally revoke the one-hour ozone standard until an area meets the one-hour standard.[159] It is highly likely that these organizations will also litigate the eight-hour implementation rule.

Table II: Comparing 1990 and 2004 One-Hour Ozone Nonattainment Designations With 2004 Eight-Hour Nonattainment Designations

Category	1990 congressionally imposed one-hour nonattainment designations	2004 one-hour nonattainment areas	2004 EPA-created eight-hour nonattainment designations
Extreme	1	2	0
Severe	12	12	1
Serious	13	9	3
Moderate	30	6	30
Marginal	43	19	7
Basic	N/A	N/A	84
Total	*99*	*48 (plus 1 "other" = 49)*	*125*

Sources: U.S. EPA, *1-Hour Ozone Nonattainment Area Summary History*, *at* http://www.epa.gov/oar/oaqps/greenbk/onsum2.html (last updated May 21, 2004); U.S. EPA, *Currently Designated 8-Hour and 1-Hour Ozone Areas*, *at* http://www.epa.gov/oar/oaqps/greenbk/gncl.html (last updated May 7, 2004).

E. Key Bush Administration Proposals Further Delay Ozone Attainment

Clean air requirements imposed on the states under EPA's eight-hour rule will be significantly impacted by recent proposals by President George W. Bush and members of Congress to delay or relax implementation of ozone standards. The Bush Administration has initiated a number of programs that EPA Administrator Michael Leavitt boasts will lead to "the most productive period of air quality improvement in the history of our Nation,"[160] but which environ-

148. U.S. EPA, Final Designations Rule: Part 81, at 112, 116 (2004).

149. *Id.* at 104, 106, 116, 118, 126.

150. *Id.* at 101, 103.

151. U.S. EPA, *Early Action Compacts, at* http://www.epa.gov/air/eac/ (last modified Dec. 15, 2003).

152. *Id.*

153. U.S. EPA, *Ozone Early Action Compacts, at* http://www.epa.gov/ttn/naaqs/ozone/eac/index.htm#List (last modified Apr. 21, 2004).

154. *See, e.g.*, Press Release, American Lung Ass'n, Statement of John L. Kirkwood, President and Chief Executive Officer American Lung Association on EPA's Ozone Designations and Implementation Rule (Apr. 15, 2004), *available at* http://www.lungusa.org/site/apps/nl/content3.asp?c=dvLUK9O0E&b=40404&content_id={0CBDDD0D-2087-4981-86C1-9E6FD72B78F0}.

155. *Id.*

156. *See supra* note 44.

157. 531 U.S. 457, 481, 485-86, 31 ELR 20512 (2001) (finding EPA cannot make Subpart 2 nugatory as Congress explicitly developed a detailed program for ozone nonattainment areas under Subpart 2).

158. *See supra* note 44.

159. *Id.* Under CAA §§107(d)(1)(B)(4) and 107(d)(3), no ozone nonattainment area can be redesignated as an attainment area until the EPA Administrator determines the area has attained NAAQS, including a pollution maintenance plan.

160. *Implementation of the National Ambient Air Quality Standards for Particulate Matter and Ozone: Before the Senate Env't and Public Works Comm., Subcomm. on Clean Air, Climate Change, and Nuclear Safety*, 108th Cong. (2004) (testimony of Hon. Michael O. Leavitt, Administrator, U.S. EPA), *available at* http://epw.senate.gov/hearing_statements.cfm?id=220004 [hereinafter *Senate Hearings*].

mental and public health organizations argue circumvent the basic principles of the CAA and subject Americans to polluted air for a longer amount of time. The two Bush Administration programs most likely to negate many of the air pollution gains made in the past, as well as future pollution reductions under the new eight-hour standard, are the legislative and regulatory versions of the Clear Skies Initiative and changes to the NSR provisions of the CAA.

On February 14, 2002, President Bush announced his Clear Skies Initiative.[161] The Bush Administration contends that this latest CAA amendment will result in greater reductions in air pollution from electric generators than the current CAA.[162] Electric utilities are the largest industrial source of air pollution, generating more than one-quarter of the NO_x emissions in the United States.[163] In 2000, an estimated 30,000 people died prematurely due to power plant pollution from all pollutants, not just NO_x.[164] The president promises that the initiative will result in major cuts in pollution from electric generators: reducing sulfur dioxide (SO_2) by 73%, NO_x by 67%, and mercury by 69%.[165] Based on his father's successful acid rain cap-and-trade program, the president has proposed a program that caps the amount of emissions the regulated community can emit and then allows the regulatees to freely trade these allowances with each other.[166] EPA would reduce the emission allowances over time.[167] The program awards creative, efficient companies while lowering compliance costs.[168]

More specifically, the Clear Skies Initiative would reduce NO_x from electric utilities from 2000 emissions of 5 million tons to a cap of 2.1 million tons in 2008, and a cap of 1.7 million tons in 2018.[169] EPA estimates that 290 counties currently exceed the eight-hour ozone standard.[170] Under a combination of the Clear Skies Initiative, the NO_x SIP call, and proposed controls on mobile sources, the number of counties attaining the eight-hour standard is predicted to increase from 44 to 47 by 2010, with 3 more counties coming into compliance by 2020.[171] Counties that would continue to be in ozone nonattainment in 2020 are approximately the same counties that currently are in severe or extreme nonattainment under the one-hour standard.[172]

The Bush Administration has been openly criticized for rewriting the CAA to insulate electric utilities from emissions reductions. An important component of the Clear Skies Initiative is the exemption of public power plants from NSR.[173] President Bush's own EPA urged the president to propose a more stringent plan based on assessments that the Clear Skies Initiative will actually allow more pollution than the existing CAA, but critics contend the Administration refused the proposal in order to avoid burdening the electric utility industry.[174]

Internal EPA assessments demonstrate that the Clear Skies Initiative will allow more than one and one-half times as much NO_x for nearly a decade longer than the current CAA (2010-2018) and one-third more NO_x after 2018.[175] Additionally, pollution reductions could be delayed until 2025 because the Clear Skies Initiative allows polluters to bank emission credits.[176] In essence, the environmental community finds that the plan achieves too little too late. The Natural Resources Defense Council (NRDC) contends that the Clear Skies Initiative would result in more pollution than full-scale implementation and enforcement of the current law.[177] Additionally, those citizens who have already shouldered a large part of our country's air pollution will be forced to wait for clean air longer than the CAA would permit.

Although the Clear Skies Initiative legislation has been introduced in both the U.S. House of Representatives and the Senate, the legislation does not appear to have very much political support.[178] Anxious to get its Clear Skies Initiative passed before the 2004 election, the Bush Administration decided to take a more direct approach while the legislation is debated in the halls of Congress. EPA's January 2004 proposed rule, the IAQR, is a spin-off of the Clear Skies Initiative. The rule sets new targets for the electric utility industry to reduce overall pollution in the next 15 years through a program that closely tracks the goals of the Clear Skies Initiative,[179] but the proposed rule includes a controversial cap-and-trade program for mercury that the original plan did not include.[180]

The proposal is an offshoot of the Clear Skies Initiative because it also allows states to meet SIP requirements using a cap-and-trade program. Under the new rule, EPA will require each state to submit a SIP showing attainment of the specified emission reductions using any controls the state prefers, including trading programs.[181] Significantly, however, if a state wants to impose controls on electric utilities "they must impose a cap because this category may feasibly

161. Press Release, President George W. Bush, *supra* note 65.

162. Katharine Q. Seelye, *White House Rejects a Stricter EPA Alternative to the President's Clear Skies Plan*, N.Y. Times, Apr. 28, 2002, at A24.

163. Natural Resources Defense Council, *The Bush Administration's Air Pollution Plan*, *at* http://www.nrdc.org/air/pollution/qbushplan.asp (Sept. 5, 2003).

164. American Lung Ass'n, *supra* note 9, at 59.

165. Seelye, *supra* note 162, at A24.

166. *Id.*

167. *Id.*

168. Press Release, President George W. Bush, *supra* note 65. The Bush Administration estimates that the cap-and-trade program will only cost two-thirds of the cost to meet standards under traditional command-and-control measures under the CAA. *Id.*

169. U.S. EPA, *Clear Skies: Basic Information*, *at* http://www.epa.gov/air/clearskies/basic.html (Feb. 29, 2004) (last modified Sept. 8, 2003).

170. U.S. EPA, Initial Results, *supra* note 124, at 14.

171. *Id.* at 16.

172. *See id.* at 16.

173. Percival et al., *supra* note 24, at 536.

174. Seelye, *supra* note 162, at A24.

175. American Lung Ass'n, *supra* note 9, at 59.

176. *Id.*

177. Natural Resources Defense Council, *supra* note 163.

178. The House bill has only has one cosponsor other than the bill's sponsor, Rep. Joseph Barton (R-Tex.). H.R. 999, 108th Cong. (2003). Similarly, the only supporter of the Senate bill is its sponsor, Sen. James Inhofe (R-Okla.). S. 1844, 108th Cong. (2003).

179. NO_x emissions would be reduced by 1.5 million tons in 2010 and 1.8 million tons annually by 2018. U.S. EPA, *Interstate Air Quality Rule: Basic Information, at* http://www.epa.gov/interstateairquality/basic.html (last modified Feb. 4, 2004).

180. Jennifer Lee, *EPA Plans to Expand Pollution Markets*, Wash. Post, Dec. 14, 2003, at A24.

181. Proposed Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule), 69 Fed. Reg. 4566, 4625 (Jan. 30, 2004) (to be codified at 40 C.F.R. pts. 51, 72, 75, and 96).

implement a cap."[182] EPA strongly encourages the states to implement a cap-and-trade approach on other source categories as well.[183]

EPA's proposed rule specifically addresses interstate transport of ozone and SO_2.[184] The rule requires 29 upwind states and Washington, D.C., to create a SIP that specifically meets the Act's requirement of not contributing significantly to SO_2 and NO_x nonattainment in downwind states.[185] EPA is proposing the rule because it predicts that many areas that implement local ozone controls will still be unable to meet the eight-hour ozone standard by 2010 unless upwind emissions are controlled.[186] EPA finds that NO_x emissions in 25 states, as well as Washington, D.C., significantly contribute to nonattainment of the eight-hour ozone standard in 56 counties.[187]

EPA predicts that under the IAQR, only 26 counties in the East will exceed the eight-hour ozone standard by 2015, compared to the 274 eastern counties that exceeded the standard in 2002.[188] As with President Bush's Clear Skies Initiative, many of the counties that will remain in nonattainment by 2015 are the same counties currently facing devastating levels of ozone pollution.[189] Environmental organizations find the 2015 deadline to be unlawful and unacceptable. Not only does the IAQR fail to help counties most seriously suffering from harmful levels of ozone pollution, but the IAQR delays full implementation of ozone pollution controls until 2015—a full six years after most areas have to meet the new eight-hour standard.[190] They also point out that EPA is aware that industry has cost-effective technology to reduce VOCs and NO_x by 2010 by amounts much greater than what EPA has proposed.[191]

President Bush has also finalized dramatic changes to the Act's NSR program that may further negate progress made under the Act as well as future progress under the new eight-hour standard. Under the CAA, new sources of air pollution, as well as some actions taken to modify existing facilities, trigger greater pollution controls than controls required for existing pollution sources.[192] Congress anticipated that older plants would be retired and replaced with newer, cleaner plants. As a precaution, however, Congress included a provision that requires new sources, or older sources modifying their facility in such a way as to increase emissions, to apply for an NSR permit before they can begin construction or modification of their facility in nonattainment areas.[193]

Rather than shutting down old plants, many sources are modifying or upgrading their plants beyond the plant's life expectancy under EPA's modifications exception. In the late 1990s, Northeast states and EPA began suing power plants in the Midwest and South, claiming that plants in these areas were upgrading their facilities but not acquiring the mandatory NSR permits. EPA filed a lawsuit in November 1999 against 7 electric utilities, a total of 51 power plants.[194] The utilities contended that the plant upgrades fell under the modification exception, although EPA won some major victories late in the Clinton Administration.[195]

In December 2002, the Bush Administration EPA finalized a Clinton-era rule that exempted facilities from NSR if they agreed to operate under a site-specific cap or "plant-wide applicability limits."[196] The rule also changed the methodology for determining when NSR is triggered.[197] Northeastern states and environmental groups are challenging this rule in court.[198]

Fearing more lawsuits, while serving on the president's energy policy task force in 2001, the energy sector asked President Bush to weaken the NSR program.[199] The task force took this recommendation into consideration, resulting in EPA's issuance of several further changes to its NSR regulations in October 2003.[200] Most significantly, under the latest NSR rule, older plants can avoid installing new pollution controls when they replace equipment with a functionally equivalent piece of equipment if the cost does not exceed 20% of the cost of replacing the plant's essential production equipment.[201] EPA would also allow power plants to pick 2 of the last 10 years to serve as their baseline for deciding if they need to install cleaner pollution technologies in their plant, while also exempting plants that have installed pollution reduction controls in the last 10 years from having to install new pollution controls.[202] EPA believes the rule will result in more efficient, more reliable operation of electric utilities while providing the industry with greater certainty as to what actions trigger NSR.[203]

This dramatic change to the CAA, however, gives 17,000 of the nation's dirtiest power plants, oil refineries, and other industrial facilities the green light to continue polluting using decades-old pollution control technology.[204] An electric utility lawyer stated that under the new rules it would be "very rare" for a utility to trigger NSR when repairing a facility.[205] This rule is also being challenged in court by sev-

182. *Id.*

183. *Id.*

184. *Id.* at 4570.

185. *Id.*

186. *Id.* at 4579.

187. *Id.* at 4570. The upwind sources of NO_x include: Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin. *Id.* The downwind areas significantly affected by this ozone transport include some of the eight areas of concern: Washington, D.C.; Baltimore, Md.; and Philadelphia, Pa. *Id.* at 4602-03, tbl. V-3.

188. U.S. EPA, Ozone Pollution: The Interstate Air Quality Rule Together With Other Clean Air Programs Will Bring Cleaner Air to Cities in the East 2 (2004), *available at* http://www.epa.gov/air/interstateairquality/ozoneattainment.pdf.

189. *Id.*

190. *Compare* Natural Resources Defense Council, Proposed IAQR Fails to Protect Public Health (Apr. 2004) (on file with author), *and* 69 Fed. Reg. at 23953-54 (to be codified at 40 C.F.R. pts. 50-51, 81).

191. *Id.*

192. *See* 42 U.S.C. §§7411(a)-(e) (2004).

193. *See id.*

194. Percival et al., *supra* note 24, at 535.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*; Natural Resources Defense Council, *supra* note 163.

199. *Id.*

200. *Id.*

201. Eric Pianin, *Clean Air Rules to Be Relaxed: EPA Will Ease Power Plants' Requirements*, Wash. Post, Aug. 23, 2003, at A4.

202. American Lung Ass'n, *supra* note 9, at 56.

203. *Id.*

204. *Id.* at 55.

205. Elizabeth Shogren, *Clean Air Act Rules for Industry Eased*, L.A. Times, Aug. 28, 2003, at A1.

eral states, cities, and environmental organizations, and the D.C. Circuit temporarily stayed the rules from going into effect until the court can hold a trial on the merits of the rule.[206]

These significant changes to NSR regulations have been attacked by a variety of well-respected professionals including the National Academy of Public Administration (NAPA), as well as state environmental regulators. NAPA completed a two-year study analyzing the NSR program in 2003.[207] NAPA recommended to EPA a program that would force older power plants to stop operations within 10 years unless they install new pollution control devices.[208] Without such changes to NSR, NAPA contends, we will continue to experience thousands of premature deaths and acute and chronic diseases caused by air pollution.[209] NAPA's reaction to the October 2003 rule was equally as grim. The chair of the NAPA panel that reviewed the NSR program stated that the substantial exemption in the new rule is contrary to congressional intent and would have a serious impact on public health.[210]

State environmental regulators also believe that the new NSR regulations are a clear step backward in our quest for clean air. In a recent U.S. General Accounting Office (GAO) report, a majority of the 44 state air quality officials responding to a GAO survey said the NSR rule will provide industry greater flexibility at the expense of increased emissions and agency workloads.[211] Most notably, many officials believe that the potential emission increases will make it difficult for their state to meet NAAQS.[212] The GAO notes that emission increases are probable under the new NSR rules because in a previous report the GAO found that for each megawatt of electricity produced, older facilities emit approximately 25% more NO_x than newer facilities.[213] Older facilities will not trigger NSR under the new rule as often as they did under the old rule, thus, NO_x emissions from older facilities will counteract air quality gains.

Finally, although some industry representatives agreed with EPA that the new rule will decrease emissions because companies will be able to pursue energy efficiency projects that the previous NSR regulations would have stalled, these same representatives also believe that facilities that operate more efficiently could very well increase production and, subsequently, increase emissions.[214]

Regardless of whose opinion is credible, the new NSR rules will likely increase NO_x emissions. From EPA's and the industry's vantage point, the new rules allow greater efficiency in some plants while also allowing older, more polluting plants to continue business as usual. Viewing the rules from an environmental or public health perspective, the new rules could reverse the good strides that have been made in reducing NO_x emissions and ozone-related health risks. The Clear Skies Initiative, the IAQR, and the NSR changes will make it difficult for even the most stringent of states to meet the 2005 severe ozone attainment deadline, as well as the new eight-hour goals.

F. New EPA Rules Will Control Emissions From Some Sources for the First Time

In addition to the IAQR and the NSR regulations, EPA has been busy developing a number of other rules to combat ozone pollution. These rules, in combination with other existing CAA programs such as the NO_x SIP call, may help those areas on the brink of ozone attainment achieve their attainment deadlines.

First, EPA has developed new emissions standards for nonroad diesel engines used in construction, agriculture, and industrial operation. Finalized in May 2004, the nonroad diesel rule will reduce the pollution from construction equipment by 90%, including reducing NO_x emissions by 826,000 tons and SO_2 emissions by 127,000 tons in 2030.[215] This rule could have a dramatic impact on ozone attainment in California where construction and agricultural equipment are the largest source of NO_x emissions in the state.[216]

Second, 25% of model year 2004 cars and light trucks must comply with stricter tailpipe standards for passenger vehicles. Of particular interest, by 2009 sports utility vehicles, minivans, and light pick-up trucks will be required to meet the same Tier II tailpipe standards as cars.[217]

Third, the Administration hopes to entice owners of existing vehicles and equipment that burn diesel fuel to reduce their emissions through a series of voluntary programs. For instance, President Bush has requested that funding be made available for school districts that want to retrofit their school buses with newer, cleaner engines through the Clean School Bus USA program.[218]

G. The 108th Congress Wrestles With Ozone Attainment

Although no one expects Congress to pass any legislation that will significantly overhaul the CAA, members of Congress on both sides of the aisle have responded to Bush Administration proposals through legislation. Two members of Congress have put forth companion legislation that would restore the electric sector responsibilities that will be diminished if the NSR regulations are implemented. The goal of both of these bills is to reduce a variety of emissions from electric power plants including NO_x, SO_2, carbon dioxide, and mercury.

206. Katharine Q. Seelye & Jennifer Lee, *Court Blocks U.S. Efforts to Relax Pollution Rules*, N.Y. Times, Dec. 25, 2003, at A1.

207. Eric Pianin, *supra* note 201, at A4.

208. *Id.*

209. *Id.*

210. Elizabeth Shogren, *supra* note 205, at A1.

211. U.S. GAO, Key Stakeholders' Views on Revisions to the New Source Review Program 21-22 (2004).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Senate Hearings, supra* note 160 (testimony of Hon. Michael O. Leavitt, Administrator, U.S. EPA). Nonroad diesel engines account for more than 12% of total NO_x from mobile sources; the new standard will reduce NO_x emission from these nonroad diesel engines by 90% through emission controls on the engine. U.S. EPA, *Reducing Nonroad Diesel Emissions*, *at* http://www.epa.gov/nonroad-diesel/2004fr.htm (last updated July 27, 2004).

216. Elizabeth Shogren, *EPA Gets Tough on Areas With Poor Air Quality*, L.A. Times, Apr. 16, 2004, at A31.

217. *Id.*

218. U.S. EPA, *Voluntary Programs, at* http://www.epa.gov/otaq/voluntary.htm (last updated Nov. 4, 2003). Other voluntary programs that have the potential to reduce NO_x emissions consist of: the Voluntary Diesel Retrofit Program, which provides financial incentives for government offices to retrofit government fleets; SmartWay Transport Partnership, a project that encourages energy efficiency in the freight industry; and Best Workplaces for Commuters, which encourages employers to provide incentives for their employees to avoid drive-alone commuting. *Id.*

Rep. Henry Waxman's (D-Cal.) Clean Smokestacks Act of 2003 would control the same four pollutants the Bush Administration is addressing in its Clear Skies Initiative, but the congressman's bill mandates that standards be met by 2009.[219] The legislation would dramatically reduce NO_x emissions from electric utilities to 75% below 1997 levels.[220] EPA would be allowed to develop a market-based trading program, but the program could not include mercury.[221] Additionally, rather than extending the life of older power plants as the NSR rules will do, this legislation mandates that either 30 years after a power plant began operating or 5 years after the enactment of this legislation, whichever is later, outdated power plants must comply with the most recent new source performance standards and all other CAA requirements that apply to modified sources.[222]

Sen. James Jeffords' (I-Vt.) companion bill, the Clean Power Act of 2003, sets an electric power plant NO_x emissions limit of 1.510 million tons by 2009 (essentially the same goal as the House bill),[223] as compared to the 2008, 2.1 million-ton goal and 2018, 1.7 million-ton goal under the president's Clear Skies Initiative.[224] Senator Jeffords proposes to meet this reduction goal through two mechanisms. First, outdated power plants will have to meet best available control technology, technology usually applied to new sources of pollution in cleaner parts of the country, either on the power plant's 40th birthday, or 5 years after enactment of the bill, whichever is later.[225] Second, the bill allows emissions trading to the extent that trading does not harm public health or the environment.[226] Stationary sources that are not adequately controlling their NO_x emissions in areas that don't meet the 2009 deadline would have their emission allowances decreased cumulatively each year until NAAQS are met.[227]

While there is a chance that these bills will get through Congress, it is highly unlikely that the president will sign them into law, or that Congress will muster enough votes to overturn the likely presidential veto. Any legislation passed by the current Congress that affects ozone standards is more likely to push back ozone attainment deadlines without imposing more stringent controls on any industry. Sen. Thomas Carper (D-Del.) introduced a bill in April 2003 that would exempt power plants from NSR requirements as long as hourly pollution rates do not increase.[228] Under this bill, power plants could avoid NSR even though their pollution output is greater by operating more hours per day.

Without allowing for debate, at the end of 2003, Rep. Joe Barton (R-Tex.) inserted a provision into the House energy bill that would indefinitely postpone attainment deadlines for the areas that EPA had granted extensions to under EPA's extension policy, including three of the eight severe nonattainment areas of concern (Atlanta, Georgia; Baton Rouge, Louisiana; and metropolitan Washington, D.C.), in addition to the representative's district of Dallas-Fort Worth, Texas.[229] The amendment would allow EPA to delay compliance if nonattainment areas were affected by ozone transport, negating the line of court cases holding EPA's 1998 extension policy invalid.[230] Areas that EPA is under a statutory mandate to "bump up" for not meeting ozone attainment deadlines could avoid reclassification by requesting a deadline revision under the amendment.[231] In addition, the bill would invalidate any "bumpup" actions taken by EPA within the 18 months prior to the enactment of the legislation, as well as all other "bumpup" actions taken within 12 months of the bill's passage.[232] This would likely reverse the "bumpup" actions EPA finalized in 2003-2004 for Atlanta, Georgia; Baton Rouge, Louisiana; St. Louis, Missouri; Beaumont-Port Arthur, Texas; and Washington, D.C.[233]

The extension amendment enjoyed key political support including the support of President Bush, as well as Sen. Pete Domenici (R-N.M.), Chairman of the Senate Energy and Natural Resources Committee.[234] The legislation, however, would prolong the myriad of health problems our nation is currently suffering from under the current CAA. A consulting firm estimates that achieving the one-hour ozone standard in the areas affected by the legislation would mean 1,004 less hospital admissions due to respiratory problems and 384,169 less asthma attacks.[235]

The House passed the energy bill at the end of 2003, including Representative Barton's amendment.[236] Apparently there was moderately strong support for the measure because when opponents of the amendment asked for a vote on a nonbinding motion to delete the amendment, the motion lost 232 to 182 due to intense lobbying by coal-burning electric utilities and business organizations.[237] The Senate, however, vowed to stop the bill from becoming law and did just that by filibustering the bill through the end of the 2003 session.[238]

219. H.R. 2042, 108th Cong. (2003).

220. *Id.*

221. *Id.*

222. *Id.* New source performance standards (NSPS) apply to the construction or modification of certain stationary sources as determined by EPA. Belden, *supra* note 79, at 55-56. The technology that is applied to sources under the NSPS program is "best demonstrated technology," which is generally considered less stringent than technology imposed under the NSR program, but NSPS apply when there is any increase in emissions as opposed to NSR, which only applies when there is a significant increase in emissions. *Id.* at 58.

223. Sen. James Jeffords, *Clean Air*, *at* http://jeffords.senate.gov/issue_clean_air.html (last visited July 31, 2004).

224. S. 366, 108th Cong. (2003).

225. *Id.* The legislation applies best available control technology, which is the control technology applied to new sources of air pollution in areas that are meeting NAAQS, referred to as prevention of significant deterioration areas. 42 U.S.C. §§7470-7479 (2004).

226. S. 366.

227. *Id.*

228. S. 843, 108th Cong. (2003).

229. Eric Pianin, *supra* note 201, at A4.

230. *Compare* H.R. 6, 108th Cong. (2003), *and House Hearings*, *supra* note 90 (testimony of Hon. Jeffrey Holmstead, Assistant Administrator for Air and Radiation, U.S. EPA).

231. *Id.*

232. *Id.*

233. U.S. EPA, *Ozone Federal Register Notice Changes to a Higher Classification, at* http://www.epa.gov/oar/oaqps/greenbk/ofr2rpt2.html (last updated Aug. 3, 2004).

234. Eric Pianin, *supra* note 201, at A4.

235. Press Release, Clear the Air, Nation's Leading Air Consultants: Energy Bill Will Keep America's Air Dirty (Nov. 18, 2003) *at* http://cta.policy.net/.

236. Eric Pianin, *supra* note 201, at A4.

237. *Id.*

238. Jim Landers, *Energy Bill Hits Obstacles*, Dallas Morning News, Nov. 22, 2003, at 1A. The ozone amendment was one of the issues that prompted the Senate to block passage of the energy bill; however, outrage over a methyl tertiary butyl ether (MTBE) provision in

Senator Domenici introduced the Senate energy bill on February 12, 2004.[239] The Senate bill includes the ozone deadline extensions that were included in the 2003 House energy bill verbatim.[240] Perhaps more importantly, Representative Barton has replaced Rep. Billy Tauzin (R-La.) as Chairman of the House Energy and Commerce Committee. Representative Barton stated that his first priority as chairman will be to work with President Bush to ensure that a comprehensive energy bill passes the Senate.[241]

States that have already incurred the costs of implementing pollution controls in order to meet their CAA deadlines will probably oppose the amendment. In a 2003 hearing on Capitol Hill on EPA's extension policy, the Assistant Commissioner for Environmental Regulation at the New Jersey Department of Environmental Protection testified that New Jersey does not support the extension policy because the policy "simply rewards an area's failure to attain air quality standards by extending deadlines" while doing nothing concrete to solve ozone transport.[242]

IV. Looking Ahead: The Intractable Problem of Ozone Pollution in the Early 21st Century

A. The Majority of Areas in Severe Ozone Nonattainment Will Not Meet the 2005 Deadline

Recent state data demonstrates that seven of the eight areas under the 2005 severe nonattainment deadline are not likely to meet the 2005 deadline. Nevertheless, under their attainment SIPs, these states are predicting attainment by resting their hopes on programs that are just beginning to take effect, such as the NO_x SIP call.

Ventura County, California, is the only 2005 ozone nonattainment area that may meet the 2005 deadline. Ventura County Air Pollution Control District officials predict that the county will meet the 2005 attainment deadline because the area only exceeded the standard once in 2002 and twice in 2003.[243] If Ventura County does not exceed the standard this summer, it will be in compliance because the standard is met if there are no more than three exceedances in three consecutive years.[244]

Table III: Number of Exceedances of One-Hour NAAQS Standard in Areas With 2005 Severe Nonattainment Deadlines (2000-2003)

	2000	2001	2002	2003
Atlanta, Ga.[a]	11	3	8	1
Baltimore, Md.[b]	1	9	14	2
Baton Rouge, La.[c]	11	1	2	11
Philadelphia-Wilmington-Trenton[d]	4	6	9	2
Sacramento, Cal.[e]	5	2	7	6
*San Joaquin, Cal.[f]	30	32	31	37
Ventura County, Cal.[g]	1	2	1	1
Washington, D.C.[h]	2	3	9	3

[a] Environmental Protection Division, Georgia Dep't of Natural Resources, *Georgia's State Implementation Plan for the Atlanta Ozone Non-Attainment Area* (July 17, 2001), *at* http://www.ganet.org/dnr/environ/.
[b] Maryland one-hour exceedance tables from the Maryland Department of the Environment (2000-2003) (on file with author).
[c] Data for 2000-2002 can be found on the Internet at Baton Rouge Area Ozone Task Force Support Group, *Baton Rouge Ozone Attainment Demonstration and Final State Implementation Plan*, *at* http://www.deq.state.la.us/evaluation/ozone/otf/otfsupport.htm (last visited Apr. 25, 2004). The data for 2003 can be found at U.S. EPA, *Air Data*, *at* http://www.epa.gov/air/data/geosel.html (last visited Sept. 9, 2004).
[d] *Id.*
[e] California Air Resources Board, *Ozone Trends Summary: Sacramento Valley Air Basin*, *at* http://www.arb.ca.gov/adam/cgi-bin/db2www/polltrendsb.d2w/start (last visited Apr. 25, 2004). Data for 2003 is found at the California Air Resources Board, *Annual Ozone Summaries for Selected Regions, at* http://www.arb.ca.gov/adam/cgi-bin/db2www/ozonereport_annual.d2w/start (last visited Sept. 9, 2004).
[f] The 2000-2002 data is available at California Air Resources Board, *Ozone Trends Summary: San Joaquin Valley Air Basin*, *at* http://www.arb.ca.gov/adam/cgi-bin/db2www/polltrendsb.d2w/start (last visited Apr. 25, 2004). The 2003 data is available at California Air Resources Board, *Annual Ozone Summaries for Selected Regions, at* http://www.arb.ca.gov/adam/cgi-bin/db2www/ozonereport_annual.d2w/start (last modified Apr. 25, 2004).
[g] Covarrubias, *supra* note 243, at B1.
[h] Metropolitan Washington Council of Governments, *Air Quality Data*, *at* http://www.mwcog.org/environment/air/data/default.asp (last visited Sept. 9, 2004).
* In 2004, the San Joaquin Valley was reclassified to extreme nonattainment.

EPA has approved California's request to reclassify the San Joaquin Valley to extreme nonattainment.[245] As of January 2004, the area had not yet identified sufficient emission reductions to demonstrate attainment of the one-hour standard by 2005 and was, therefore, facing sanctions that it could only avoid by reclassifying the area to extreme.[246] In April 2004, Los Angeles handed over its unenviable title of "smog capital" to the San Joaquin Valley.[247] EPA and the local air district's track record of missing at least 24 clean air deadlines in the last 12 years is at least partially to blame.[248]

the final House bill was the primary motivation for the filibuster. *Id.* MTBE is a gasoline additive that has leaked from storage tanks and contaminated the drinking water supplies of thousands. The MTBE provision in the House bill would shield gasoline refiners, mainly in Texas and Louisiana, from products liability lawsuits. *Id.*

239. S. 2095, 108th Cong. (2004).

240. *Compare id.*, *and* H.R. Conf. Rep. No. 108-375 (2003) (Conference report for H.R. 6, *supra* note 230).

241. David Ivanovich, *Texan to Lead Energy Panel*, Hous. Chron., Feb. 12, 2004, at 1-Bus.

242. *House Hearings, supra* note 90 (testimony of Mr. Samuel Wolfe, Assistant Commissioner for Environmental Regulation, New Jersey Department of Environmental Protection).

243. Amanda Covarrubias, *Smog Levels in Check in 2003*, L.A. Times, Jan. 3, 2004, at B1.

244. *Id.*

245. Clean Air Act Reclassification, San Joaquin Valley Nonattainment Area; California; Ozone, 69 Fed. Reg. 20550 (Apr. 16, 2004).

246. Clean Air Act Reclassification, San Joaquin Valley Nonattainment Area; California; Ozone, 69 Fed. Reg. 8126 (Feb. 23, 2004).

247. Hymon & Arax, *supra* note 63, at A1.

248. *Id.* The area was classified as serious under the 1990 CAA Amendments, but in 2001 EPA reclassified the area to severe because the area did not meet the 1999 attainment deadline for areas in serious nonattainment. EPA gave the San Joaquin area until May 2002 to submit a severe nonattainment SIP. San Joaquin failed to meet this requirement, prompting EPA to state that it would apply offset sanc-

According to the attainment SIPs in these severe ozone nonattainment areas, many areas are perhaps unrealistically optimistic that they will meet the 2005 attainment deadline. In Georgia's 2001 SIP, the state predicted that the Atlanta area would meet the one-hour standard by the end of 2004.[249] The Baltimore region expects to meet the 2005 deadline.[250] Louisiana is predicting that Baton Rogue will meet the 2005 deadline as well.[251] There have not been any predictions regarding the attainment status of the Philadelphia-Wilmington-Trenton area. California is predicting that the Sacramento area could still be on track to meet its 2005 goals because of new local programs[252] and that Ventura County will meet the 2005 deadline.[253] The latest SIP for Washington, D.C., created in December 2003, predicts that the area will meet its ozone attainment goals in 2005.[254]

Even if these areas meet the 2005 statutory deadline, EPA has designated one-hour ozone severe nonattainment areas of concern as eight-hour marginal, moderate, or serious nonattainment areas as depicted in Table IV. Interestingly, although all of these areas failed to meet the eight-hour standard many times since 2000, most of these areas were designated by EPA as only being in marginal or moderate nonattainment of the eight-hour standard. Environmental organizations have identified designations, such as these, to be inconsistent with the greater number and wider expanse of violations created by Congress under the 1990 CAA Amendments.[255] The 1990 one-hour ozone nonattainment classifications implemented by EPA included 1 extreme area, 12 severe areas, 13 serious areas, 30 moderate areas, and 43 marginal areas.[256]

Table IV: Designations and Number of Exceedances of Eight-Hour NAAQS Standard in Areas With 2005 Severe Nonattainment Deadlines (2000-2003)

	8-hour designation	2000	2001	2002	2003
Atlanta, Ga.[a]	Marginal	46	20	37	13
Baltimore, Md.[b]	Moderate	16	27	39	10
Baton Rouge, La.[c]	Marginal	117	23	10	55
Philadelphia-Wilmington-Trenton[d]	Moderate	11	12	12	10
Sacramento, Cal.[e]	Serious	35	37	34	40
San Joaquin, Cal.[f]	Serious	103	109	125	134
Ventura County, Cal.[g]	Moderate	27	18	12	22
Washington, D.C.[h]	Moderate	10	24	17	8

[a] Environmental Protection Division, Georgia Dep't of Natural Resources, *Air Monitoring Program, at* http://www.air.dnr.state.ga.us/amp/ (last visited Feb. 27, 2004).
[b] U.S. EPA, *Air Data*, *at* http://www.epa.gov/air/data/geosel.html (last visited Sept. 9, 2004).
[c] *Id.*
[d] *Id.*
[e] California Air Resources Board, *Annual Ozone Summaries for Selected Regions, at* http://www.arb.ca.gov/adam/cgi-bin/db2www/ozonereport_annual.d2w/start (last visited Sept. 9, 2004).
[f] *Id.*
[g] *Id.*
[h] The 2000 and 2003 data can be found at U.S. EPA, *Air Data*, *at* http://www.epa.gov/air/data/geosel.html (last visited Sept. 9, 2004). The 2001 and 2002 is available at Metropolitan Washington Council of Governments, Draft 2001 Ozone Season Summary (2001), *available at* http://www.mwcog.org/pdf/o3sum2001.pdf.

Sources: The eight-hour designation is available on the Internet at Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1, 69 Fed. Reg. 23951 (Apr. 30, 2004) (to be codified at 40 C.F.R. pts. 50-51, 81). See individual area footnotes for sources for area data.

Assuming that EPA or Congress does not deliver the states from themselves by extending deadlines or delaying compliance in any other way, technically, areas not meeting the 2005 deadline should face harsh consequences, including additional mandatory controls and fee systems. First, these states will be required to charge each major stationary source of VOCs in the nonattainment zone a fee as a penalty for the area's noncompliance.[257] The fee is set at $5,000 per ton of VOCs, with some room for modification, until the area meets national ozone standards.[258] Only areas with a population of 200,000 or less that can demonstrate that the standard cannot be met due to ozone transport will be given an exemption from this penalty.[259]

Second, the state must continue to meet the percent reductions for VOCs and/or NO_x until the standard is attained.[260] If a state cannot demonstrate these reductions each year in a three-year interval after missing the attainment deadline, the state, or a political subdivision if only that subdivision is responsible for the deficiency, is subject to sanctions.[261] The EPA Administrator has the discretion to administer two different types of sanctions: highway sanctions

tions, followed later by highway sanctions, against the state if they didn't submit the required SIP revisions in 18 months. 69 Fed. Reg. at 8126.

249. Georgia Dep't of Natural Resources, Environmental Protection Division, Air Protection Branch, *Georgia's State Implementation Plan for the Atlanta Ozone Nonattainment Area* (July 17, 2001), *at* http://www.ganet.org/dnr/environ/.

250. Maryland Dep't of the Env't, Modification of the Rate of Progress Plan for the Baltimore Region: Revising Mobile Emission Estimates With Mobile 6, at 1 (2003), *available at* http://www.mde.state.md.us/assets/document/FINAL%20BNAA%20M6%20ROP.pdf.

251. Louisiana Dep't of Envtl. Quality, 2005 Final Baton Rouge Area Attainment Plan and Transport Demonstration 1-8 (2001), *available at* http://www.deq.state.la.us/evaluation/ozone/otf/sip/Chapter1.pdf.

252. Sacramento Metropolitan Air Quality Management District, *Sacramento Regional Clean Air Plan Update*, *at* http://www.airquality.org/cleanairplan/index.shtml (last modified Apr. 22, 2004).

253. Covarrubias, *supra* note 243, at B1.

254. Metropolitan Washington Council of Governments, Plan to Improve Air Quality in the Washington, DC-MD-VA Region (2003) *available at* http://www.mde.state.md.us/assets/document/completeSIP_Dec17.pdf.

255. *See supra* note 44.

256. U.S. EPA, *1-Hour Ozone Nonattainment Area Summary History*, *at* http://www.epa.gov/oar/oaqps/greenbk/onsum2.html (last updated May 21, 2004).

257. 42 U.S.C. §§7511d(a)-(e) (2004).

258. *Id.* §7511d(b).

259. *Id.* §7511d(e).

260. *Id.* §7511(b)(4)(A).

261. *Id.* §7410(m).

or emission offsets.[262] EPA must prohibit the Secretary of Transportation from approving any projects or awarding any grants, subject to numerous clean air and safety-oriented exceptions.[263] The list of exceptions makes it feasible for a state to avoid sanctions in many situations. For example, the Secretary can approve programs for a number of reasons, including: if the principal purpose of the project is to improve highway safety, if it is a capital program for public transit, or if the program involves the construction of high occupancy vehicle lanes.[264] EPA can also compel areas that do not meet their percent reductions to offset the emissions from new or modified sources by 2:1.[265]

Third, if the area's ozone design value is above 0.140 ppm for the year of attainment, or the area fails to meet one of the milestones in §7511a(g) of the Act, the onerous NSR requirements for areas in extreme nonattainment shall apply.[266]

Fourth, states with serious and severe air quality control regions that fail to submit a demonstration showing that they have met each nonattainment milestone must elect: (1) to have the area reclassified to the next highest classification; (2) to implement additional controls that the EPA Administrator finds adequate to achieve the next milestone; or (3) to adopt an economic incentives program.[267] Economic incentives programs include emissions fees, marketable permits, a state fee on products whose production creates emissions, and incentives to reduce vehicle emissions and miles traveled.[268]

B. EPA Is Not Likely to Impose Sanctions Against Areas That Do Not Meet the 2005 Deadline

Considering the regulatory flexibility movement that seems to have settled in Congress, EPA, and the Administration, as well as the history of the CAA, it is highly likely that states that fail to meet the 2005 deadlines will not face any real penalties for violating the Act. It is highly improbable that any administration, especially the Bush Administration, will impose sanctions against the states for not meeting the 2005 deadline (though they might threaten the states with sanctions, as EPA has been apt to do in the past). EPA has a precarious relationship with the states in that it both assists the states in complying with environmental regulations, while enforcing those regulations against them.

History demonstrates that oftentimes when the Agency tries to either impose sanctions for nonattainment or a FIP on a state that fails to submit an adequate SIP,[269] either Congress or the administration comes to the state's rescue. For example, after EPA proposed sanctions for 11 areas with insufficient SIPs in 1987, Congress passed legislation prohibiting EPA from sanctioning the states.[270] On the other hand, although EPA has imposed sanctions only 14 times, being placed on the "sanctions clock" is enough of an incentive for states to comply with the law and avoid sanctions.

Currently the only sanctions in effect are emission offset sanctions and highway sanctions against East Helena, Montana, for noncompliance with SO_2 controls, and emission offset sanctions against the South Coast Air Quality Management District in California (covering the Los Angeles area) for noncompliance with VOC controls in a specific industry.[271] Most of the sanctions proposed are for ozone violations, many pertaining to failures to control ozone pollution from mobile sources, such as EPA's disapproval of enhanced vehicle I/M plans in Massachusetts, New Hampshire, and New Jersey.[272]

The vast majority of sanctions EPA proposes it later stays because the state takes actions to comply with CAA requirements. Between 1990 and 1997, EPA threatened to impose sanctions 855 times but only actually imposed sanctions 14 times.[273] All 14 of these sanctions included the offset ratio; only 2 of the sanctions included highway sanctions.[274] In ozone nonattainment areas, this trend may retard any progress toward ozone attainment as 49% of the NO_x pollution in our country comes from automobiles[275] and many areas already in ozone nonattainment, and those just now being downgraded to nonattainment areas, can only truly address ozone pollution with stringent controls on automobiles. For example, in Fauquier County, Virginia (part of the Washington, D.C., area), over 63% of ozone pollution comes from cars and trucks.[276] Similarly, in Newton County, Georgia (part of the Atlanta area), a full 56% of ozone pollution is emitted from cars and trucks.[277] In addition, in 22% of the counties entering ozone noncompliance for the first time under the eight-hour standard, more than one-half of the VOCs and NO_x is emitted from cars and trucks.[278]

Although EPA rarely sanctions areas for noncompliance, the threat of sanctions is a powerful compliance mechanism, especially considering the other more burdensome, and perhaps even less politically palatable, option of EPA developing a FIP for the area.[279] Sanctions imposed in the

262. *Id.* §7509(b).

263. *Id.* §7509(b)(1).

264. *Id.*

265. *Id.* §7509(b)(2).

266. *Id.* §7511(b)(4).

267. *Id.* §7511a(g)(3).

268. *Id.* §7511a(g)(4).

269. *Id.* §7410(c)(1). EPA is not required to promulgate a FIP under the ozone nonattainment provisions. However, for other criteria that do not have a specific nonattainment milestone program like ozone, if after two years a state does not rectify an inadequate SIP or continues to fail to produce a SIP, EPA must promulgate a FIP. *Id.* EPA has tried writing a FIP once for the South Coast Air Basin in California but faced huge political opposition in Congress. Having been burned once before, EPA is not likely to create another FIP anytime soon. Percival et al., *supra* note 24, at 531.

270. McGarity, *supra* note 27, at 48.

271. Office of Air and Radiation, U.S. EPA, Areas of the Country Where EPA Has Implemented Sanctions for Elements Required Under Title I of the 1990 Clean Air Act (2004) (on file with author).

272. Office of Air and Radiation, U.S. EPA, Status of Sanctions Clock Under the Clean Air Act (2004) (on file with author) [hereinafter Office of Air and Radiation, Status of Sanctions].

273. Congressional Research Service, Highway Fund Sanctions for Clean Air Act Violations (1997), *available at* http://www.ncseonline.org/NLE/CRSreports/Transportation/trans-9.cfm.

274. *Id.*

275. U.S. EPA, *supra* note 5.

276. Natural Resources Defense Council & Surface Transportation Policy Project, *Transportation Sector Is a Leading Reason for Poor Air Quality Across the Country*, *at* http://www.transact.org/nrdc/ozone.htm (Mar. 3, 2004).

277. *Id.*

278. *Id.*

279. Congressional Research Service, *supra* note 273.

late 1990s were all lifted less than two years after being imposed on the states, with many sanctions being lifted within a few months after the sanctions clock began running.[280] The threat of sanctions is often the primary motivator for clean air compliance.

C. Once Again, EPA and Congress Will Delay the Implementation of Ozone Standards Under the Guise of Ozone Transport and Regulatory Flexibility

Since the CAA's inception in 1970, EPA and Congress have been in a tug-of-war over ozone standards. At some points, such as when Congress created the 1990 CAA Amendments, Congress has imposed rigorous requirements on EPA and the states. At other times, Congress has usurped EPA's authority by prohibiting EPA from enforcing sanctions, for example. EPA has also been on both sides of this tug-of-war, affected not only by the policy agenda of the administration at the time, but also by the states, their co-regulators. For decades, states have been receiving mixed messages from both EPA and Congress.

Viewed through this historical perspective, it is easy to envision why attempts by Congress and the Bush Administration to change significant parts of the Act that are politically difficult for the federal government to enforce, and the states to implement, are likely to prevail. EPA's IAQR and Final Rule to Implement the 8-Hour National Ambient Air Quality Standard will both become a reality one year before the 2005 severe nonattainment deadline. Together, these programs could either stagnate air quality at current levels or reverse the decades of progress EPA and the states have made to address the intractable problem of ozone pollution.

The IAQR has broad appeal. More conservative environmental organizations might support the rule, while many in industry can generally be counted on to support regulations that use cap-and-trade programs in lieu of command-and-control regulations. Congress is also not likely to prohibit EPA from implementing the rule. The 25 downwind states that would benefit from the rule will likely support the IAQR, whereas the 29 states plus Washington, D.C., that must create a SIP taking their downwind neighbors into account will probably oppose the rule unless they are also a downwind state, as many states are.[281]

Likewise, Congress is warming up to market-based regulations, as evidenced by the two clean air bills introduced last year by traditionally environmentally friendly members of Congress: Representative Waxman and Senator Jeffords.[282] What was once considered a regulatory tool only routinely advocated for by economists is gaining acceptance as a mainstream mechanism to address costly pollution issues. Congress has also been sensitive to issues of state fairness and may very well support a regulation that requires upwind states to make more stringent, earlier ozone reductions than their downwind counterparts.[283]

The courts would probably uphold this rule as well because through the CAA, Congress expressed its intent to allow some variations due to ozone transport.[284] Whether courts will allow the Agency to single out the electric sector and require states to only regulate this sector via a cap-and-trade system is another question. Generally the courts allow states wide discretion in creation of their SIPs and refuse to allow EPA to mandate any specific measures other than those articulated in the Act. In *Virginia v. U.S. Environmental Protection Agency*,[285] the D.C. Circuit held that EPA could not condition approval of a SIP for states in ozone transport regions based on the use of specific auto emission standards. The court held that because §110 of the Act prohibits EPA from requiring specific control measures, EPA also cannot impose specific controls in ozone transport regions.[286] Courts, therefore, may uphold EPA's overall rule but strike down the special provision for electric utilities.

EPA's final rule to implement the eight-hour standard will also withstand congressional scrutiny, but is also somewhat vulnerable to a legal challenge. Especially in light of past congressional actions extending and weakening ozone commitments, Congress will not compel the agency to enforce CAA mandates for those areas still in noncompliance with the one-hour standard. The rule could be subject to legal action, nonetheless, because even the Agency has noted there is a strong argument that Congress intended the one-hour standard to remain in place until achieved.[287] Indeed, there is nothing in the section of the Act creating the ozone nonattainment program that addresses how new ozone standards are to be integrated into the nonattainment regulatory scheme. The judiciary might find that EPA's rule contradicts clear congressional intent requiring states to meet the one-hour standard regardless of any new ozone standard.[288]

Many other attempts discussed herein to stall achievement of ozone standards have been, or will be, thwarted by upwind members of Congress, environmental organizations, or the courts. The NSR rules face an uncertain future. In December 2003, the D.C. Circuit temporarily stayed the rule from taking effect, finding that the rule posed a likelihood of irreparable harm and that the plaintiffs would likely win on the merits.[289] If EPA is able to overcome the stay, many believe that the rule will lead to greater ozone pollution than existing clean air regulations allow.

Similarly, many senators are refusing to reconsider the energy bill passed by the House, including the ozone attainment extensions added by Representative Barton.[290] Therefore, the eight areas that were granted one-hour ozone attainment extensions under this legislation, as well as the handful of areas that would be classified under a less polluted classification, probably won't be given the Congressional relief already approved by the House. If Representative Barton, new Chairman of the House Energy and Commerce Committee, and Senator Domenici, Chairman of the Senate Energy and Natural Resources Committee, can use the 2004 presidential and congressional elections to strong-

280. Office of Air and Radiation, Status of Sanctions, *supra* note 272.

281. Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule), 69 Fed. Reg. 4566, 4570 (proposed Jan. 30, 2004) (to be codified at 40 C.F.R. pts. 51, 72, 75 and 96).

282. H.R. 2042; S. 366.

283. *See* H.R. 6. The House approved ozone deadline extensions for downwind areas that cannot meet the ozone NAAQS due to upwind pollution. *Id.*

284. *See, e.g.*, 42 U.S.C. §7511c (2004).

285. 108 F.3d 1397 (D.C. Cir. 1997).

286. *Id.*

287. 68 Fed. Reg. at 32820.

288. *See* 42 U.S.C. §§7511(a)-7511f.

289. *See* Seelye & Lee, *supra* note 206, at A1.

290. *Sense and Reliability*, Wash. Post, Apr. 12, 2004, at A18.

arm Republican senators into considering the bill and passing the ozone and methyl tertiary butyl ether (MTBE) amendments (or removing the controversial MTBE amendments altogether), then there might be enough support to pass the energy bill in the Senate. Whereas the Senate prevented the passage of the bill partially due to Representative Barton's extension amendment, a much larger number of senators voted down the energy bill because of concerns over the cleanup of MTBE in drinking water supplies.[291]

In addition, President Bush's Clear Skies Initiative will probably never resurface on Capitol Hill. There has been virtually no movement on the legislation and the Administration itself has given up its legislative strategy in favor of a more direct, regulatory approach.

Finally, there are numerous other programs addressed in this Article that are likely to decrease NO_x or VOC emissions. EPA speculates that a slight decline in ozone readings may be attributed to controls mandated on coal-fired power plants in the East, anticipating that such reductions are likely to continue as more control measures are placed on plants by the May 2004 NO_x SIP call deadline.[292] Potential emission reductions through the NO_x SIP call or the Regional Haze Regulations, however, are likely to be counteracted by the IAQR and possibly the NSR changes. While programs like the nonroad diesel standard or Tier II tailpipe emissions boast dramatic emission decreases, like the Clear Skies Initiative and the IAQR, many of these programs delay real improvements in air quality. The nonroad diesel standard, for example, would not remove 826,000 tons of NO_x until 2030.[293]

V. EPA Must Stringently Apply Sanctions Against Those States That Fail to Meet the 2005 Deadline, While Environmental Organizations and the Courts Continue to Enforce the Act

Considering Congress' Dr. Jeckel and Mr. Hyde approach to the CAA—in both developing a tough law and mandating that states comply, while simultaneously slipping the enforcement rug out from under EPA's feet—it is not likely that Congress will hold the eight areas of concern responsible for not meeting their 2005 deadline. For every bill tough on ozone pollution, there is an opposing bill easing restrictions on states, regardless of their record of attainment.

EPA must step up to the plate and impose sanctions against those states that do not meet their CAA obligations. After 30 years of failing to meet CAA deadlines and failing to protect the health of Americans, the American public has been more than patient with EPA and the states. Sanctions are an effective enforcement mechanism. States often cite their fear of sanctions as a major motivator in meeting NAAQS.

Moreover, EPA must seriously reconsider its imposition of sanctions on areas primarily affected by mobile source pollution. Imposing offset sanctions, in lieu of highway sanctions, on areas that are significantly affected by mobile sources, will not stop the continual increase in mobile source pollution. For areas like Atlanta and Washington, D.C., in which mobile sources can make up more than one-half of the ozone pollution in the area, EPA should impose highway sanctions as opposed to pollution offsets.[294] Although Congress did allow for specific exemptions from highway sanctions within the CAA itself, EPA has been accused of liberally interpreting these exemptions to avoid imposing highway sanctions.

The courts and environmental organizations, as well, should continue to play a critical role in the clean air debate. Many of the most important actions EPA has taken in the clean air arena were precipitated not by EPA's own statutory mandate, but by litigation brought by environmental organizations. The courts have, more often than not, sided with environmentalists' arguments that the CAA contains specific, unambiguous requirements that states are required to meet, generally without exception. No matter how EPA, the Administration, or Congress tries to get out from under the weight of the Act, the judicial backstop tends to uphold the true meaning of the Act.

VI. Conclusion

It is often said that those who forget the past are doomed to repeat it.[295] Congress has been struggling with clean air problems and ozone transport questions for decades. For three years prior to the 1990 CAA Amendments, Congress debated the most fair, most health-protective way to combat ozone pollution by passing an amendment that adequately tackles many of the complexities of ozone pollution. The current Congress and the Bush Administration should carefully consider the wisdom of the 1990 bipartisan amendments before moving forward with plans to unravel the existing CAA before it is fully implemented and enforced.

Now, as the 2005 deadline and other deadlines approach, it is evident that at some point in the very near future the government, industry, and citizens all must take aggressive actions to protect the health of millions of Americans. Decades of delay have already subjected millions to asthma attacks and other respiratory ailments. Deadline extensions and industrial sector exemptions introduced by both Congress and the Bush Administration will continue to condemn Americans to unhealthy air for decades longer. At this critical juncture, we cannot play politics with our health.

EPA must impose sanctions on states that fail to comply with the letter of the law, focusing especially on imposing highway sanctions on those areas significantly affected by pollution from cars and trucks. States have had a full generation, or 30 years, to meet our national ozone standard. The federal government and the American public must not allow another generation's health to be sacrificed as well. In addition, the judiciary and environmental organizations must continue to use the legal system to enforce the Act as Congress wrote it, not as politicians chose to interpret it for political gain. Such action is imperative if the CAA is to remain a living, viable law rather than a symbolic law of past aspirations.

291. Landers, *supra* note 238, at A1.

292. American Lung Ass'n, *supra* note 9, at 9.

293. *Senate Hearings*, *supra* note 160 (testimony of Hon. Michael O. Leavitt, Administrator, U.S. EPA).

294. In Fauquier County, Virginia (part of the Washington, D.C., area), over 63% of ozone pollution comes from cars and trucks. *See supra* note 276. Similarly, in Newton County, Georgia (part of the Atlanta area), a full 56% of ozone pollution is emitted from cars and trucks. *Id.*

295. George Santayana, Life of Reason, Reason in Common Sense 284 (Scribner's 1905).