



JENNIFER M. GRANHOLM  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
LANSING



March 31, 2009

VIA E-MAIL and U.S. MAIL

Air and Radiation Docket and Information Center  
Attention Docket ID No. EPA-HQ-OAR-2007-0956  
U.S. Environmental Protection Agency  
Mail Code: 2822T  
1301 Constitution Avenue NW  
Washington, DC 20460

Dear Sir or Madam:

The Michigan Department of Environmental Quality (MDEQ), Air Quality Division (AQD), submits the attached comments in response to the U.S. Environmental Protection Agency (EPA) proposal to revise the rule for implementing the 1997 8-hour ozone national ambient air quality standard for several of the limited portions of the rule vacated by the U.S. Circuit Court of Appeals for the District of Columbia, as published in the *Federal Register* on January 16, 2009 (FRL-8762-5).

The MDEQ has serious concerns with this proposal to reclassify designated nonattainment areas under Subpart 2 using design values from 2001-2003 air quality data, with the proposed treatment of areas that fall within the "gap," and with the proposed timeline for preparation and submittal of State Implementation Plans for newly classified Subpart 2 areas.

Please contact me if you have any questions on these comments.

Sincerely,

G. Winson Hellwig, Chief  
Air Quality Division  
517-373-7069

ACTING

Attachment

cc/att: Mr. Steven E. Chester, Director, MDEQ  
Mr. Jim Sygo, Deputy Director, MDEQ  
Ms. Mary Maupin, MDEQ

Michigan Department of Environmental Quality Comments  
Docket ID No. EPA-HQ-OAR-2007-0956  
March 31, 2009

The Michigan Department of Environmental Quality (MDEQ) strongly supports the Clean Air Act's purpose to promote the public health and welfare and the productive capacity of the nation's population. However, when Congress enacted Subpart 2 in 1990 it codified a considered and detailed plan to ensure progress towards, and eventual attainment of, the ozone standard, and consciously balanced economic and environmental considerations. This proposed implementation rule does not conform to that congressional intent, and if promulgated would create unrealistic expectations for states.

The U. S. Environmental Protection Agency's (EPA's) attempts to adapt the classification scheme (table) set forth in Section 181 of Subpart 2 in the 1990 amendments to the Clean Air Act to a revised ozone national ambient air quality standard has been overturned by the courts twice, in *Whitman v EPA*, 531 U.S. 457 (2001), and in *South Coast Air Quality Management District v EPA*, 472 F.3d. 882 (D.C. Circuit 2006). The EPA in this proposal is once again trying to construct a reasonable method to translate a regulatory scheme developed 19 years ago to a standard with a different form and threshold, to be applied in a different age. The MDEQ recognizes that this is an unenviable task fraught with the potential danger of creating absurd outcomes. Unfortunately, this proposal does not conform to the court's instructions to find a reasonable reconciliation of Subparts 1 and 2, and is an unacceptable response to the remand. This proposed rule sets states up for failure and must be recrafted.

The EPA should not use data from 2001-2003 to classify areas. The classification of nonattainment areas is meant to be based upon the severity of the pollution experienced and the effort needed to bring the area into attainment. The EPA should use the most recent ambient monitoring data design values to classify areas to avoid the imposition of programs that Congress meant for areas with more severe ozone problems. By turning the clock back to 2004, the reductions that have occurred between 2001 and 2009 that have significantly improved air quality would be ignored. The classifications are to be made in 2009, not 2004. It was not the intent of Congress to classify areas five years after designation. Though this situation developed because the EPA's original scheme encountered legal setbacks, the proposed remedy illogically penalizes areas that have made progress. The attainment deadlines should also be reset based upon the date of the newly imposed classifications in order to avoid more illogical outcomes such as subjecting new marginal areas to an expired attainment deadline and immediate bump-up. To the extent that EPA classifies areas under Subpart 2, the most recent design values should be used, marginal areas should have three years to attain, and moderate areas should have six years to attain the standard.

The EPA has not provided an adequate rationale for proposing to classify areas under Subpart 2 if the design value (using the appropriate data set) is within the 0.08-to-0.09 parts per million (ppm) classification "gap" that the Supreme Court identified in *Whitman*, 531 U.S. at 483, "to the extent that the new ozone standard is stricter than the old one, the classification system of Subpart 2 contains a gap, because it fails to classify areas whose ozone levels are greater than the new standard (and thus nonattaining) but less than the approximation of the old standard codified by Table 1." The D.C. Circuit clearly held that Subpart 2 applies to nonattainment areas with design values over 0.09 ppm, but did not limit the EPA's ability to classify areas with design values within the gap under Subpart 1. The Supreme Court, in fact, noted in *Whitman*, 531 U.S. at 483 that gaps in the Subpart 2

scheme prevent them "from concluding that Congress clearly intended Subpart 2 to be the exclusive permanent means of enforcing a revised ozone standard in nonattainment areas."

Congress crafted a compromise program that forced progress, but also set achievable goals within a reasonable timeline that took into account economic concerns. The requirements of Subpart 2 reflect a careful balance of environmental goals and economic realities, and recognition that areas with more serious air quality problems need more time to reach attainment. This proposal to require states to develop and submit State Implementation Plans (SIPs) in one year does not provide the full amount of time Congress provided for newly classified Subpart 2 areas, and sets states up to fail and to incur penalties such as classification bump-ups and sanctions. It is an absurd expectation that the steps required to start up a new vehicle inspection and maintenance program in order to submit an approvable SIP could be completed in one year, as this proposed rule would mandate for Cincinnati and Columbus, Ohio.

In Michigan, only Allegan County is still not meeting the 0.08 ppm ozone standard. This proposed implementation rule would be extremely problematic for this nonattainment area in which ozone levels are tied to emissions generated across Lake Michigan in areas that are now attaining the ozone standard.

- The design value at the Allegan County monitor in Holland for 2006-2008 is 0.086 ppm, a level that is within the gap.
- For Allegan County, an ozone receptor area, less than 5 percent of the ozone levels at the Holland monitor are attributed to local emissions.
- Even though local reductions will have negligible effect, as demonstrated by the EPA's *Western Michigan Ozone Study, November 19, 2008*, the Clean Air Act does not feature any relief mechanisms for such areas impacted by overwhelming ozone transport.
- Regional modeling indicates attainment by 2012 resulting from scheduled upwind reductions. By using the design values based on recent monitoring data, and devising an implementation rule that places "gap" areas in Subpart 1, attainment deadlines could be met, and this receptor area would not be further penalized with bump-up and sanctions for not reaching a goal that can not be achieved through state or local actions. Attainment progress is inextricably tied to upwind reductions.
- Adoption of state regulations or legislation to achieve a 15 percent reduction in volatile organic compound emissions, given the widespread recognition of the overwhelming transport phenomena in counties adjacent to Lake Michigan, is unlikely to be completed in one year. Because the upwind source regions are now meeting the standard and have petitioned for redesignation, state regulation adoption will meet serious, and probably justifiable, political backlash.

This proposal is not an acceptable response to the remand, and is not a reasonable reconciliation of Subparts 1 and 2. The EPA should use current design values and should reconsider its approach to classifying gap areas. The one-year proposed SIP deadline would result in a depletion of resources and political support at a time when states need to be gearing up strategic planning for attainment of the new ozone standard.