UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 15 2007

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Decision of the U.S. Court of Appeals for the District of Columbia Circuit on our Petition for Rehearing of the Phase 1 Rule to Implement the 8-Hour Ozone NAAQS

FROM: Robert J. Meyers
Acting Assistant Administrator

TO: Regional Administrators
Regions I-X

On June 8, 2007, the U.S. Court of Appeals for the District of Columbia Circuit responded to our petition for rehearing on the court's December 22, 2006, decision on the Phase 1 Rule to implement the 8-hour ozone NAAQS. The purpose of this memorandum is to provide a summary of the court's opinion and its implications for the June 15, 2007, due date for submission of State implementation plans (SIPs) for nonattainment areas.

Summary of Court Decision

The court rejected our request for rehearing on the classification of subpart 1[1] areas and anti-backsliding issues, granted our request to limit the scope of its decision regarding continued application of 1-hour ozone conformity obligations and limited its vacatur of the Phase 1 Rule to those portions on which it had ruled against the Agency. The court upheld the portions of the Phase 1 Rule relating to EPA's classification system under subpart 2.[2] The court also urged EPA to promulgate a revised rule to implement the 8-hour ozone NAAQS for all unresolved issues as promptly as possible to ensure continued protection of public health.

With regard to anti-backsliding, the court reaffirmed its decision that EPA improperly determined that areas would no longer be subject to 1-hour ozone NAAQS new source review requirements, the section 185 penalty fees for failure of severe and

[1] Areas covered under subpart 1 of title 1 of Part D of the CAA were generally attaining the 1-hour ozone NAAQS but were not attaining for the 8-hour ozone NAAQS at the time they were designated nonattainment. Subpart 1 contains general requirements for SIPs for nonattainment areas for any pollutant, including ozone, governed by a NAAQS.

[2] Areas classified under subpart 2 of title of Part D of the CAA were generally not attaining for the 1-hour ozone NAAQS and were also not attaining the 8-hour ozone NAAQS at the time they were designated nonattainment. Subpart 2 contains more specific requirements for ozone nonattainment SIPs.

extreme areas to attain the 1-hour ozone NAAQS and contingency measures for failure to attain or make reasonable further progress toward attainment of the 1-hour ozone NAAQS.

The court limited its December 22, 2006, decision on the 1-hour conformity determination obligation for anti-backsliding purposes in 1-hour ozone nonattainment and maintenance areas. The court granted a joint request by EPA and environmental petitioners to clarify that the court's reference to conformity determinations speaks only to the use of 1-hour motor vehicle emissions budgets as part of 8-hour conformity determinations until 8-hour SIP budgets are found available. The court thus clarified that 1-hour conformity determinations are not required for anti-backsliding purposes. Therefore, there is no change to the transportation conformity or general conformity determination regulations in place before the court's December 22, 2006, ruling. Eight-hour ozone nonattainment and maintenance areas must continue to meet the requirements of the conformity regulations for the 8-hour ozone standard.

In addition, the court limited its vacatur of the Phase 1 Rule to provisions establishing a subpart 1 classification and those provisions determining that four requirements did not need to be retained as anti-backsliding requirements. Therefore, the classifications for areas currently classified as subpart 2 nonattainment areas, the 8-hour ozone attainment dates and the timing for emissions reductions needed for attainment of the 8-hour ozone NAAQS remain in place. Additionally, with the exception of the regulatory provisions addressing the 1-hour ozone requirements that the court found EPA improperly waived, the anti-backsliding requirements remain in place.

Implications for Subpart 2 Areas

In its December 2006 decision, the court upheld EPA's system of classifying areas under subpart 2, and have now clarified that these provisions were not vacated. As a result, the subpart 2 classifications and associated requirements, including the June 15, 2007, SIP submittal date, remain in place. However, because the court initially stated that it was vacating "the 2004 Rule" for the 8-hour ozone standard, there has been uncertainty on the part of State, local and Tribal agencies as to whether the SIPs were still due on June 15, 2007, (i.e., attainment demonstrations and other SIP elements needed for attainment). In a March 19, 2007, memorandum from William L. Wehrum entitled "Impacts of Court Decision on the Phase 1 Ozone Implementation Rule," the Regional Offices were encouraged to work with their States to continue efforts to develop and submit their 8-hour ozone SIPs expeditiously. The court has now clarified that it is not vacating the entire Phase 1 Rule. We understand that the uncertainty over the last several months may have caused some delays in State action. The Regional Offices should continue to work with your States over the next two months to ensure a complete submittal. We will not make findings of failure to submit SIPs sooner than August 15, 2007.

Implications for Subpart 1 Areas

Since the court has vacated the portions of the rule that created the subpart 1 classification and because SIP submission dates under the Phase 2 Implementation Rule are based on an area's classification, areas that were classified as "subpart 1" are not currently subject to the June 15, 2007 submission date for their attainment demonstrations. EPA is in the process of reviewing the June 8 court opinion to determine how to proceed on subpart 1 area classifications and the anti-backsliding provisions. In the interim, we encourage States with subpart 1 areas to continue their efforts toward improving local air quality.

If you or your staff has any questions on specific program elements, please refer to the attached list of EPA staff to contact.

Attachment

List of OAR Contacts

Transportation Conformity	--	Meg Patulski (734) 214-4842 Rudy Kapichak (734) 214-4574
General Conformity	--	Tom Coda (919) 541-3037
New Source Review	--	David Painter (919) 541-5515 Lynn Hutchinson (919) 541-4795
Ozone Implementation	-- --	John Silvasi (919) 541-5666 Denise Gerth (919) 541-5550