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VIA ELECTRONIC SUBMISSION

COMMENTS OF THE NAAQS IMPLEMENTATION COALITION ON THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S "IMPLEMENTATION OF THE 2015 NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE: NONATTAINMENT AREA CLASSIFICATIONS AND STATE IMPLEMENTATION PLAN REQUIREMENTS: PROPOSED RULE"

**81 FED. REG. 81276 (Nov. 17, 2016)
DOCKET NO. EPA-HQ-OAR-2016-0202**

The National Ambient Air Quality Standards ("NAAQS") Implementation Coalition submits these comments on the Environmental Protection Agency's ("EPA") proposed rule on "Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements: Proposed Rule" ("Proposal").¹

SUMMARY

The NAAQS Implementation Coalition is comprised of trade associations, companies, and other entities who confront difficulties in permitting and operating facilities under increasingly-stringent NAAQS, including for ozone. We have submitted numerous comments on rulemakings, guidance, and other implementation documents outlining a path towards implementing NAAQS in a manner that preserves air resources while ensuring economic growth. We encourage EPA to acknowledge and address NAAQS implementation issues as a growing burden on state agencies, business, and domestic manufacturing.

As to the Proposal specifically, we believe that the conflicting implementation schedules for the 2008 Ozone NAAQS and 2015 Ozone NAAQS should be addressed, if not legislatively, then administratively. However, EPA need not implement the Proposal's anti-backsliding measures when transitioning from the 2008 Ozone NAAQS to the more-stringent 2015 Ozone NAAQS. Furthermore, having cited "tools" in the Clean Air Act ("CAA") like

¹ Nothing in these comments shall constitute a waiver of any arguments our members have made or will make in any other context, including but not limited to rulemakings and/or litigation.

February 13, 2017

Page 2

CAA § 179B as providing flexibility for states to implement the near-background 2015 Ozone NAAQS, EPA should not now take steps to inhibit the use of those tools. Finally, we agree with EPA that the CAA supports interprecursor trading and note that such trading is important to balanced and effective NAAQS implementation.

DISCUSSION

I. NAAQS Implementation Issues are a Growing Burden to State Agencies, Business, and Domestic Manufacturing.

As we have repeatedly stated in past comments,² we are concerned that EPA has been promulgating lower air quality standards without developing a clear plan for their implementation. This imbalance, particularly with respect to the 2015 Ozone NAAQS, creates substantial permitting difficulties for American business and manufacturing, inhibits job growth, and needlessly adds to administrative burdens for states. It is for these reasons that we believe EPA should issue implementation rules, guidance, and technical updates – with maximum allowable flexibility – concurrent with a newly-revised NAAQS. Doing so would encourage a more cohesive NAAQS process that is informed by the real-world challenges created by more-stringent NAAQS. It would also position EPA to nimbly address implementation issues emerging throughout NAAQS implementation. Put simply, EPA’s decisions to lower NAAQS should be matched by increased effort to timely and effectively address resulting implementation concerns.

Absent contemporaneous action on implementation, EPA should focus on mitigating the regulatory burdens that more-stringent NAAQS create by issuing implementation rules, guidance, and technical updates soon after a revised standard is promulgated, and before new or revised requirements become effective for any purpose. EPA appeared to acknowledge these concerns in its implementation memorandum accompanying the 2015 Ozone NAAQS (“Ozone Implementation Memo”), where it committed to “ensuring that air agencies have adequate guidance, and new rules where necessary, to carry out Clean Air Act . . . directives

² See e.g. NAAQS IMPLEMENTATION COAL., COMMENTS ON REVISED DRAFT GUIDANCE ON SIGNIFICANT IMPACT LEVELS FOR OZONE AND FINE PARTICLES IN PREVENTION OF SIGNIFICANT DETERIORATION PERMITTING PROGRAM 1, Sep. 30, 2016 and NAAQS IMPLEMENTATION COAL., COMMENTS ON TREATMENT OF DATA INFLUENCED BY EXCEPTIONAL EVENTS: PROPOSED RULE 14, EPA Docket No. EPA-HQ-OAR-2013-0572-0147, Nov. 20, 2015.

February 13, 2017

Page 3

through the state implementation plan process.”³ Yet, over a year has passed, and EPA is just now proposing implementation rules for the 2015 Ozone NAAQS. While this is an improvement over the seven years it took EPA to promulgate implementation rules for the 2008 Ozone NAAQS,⁴ this delay still creates administrative burdens for state agencies tasked with implementing NAAQS.

EPA’s Ozone Implementation Memo also recognized that “the owners and operators of emissions sources need clarity and certainty about regulatory requirements, especially when there are changes in air quality standards that may affect their construction and operations.”⁵ We agree. Our members, and the companies they represent, have a proven record of working with states and regional EPA offices to install emission controls required for attaining NAAQS. Yet, they face significant permitting challenges as EPA’s outdated implementation tools and policies are pushed beyond their limits by new, more-stringent NAAQS. When layered with current natural background emissions and emissions related to normal economic activity, these implementation tools and policies leave little room for new or expanded manufacturing facilities to make the demonstrations necessary for NAAQS-related permitting.

Seeming to acknowledge these concerns, the Ozone Implementation Memo cited various “enhancements” to existing rules as adding “clarity and certainty” to implementing the 2015 Ozone NAAQS.⁶ However, we have found that many of these measures are inadequate and could even increase regulatory uncertainty. For example, the Ozone Implementation Memo highlights EPA’s proposed updates to PSD permit modeling guidelines in Appendix W of 40 CFR part 51.⁷ The proposed Appendix W Revision Rule did indeed include fixes responding to known over-prediction tendencies in EPA modeling tools.⁸ However, EPA changes to the recently-published Final Appendix W Revision Rule either substantially reduced the utility of those fixes, such as with changes to ADJ_U*, or, as with

³ Memorandum from Janet G. McCabe, Acting Assistant Adm’r for Air and Radiation, EPA, to Reg’l Air Div. Dir’s. on Implementing the 2015 Ozone National Ambient Air Quality Standards 3 (Oct. 1, 2015).

⁴ See *Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements*, 80 Fed. Reg. 12,264 (Mar. 6, 2015).

⁵ *Id.* at 5.

⁶ *Id.* at 5.

⁷ Ozone Implementation Memo, *supra* note 3, at 3-4.

⁸ 80 Fed. Reg. 45,339 (July 29, 2015).

February 13, 2017

Page 4

LOWWIND, eliminated them altogether.⁹ Permit applicants are now left uncertain on how to address known flaws with EPA's preferred models for NAAQS-related permitting. Even worse, the Final Appendix W Revision Rule requires that, in the absence of an analysis allowing a source to screen out of new modeling, applicants seeking PSD permits must model impacts from ozone and PM_{2.5} precursors on ambient air quality, even though a robust reduced form model for such assessment does not yet exist.¹⁰ This will only increase permitting challenges. EPA should focus on addressing implementation and permitting difficulties that increasingly more-stringent ozone NAAQS create by improving its tools and policies, not make those problems worse.

The growth of implementation challenges under new, more-stringent NAAQS is creating administrative burdens for state agencies and impeding the path towards reasonable project development – undermining economic expansion that brings jobs and needed tax revenue to local communities throughout the country. As these projects sometimes upgrade existing facilities with state-of-the-art pollution controls, they are often critical to both the economy *and* the environment.¹¹ Ultimately, NAAQS implementation concerns, under the 2015 Ozone NAAQS as well as other NAAQS, burden the competitiveness of domestic business and manufacturing at a critical time for blue-collar workers. Mindful of the recent Trump Administration memorandum calling for a review of domestic manufacturing regulatory burdens,¹² we encourage examination of these NAAQS implementation issues during that dialogue.

⁹ 82 Fed. Reg. 5,182 (Jan. 17, 2017).

¹⁰ As EPA has acknowledged, our comments to the proposed Appendix W Revision Rule note that the *Interagency Workgroup on Air Quality Modeling Phase 3 Summary Report: Near-Field Single Source Secondary Impacts* found that a robust reduced form model does not exist for ozone or secondary PM_{2.5} impacts from single sources. Yet, rather than address this concern by improving the Appendix W Rule, EPA instead simply went back and rewrote the report to make it conform with the Appendix W Rule. See EPA, RESPONSE TO COMMENTS ON THE REVISIONS TO THE GUIDELINE ON AIR QUALITY MODELS: ENHANCEMENTS TO THE AERMOD DISPERSION MODELING SYSTEM AND INCORPORATION OF APPROACHES TO ADDRESS OZONE AND FINE PARTICULATE MATTER 51-52, EPA Docket No. EPA-HQ-OAR-2015-0310-0156 (Dec. 20, 2016).

¹¹ See e.g. NAAQS IMPLEMENTATION COAL., COMMENTS ON DRAFT GUIDANCE FOR PM_{2.5} PERMIT MODELING 3, May 31, 2013 (noting that the Charlotte Pipe and Foundry Company testified to Congress that changing and economically impractical PM_{2.5} modeling requirements prevented the company from replacing its downtown Charlotte foundry with a new, state-of-the-art, high efficiency green facility).

¹² *Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing*, 82 Fed. Reg. 8,667 (Jan. 30, 2017).

February 13, 2017

Page 5

II. The Simultaneous 2008 Ozone NAAQS and 2015 Ozone NAAQS Implementation Schedules Imposed Upon States Should be Addressed.

During the rulemaking process for the 2015 Ozone NAAQS, numerous stakeholders, including some of our members, expressed concern that the revised standards would conflict with the then-existing 2008 Ozone NAAQS. These commenters noted that EPA had stalled work on the 2008 Ozone NAAQS for two years starting in 2009 while it pursued reconsideration of those standards. The Office of Information and Regulatory Affairs, citing “costs and burdens, particularly in this economically challenging time,” ultimately ordered EPA to abandon that reconsideration in late 2011.¹³ However, EPA’s delay pushed it so far behind schedule that it did not finalize implementation rules for the 2008 Ozone NAAQS until March 6, 2015, as noted above, seven years after the standards themselves were promulgated. States warned EPA that revised ozone NAAQS would burden state agencies already working to catch up on implementing the 2008 Ozone NAAQS.¹⁴ Nevertheless, in October 2015, EPA promulgated the new, more-stringent 2015 Ozone NAAQS.

In doing so, EPA has established two different, but simultaneous, ozone implementation programs on states and our members. Because implementation schedules are statutorily tied to the promulgation of new NAAQS, EPA cannot address this overlap by delaying implementation of the 2015 Ozone NAAQS. Thus, Congress is pursuing measures to relieve this tension by creating a phased “glide path” for the 2015 Ozone NAAQS that would allow states sufficient time to first implement the 2008 Ozone NAAQS. This approach would lessen obstacles to economic development while, according to EPA’s own analysis, continuing ongoing clean air improvements. However, if Congress does not address the

¹³ Letter from Cass Sunstein, Adm’r of the Office of Info. And Regulatory Affairs to Lisa Jackson, Adm’r of the Env’tl. Prot. Agency 2, Sep. 2, 2011.

¹⁴ See, e.g., COMMENTS OF THE ARK. DEP’T. OF ENVTL. QUAL. ON THE 2015 OZONE NAAQS PROPOSAL 11, EPA-HQ-OAR-2008-0699-1957, Mar. 16, 2015 (“The EPA should consider to what extent revising a standard - thus creating additional economic, regulatory and administrative burdens - would result in air quality improvements beyond those that would occur from the ongoing implementation of current and planned emissions reductions measures.”), COMMENTS OF THE S.D. DEP’T. OF ENV’T. AND NATURAL RES. ON THE 2015 OZONE NAAQS PROPOSAL 1, EPA Docket No. EPA-HQ-OAR-2008-0699-1744, Mar. 13, 2016 (“States have not had a chance to implement EPA’s recent guidance on how to bring areas not attaining the current ozone standard of 0.075 parts per million back into attainment.”), and COMMENTS OF THE MISS. DEP’T. OF ENVTL. QUAL. ON THE 2015 OZONE NAAQS PROPOSAL 5, EPA-HQ-OAR-2008-0699-1644, Mar. 17, 2015 (“The 2008 Ozone implementation requirements have just been issued. Thus, there has not been adequate time for the emission reductions mandated by these required investments to cause significant decreases in ozone concentrations.”).

February 13, 2017

Page 6

current simultaneous implementation of the 2008 and 2015 Ozone NAAQS, then EPA should alleviate that conflict administratively.

To that end, the Proposal provides two approaches for transitioning from the 2008 Ozone NAAQS to the 2015 Ozone NAAQS. “Option 1” would revoke the 2008 Ozone NAAQS for all purposes in each area one year after the effective date of the designation for the 2015 Ozone NAAQS.¹⁵ “Option 2” would revoke the 2008 Ozone NAAQS for all purposes in an area only when designated attainment for that NAAQS, no sooner than one year after the effective date of the designations for the 2015 Ozone NAAQS.¹⁶

We agree with EPA that it is appropriate not to have “a situation in which two standards would apply concurrently”¹⁷ and that doing so “could result in unnecessarily complex implementation procedures.”¹⁸ Furthermore, we note that Option 2 would result in the 2008 Ozone NAAQS remaining applicable in some areas in the country while not in other areas. We find this to be fundamentally inconsistent with the concept of *National* Ambient Air Quality Standards. Therefore, in the absence of Congressional action on the 2015 Ozone NAAQS, we find Option 1 to be preferable to Option 2.

However, “[g]iven the succession of NAAQS of increasing stringency that has occurred[,]”¹⁹ we believe that EPA should not finalize the anti-backsliding measures outlined in the Proposal, and should instead focus on implementing the new, more-stringent 2015 Ozone NAAQS. Indeed, such anti-backsliding measures are neither required by the CAA nor necessary to maintain cleaner air.

EPA acknowledges that the CAA does not require anti-backsliding measures where standards are made more stringent. However, “[b]ecause the CAA does not speak to what to do where a NAAQS is strengthened,” the Proposal “look[s] to the principles of CAA section 172” to impose such measures.²⁰ While this has been EPA’s long-standing policy, we believe Congress does not mandate that an agency impose certain actions on the regulated community

¹⁵ 81 Fed. Reg. 81,286.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 81,290.

²⁰ *Id.* at 81,288.

February 13, 2017

Page 7

by being explicitly silent on those actions. It is not simply that CAA § 172(e) “does not speak” to transitioning to more-stringent standards. Rather, the provision – just two sentences long but still using the word “relax” four times – is unambiguously predicated on less-stringent standards. “If the Administrator *relaxes*” a NAAQS, then the Administrator must promulgate requirements “within 12 months after the *relaxation*” to all areas that have not attained the NAAQS “as of the date of such *relaxation*” that are not less stringent than controls applicable to the area “before such *relaxation*.”²¹ Any look to CAA § 172(e) cannot ignore that one of its principles is the relaxation of NAAQS. As such, neither the principles nor the plain text of CAA § 172(e) mandate that EPA impose anti-backsliding measures where a NAAQS has not been relaxed.

EPA cites *South Coast Air Qual. Mgmt. Dist. v. EPA*²² as upholding its authority to impose anti-backsliding measures where the 2008 Ozone NAAQS has been revoked.²³ However, that case does not require EPA to impose such measures. *South Coast* rejected a claim that CAA § 172(e) could not justify anti-backsliding measures and found the removal of certain measures to be impermissible backsliding.²⁴ But, in so deciding, the court first noted that “[a]fter interpreting 172(e) to apply to strengthening the ozone NAAQS, EPA proceeded to limit the scope of interpretation.”²⁵ *South Coast* only requires that EPA implementation of CAA § 172(e) be consistent with its interpretation of CAA § 172(e). *South Coast* may have found it reasonable to interpret CAA § 172(e) as authorizing EPA to impose anti-backsliding measures where NAAQS have not been relaxed. However, it is also reasonable to interpret CAA § 172(e) as not *requiring* anti-backsliding measures where NAAQS have not been relaxed.

In any case, EPA need not rely on anti-backsliding measures to ensure that safe air quality is not allowed to retreat in revoking the 2008 Ozone NAAQS. As *South Coast* points out in upholding EPA’s interpretation of CAA § 172(e), a number of other provisions in the CAA can fulfill that role.²⁶ For example, CAA §110(l) prevents state implementation plans from being revised if doing so would interfere with attaining the more-stringent 2015 Ozone

²¹ CAA § 172(e), 42 U.S.C. § 7502(e) (emphasis added).

²² 472 F.3d 882 (D.C. Cir. 2006).

²³ 81 Fed. Reg. 81,288.

²⁴ 472 F.3d 900.

²⁵ *Id.*

²⁶ *See Id.*

February 13, 2017

Page 8

NAAQS.²⁷ These provisions may serve as a more functional approach to NAAQS implementation when bridging between increasingly more-stringent standards.

III. EPA Should Provide States More, not Less, Implementation Flexibility to Address Increasing Internationally-Transported Ozone.

EPA notes in the Proposal that a general theme of its stakeholder outreach since release of the 2015 Ozone NAAQS, “was a concern that the EPA is underestimating the magnitude and effects of [background ozone], and that available policy solutions do not provide meaningful relief from nonattainment designations in affected areas.”²⁸ While EPA acknowledges this perception, the Proposal does little to mollify stakeholder concerns.

Instead, the Proposal continues to downplay the challenge posed to states and local communities by internationally-transported ozone, saying that “[m]ost modeled ozone air quality values that exceed the NAAQS in the United States . . . are due primarily to emission sources within the U.S.”²⁹ As noted in our comments to the *White Paper on Implementation of the 2015 Primary Ozone NAAQS: Issues Associated with Background Ozone* (“Ozone Implementation White Paper”), EPA’s own data indicate that background ozone significantly contributes to EPA-modeled ozone design values throughout the country.³⁰ Even where it is not the sole cause for an exceedance, when combined with emissions associated with reasonable economic development, background ozone concentrations present a substantial and widespread challenge to NAAQS implementation.

EPA has past conceded that background ozone was the topic of “a good deal of discussion” during review of the 2015 Ozone NAAQS.³¹ Indeed, EPA was adamant upon

²⁷ 42 U.S.C. § 7410(l).

²⁸ Ozone Implementation Memo, *supra* note 3, at 8.

²⁹ 81 Fed. Reg. 81, 303.

³⁰ NAAQS IMPLEMENTATION COAL., COMMENTS ON IMPLEMENTATION OF THE 2015 PRIMARY OZONE NAAQS: ISSUES ASSOCIATED WITH BACKGROUND OZONE 1-2, EPA Docket No. EPA-HQ-OAR-2016-0097-0033, Mar. 31, 2016 (citing EPA, WHITE PAPER: IMPLEMENTATION OF THE 2015 PRIMARY OZONE NAAQS: ISSUES ASSOCIATED WITH BACKGROUND OZONE 18-24 tbls. 2(a) and (b) (Dec. 15, 2015)). Note that these tables show that emissions other than those from manmade US sources comprise 40% - 50% of modeled 2017 design values in numerous counties across the country. Those contributions raise to as much as 70% to 90% of modeled 2017 design values in counties throughout California and the Intermountain West.

³¹ Ozone Implementation Memo, *supra* note 3, at 8.

February 13, 2017

Page 9

release of the 2015 Ozone NAAQS that those standards would be implemented in a manner that “maximizes common sense, flexibility and cost-effectiveness” while abiding by the CAA.³² EPA repeatedly assured stakeholders and the public during roll-out of the 2015 Ozone NAAQS that the CAA provided “tools” for addressing background ozone and that EPA would work closely with states so that those tools could be utilized.³³

According to EPA, these tools included exceptional events exclusions (CAA § 319), rural transport areas (CAA § 182(h)), and international transport provisions (CAA § 179B).³⁴ As we stated in our comments on the Ozone Implementation White Paper, and as EPA points out in the Proposal as a general impression among stakeholders, these tools are insufficient to confront the significant challenges to designations, implementation, and permitting posed by increasingly more-stringent ozone NAAQS.³⁵ We remain skeptical that these tools will effectively address the substantial implementation difficulties caused by EPA’s near-background 2015 Ozone NAAQS, and are concerned that the Proposal offers no further flexibilities. However, as implementation challenges continue to grow under increasingly more-stringent NAAQS, so naturally should EPA’s willingness to allow states using these tools the maximum degree of flexibility afforded by statute. By accepting comment on limiting the CAA § 179B’s international transport provisions to border regions and proposing to predicate CAA § 179B demonstrations for marginal areas on the adoption of reasonably available control measures (“RACM”), the Proposal would do the opposite.

a. EPA Should Not Confine Relief under CAA § 179B to Border Regions.

The Proposal requests comment on whether it is appropriate to limit CAA § 179B demonstrations to nonattainment areas adjoining international borders.³⁶ We believe it is not. Nothing in CAA § 179B compels limiting its application in this manner. Rather, the

³² *Id.* at 1.

³³ See, e.g., Ozone Implementation Memo, *supra* note 3, at 8, EPA, *Fact Sheet: The National Ambient Air Quality Standards: Tools for Addressing Background Ozone 1 and 2*, EPA, *Fact Sheet: The National Ambient Air Quality Standards: Ozone and Ozone Standards: The Basics 1*, and Ozone Implementation White Paper, *supra* note 30, at 2 (“As part of the communications material associated with the final rule, the EPA provided information on tools for addressing background O₃.”).

³⁴ Ozone Implementation White Paper, *supra* note 30, at 12-13.

³⁵ NAAQS IMPLEMENTATION COAL., *supra* note 30, at 2.

³⁶ 81 Fed. Reg. at 81,304.

February 13, 2017

Page 10

provision applies simply to “any State” without qualification.³⁷ In defense of its interpretation, EPA asserts that background ozone levels will be largest in the immediate vicinity of Mexico and Canada.³⁸ However, as outlined above and in comments to the Proposal by the American Petroleum Institute, recent research, including from EPA, indicates that internationally-transported ozone is growing and increasingly influencing areas outside of border regions.

EPA further notes that it has historically limited use of CAA § 179B authority to areas in the immediate vicinity of the Mexican border.³⁹ This is not only irrelevant, but also highlights a central and often-repeated concern of the NAAQS Implementation Coalition – EPA’s past conduct cannot drive its future NAAQS implementation because *new*, more-stringent NAAQS create *new* implementation challenges. With the 2015 Ozone NAAQS, EPA promulgated standards that make it more likely than in the past that areas outside the immediate vicinity of the Mexican border may submit CAA § 179B demonstrations. EPA should adapt to the reality it created, rather than codify an outdated approach by limiting CAA § 179B to border regions.

b. Marginal Areas Should Not be Required to Self-Impose Additional Controls to Seek Relief Under CAA § 179B.

The Proposal further proposes to require that CAA § 179B demonstrations from marginal nonattainment areas include a showing that the area adopted all RACM.⁴⁰ This interpretation is inherently flawed and out of line with the CAA’s clear statutory language. CAA § 179B relieves nonattainment areas of certain statutory requirements where states establish “to the satisfaction of the Administrator” that the nonattainment area would have achieved the NAAQS “but for” internationally-transported emissions.⁴¹ Among other things, such nonattainment areas are not subject to reclassification for failing to meet the ozone NAAQS by the applicable attainment date.⁴² For marginal nonattainment areas, one of the most burdensome additional requirements resulting from reclassification is the mandate that

³⁷ CAA § 179B(b), 42 U.S.C. § 7509a(b).

³⁸ 81 Fed. Reg. at 81,304.

³⁹ *Id.* at 81,303-81,304.

⁴⁰ *Id.* at 81,304.

⁴¹ CAA § 179B(b), 42 U.S.C. § 7509a(b).

⁴² *Id.*

February 13, 2017

Page 11

sources adopt RACM. In other words, EPA is effectively proposing to require that marginal nonattainment areas self-impose RACM in order to request relief from RACM requirements. This is illogical and contravenes clear Congressional intent manifest in CAA § 179B's statutory language.

EPA supports its RACM proposal by citing to the requirement that CAA § 179B demonstrations be “to the satisfaction of the Administrator[.]”⁴³ However, CAA § 179B clearly predicates the Administrator's “satisfaction” not on the sufficiency of an area's control measures, but on the determination that internationally-transported ozone impedes an area's NAAQS attainment. To misconstrue CAA § 179B as EPA does in the Proposal would grant the Administrator limitless discretion to require additional controls as part of a CAA § 179B demonstration. Worse, it would obviate the provision's intent. It is clear from the four corners of CAA § 179B alone that Congress sought to provide areas struggling under the burden of internationally-transported ozone with relief from increased control requirements. Instead, EPA is proposing to increase control requirements for areas struggling under the burden of internationally-transported ozone. To interpret CAA § 179B as EPA suggests would render § 179B superfluous as it relates to marginal nonattainment areas, in violation of fundamental canons of statutory interpretation.

EPA also argues that reading CAA § 179B as not requiring nonattainment areas to “reasonably reduce” emissions would be “antithetical” to the CAA.⁴⁴ This reveals a troubling disconnect between EPA's rhetoric when promulgating the 2015 Ozone NAAQS and implementing them. At its heart, EPA's objection here is to the idea that Congress would carve out an exception to a statute's core intent because of other policy concerns. But, this is fundamentally the nature of statutory flexibility, and the very reason why Congress passes such statutory language – to balance conflicting policy concerns. EPA embraced this concept in the “fact sheets” it released with the 2015 Ozone NAAQS, where EPA noted that areas with an approved CAA § 179B demonstration are “no longer subject to being reclassified to a higher nonattainment classification (*which comes with additional requirements*) . . .”⁴⁵ EPA's talking points repeatedly reminded readers of the policy concerns balanced by CAA § 179B,

⁴³ *Id.* at 81,304.

⁴⁴ *Id.*

⁴⁵ *Fact Sheet: Addressing Background Ozone*, *supra* note 33, at 3 (emphasis added).

February 13, 2017

Page 12

noting that “[u]nder the Clean Air Act, states are not responsible for reducing emissions from background sources.”⁴⁶ In the Proposal, EPA now decries these very concepts.

CAA § 179B clearly relieves states of certain burdens under the CAA where NAAQS would have been achieved but for internationally-transported ozone. When issuing the 2015 Ozone NAAQS, EPA assuaged the public that it should not be concerned about background ozone because “tools” like CAA § 179B provided statutory flexibility to help states confront these challenges. Such relief was entirely in line with the CAA because, as EPA made clear, “states are not responsible for reducing emissions from background sources.”⁴⁷ Yet, now that the 2015 Ozone NAAQS are being implemented – over a year later and after public attention has turned to other issues – EPA asserts that it is “antithetical” to read CAA § 179B as providing states such relief. As explained above, we find this interpretation flawed. Marginal nonattainment areas should not be required to adopt RACM in order to make CAA § 179B demonstrations. If EPA is uncomfortable that provisions in the CAA could be – or, perhaps, should be – read to relieve areas from emissions control requirements in certain circumstances, then it should have taken those concerns into account before promulgating ozone NAAQS that make those circumstances more likely. This is yet another example of why we believe that NAAQS implementation concerns should be addressed when NAAQS are promulgated, and not after.

IV. EPA Should Finalize Provisions on Interprecursor Trading.

The Proposal proposes to reaffirm EPA’s longstanding policy that air agencies may allow major stationary sources to use interprecursor trading to satisfy nonattainment new source review (“NNSR”) offset requirements in ozone nonattainment areas. Interprecursor trading is well-supported by the CAA and critical to attaining NAAQS while encouraging economic development in nonattainment areas.

As EPA points out in the Proposal, CAA § 173(c)(1) requires that any NNSR offsets “shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the same or other sources in the area.”⁴⁸ CAA § 302(g)

⁴⁶ *Fact Sheet: Addressing Background Ozone*, *supra* note 33, at 1, *Fact Sheet: Basics*, *supra* note 33, at 1, and *Ozone Implementation Memo*, *supra* note 3, at 7.

⁴⁷ *Id.*

⁴⁸ 81 Fed. Reg. 81,296 (citing 42 U.S.C. 7503(c)(1)).

February 13, 2017

Page 13

defines air pollutant as “any air pollutant . . . emitted into . . . ambient air.”⁴⁹ Notably, that definition further states that “[s]uch term includes any precursors to the formation of any air pollutant”⁵⁰

The principal precursors that form ozone are volatile organic compounds (“VOCs”) and nitrogen oxides (“NO_x”). However, while otherwise obvious, it is important to note that the Proposal’s provisions implement the ozone NAAQS, not the VOC NAAQS – which does not exist – nor the NO_x NAAQS. For the purposes of the ozone NAAQS then, ozone is the primary air pollutant within the context of the CAA § 302(g) definition of “air pollutant,” and VOCs and NO_x are the precursors. Thus, CAA § 173(c)(1) should be read as requiring that any ozone NNSR offsets “assure that the total tonnage of increased emissions of [precursors to the formation of ozone] shall be an equal or greater reduction, as applicable, in the actual emissions of such [precursors to the formation of ozone] from the same or other sources in the area.” Put together in the context of the ozone NAAQS, this statutory language could not be clearer that the NNSR offset requirement can be satisfied by securing equivalent reductions in any ozone precursors emitted by the new or modified source.

Indeed, interprecursor trading is not only authorized by the CAA, it is a reasonable and effective strategy towards NAAQS attainment. Recent EPA research has demonstrated the relative impacts on ambient ozone concentrations from single-source precursor emissions of VOC and NO_x that may be useful to identify areas from which offsetting emissions reductions can effectively reduce ambient ozone concentrations.⁵¹ This assessment quantifies the change in ambient ozone concentrations attributable to varied levels of VOC and NO_x precursor emissions and source types, demonstrating that different environmental conditions across the U.S. (*e.g.*, NO_x-limited and VOC-limited) cause different responses in ambient ozone to precursor emissions and emphasize the need for a practical and flexible offset policy.

CONCLUSION

NAAQS implementation policies and tools are being outpaced by increasingly more-stringent NAAQS, resulting in burden on state agencies, business and manufacturing, and,

⁴⁹ 42 U.S.C. § 7602(g).

⁵⁰ *Id.*

⁵¹ *See, e.g.*, Baker, K.R., Kotchenruther, R.A., Hudman, R.C., *Estimating ozone and secondary PM_{2.5} impacts from hypothetical single source emissions in the central and eastern United States*, 7 ATMOSPHERIC POLLUTION RES. 122-133 (2016).

February 13, 2017

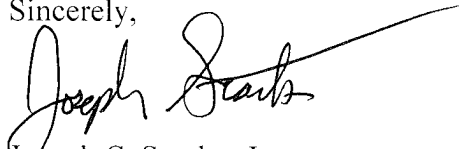
Page 14

ultimately, the American worker. This is particularly the case with the 2015 Ozone NAAQS. We therefore urge EPA to make it a priority to consider implementation challenges earlier in the NAAQS process, and to quickly and effectively address implementation issues that arise thereafter. To that end, we encourage review of such issues as part of the Administration's upcoming manufacturing permit streamlining review.

Regarding the Proposal specifically, we encourage EPA to, in the absence of legislative action, administratively address the conflict that it created when imposing overlapping ozone NAAQS implementation schedules. However, EPA should not finalize the Proposal's anti-backsliding measures. Furthermore, EPA should provide areas with as much flexibility as provided in statute, under CAA § 179B and otherwise, to confront the attainment challenges created by internationally-transported agencies. Finally, EPA should continue to support states and stakeholders working to attain the ozone NAAQS through robust interprecursor trading provisions.

We appreciate the opportunity to comment on the Proposal. We hope that these comments will foster a better dialogue as the regulated community continues to face implementation challenges under increasingly more-stringent NAAQS. We remain ready to work with EPA to identify solutions that accomplish efficient NAAQS implementation.

Sincerely,



Joseph C. Stanko, Jr.

*Counsel for the
NAAQS Implementation Coalition*