

**TESTIMONY OF DAVID S. BARON
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BEFORE THE
SUBCOMMITTEE ON ENERGY AND AIR QUALITY
OF THE
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES
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Introduction and Summary

Mr. Chairman and members of the Subcommittee, my name is David S. Baron. I am an attorney with the Washington, D.C., office of Earthjustice, a nonprofit law firm that represents conservation and community groups on a wide range of environmental and public health issues, including air quality. Our clients on clean air matters include the American Lung Association, Sierra Club, Environmental Defense, and others. I am very familiar with the Clean Air Act, having specialized in enforcement of that statute for more than twenty years at the local, state, and national levels. In 1996-97, I served on the Subcommittee for Development of Ozone, Particulate Matter and Regional Haze Implementation Programs, a Federal Advisory Committee to the U.S. Environmental Protection Agency (EPA). I have also taught environmental law courses as an adjunct professor at the University of Arizona College of Law and Tulane Law School.

I appreciate your invitation to discuss the Clean Air Act's requirements for reclassification (or "bump up") of areas that fail to timely meet clean air standards, and EPA's prior attempts to waive bump up for cities affected somewhat by air pollution transported from other areas. I strongly believe that EPA's waiver of bump ups via its "downwind extension policy" not only violated the Clean Air Act, but also wrongly delayed measures that are sorely needed to protect public health in these and other communities.

Background

In the late 1990's, EPA announced an "Attainment Date Extension Policy" (sometimes called the "downwind extension" policy) that was not authorized by the Clean Air Act. This unfounded policy allowed industries to pollute at higher levels for longer than the Clean Air Act authorized merely because they were located in cities affected somewhat by pollution transported from other areas. EPA applied the policy to unlawfully extend clean air deadlines for a number of cities without requiring them to be reclassified into more protective pollution categories with stronger pollution controls. The courts invalidated this policy as being completely contrary to both the language and purpose of the Clean Air Act.

The 1990 Clean Air Act, signed by the first President Bush, classified cities as marginal, moderate, serious or severe based on the severity of their ozone pollution problem.¹ Areas with higher classifications were given more time to meet clean air standards, but also had to adopt stronger anti-pollution measures. The clean air deadline for moderate areas was 1996, for serious areas 1999 and for severe areas 2005 or 2007.

Where a city missed its clean air deadline, the Act required that it be reclassified ("bumped up") to the next highest classification. For example, if a serious area failed to meet standards by 1999, it was to be reclassified to severe. It would then be given until

¹ Ozone -- a principal component of urban smog -- is a severe lung irritant even to healthy adults. It can cause shortness of breath, chest pains, increased risk of infection, aggravation of asthma, and significant decreases in lung function. Elevated ozone levels have been linked to increased hospital admissions and emergency room visits for respiratory causes. Ozone presents a special health risk to small children, the elderly, persons with lung ailments, and adults who are active outdoors. New studies have linked ozone exposure with death by stroke, premature death among people with severe asthma, cardiac birth defects, and reduced lung-function growth in children.

2005 to meet standards, but would also have to adopt the stronger pollution controls required for severe areas.

Reclassification triggers stronger pollution control requirements for industry as well as additional measures to reduce pollution from car and truck exhaust. These stronger measures are already required in numerous communities throughout the nation, including Chicago, Milwaukee, Baltimore, Philadelphia, New York, Los Angeles, Wilmington, Trenton, Sacramento, Ventura County (CA), Riverside County (CA), and San Bernardino County (CA).

Relying on its unfounded extension policy, EPA extended the clean air deadlines for a number of cities *without* bumping them up to the higher pollution categories that would require the adoption of more protective ozone control measures to help address the adverse public health impacts resulting from the additional delay. EPA also allowed these areas to postpone the adoption and implementation of local measures that were necessary for each area to attain the ozone health standard on the original schedule, thereby postponing a large portion of the public health benefits from reduced ozone that these measures would have achieved. In addition, EPA waived the statutory requirement that each area continue to reduce emissions by 3% annually until the area attains the standard. Three separate federal appellate courts have all ruled that EPA's policy violates the language and purpose of the Clean Air Act.² In voiding the extension policy as applied to the Washington, D.C. area, Chief Judge David Ginsberg of U.S. Court of Appeals for the D.C. Circuit, wrote that "to permit an extension of the sort urged by the EPA **would**

² See Sierra Club v. EPA, 294 F.3d 155 (D.C. Cir. 2002) (D.C. area); Sierra Club v. EPA, 311 F.3d 853 (7th Cir. 2002) (St. Louis area); Sierra Club v. EPA, 2002 WL 31761817 (5th Cir.) (Beaumont-Port Arthur area). The Eleventh Circuit also recently invalidated EPA's use of the policy in Atlanta.

subvert the purposes of the Act.” Sierra Club v. EPA, 294 F.3d 155, 161 (D.C. Cir. 2002)(emphasis added).

Harm to public health from EPA’s downwind extension policy

EPA’s application of this discredited policy has delayed adoption of additional pollution controls that are badly needed to meet clean air standards in Atlanta, Washington, D.C., Baton Rouge, and Beaumont Texas. The illegal extensions have burdened the public in those areas with dirty air until at least 2005 without the additional pollution controls already required in other cities. As a result of EPA’s illegal deadline extensions, the air in these cities is substantially dirtier than it should be.

If the Clean Air Act were weakened in an attempt to legalize EPA’s extension policy, this would delay the adoption of badly needed antipollution measures in the affected communities. Last summer, the Washington, DC area, for example, suffered from the worst ozone pollution in more than a decade, exceeding the 1-hour standard on nine days, and recording another 19 days when the air was deemed unhealthy for children and persons with lung ailments. On all of these days, children were warned to limit outdoor play. By some estimates, breathing difficulties during a typical smoggy summer in the DC area send 2,400 people to the hospital, and cause 130,000 asthma attacks

Last year alone, the Beaumont/Port Arthur, Dallas/Fort Worth, and Houston/Galveston regions exceeded the one-hour ozone standard on three, seven, and 26 days respectively. Atlanta exceeded the one-hour ozone standard seven times and the 8-

hour ozone standard 38 times. Ultimately, delay of stronger pollution controls has left the air in these cities more unhealthful than it would have been had the law been followed.

Adoption of the EPA policy would also make it harder for *other* communities to meet clean air standards. Pollution from cities like Washington, Atlanta, Beaumont, and Baton Rouge can be transported elsewhere, where it contributes to ozone violations. Cities like Baltimore, Philadelphia, and New York that have already adopted more protective “severe” area measures should not have to suffer pollution from upwind cities that have failed to adopt the same level of control.

EPA’s downwind extension policy is unfair to states that did the right thing

As noted above, many states and cities have already adopted the more protective control measures associated with higher pollution classifications.. These areas are also affected by transported pollution, a situation understood by Congress at the time that the 1990 amendments placed them in these higher classifications. Adoption of EPA’s policy, accordingly, would have an inequitable impact on areas that area already doing the right thing without resorting to delays that imperil the health of their citizens.

EPA’s extension policy has been opposed by Republicans as well as Democrats. In 1999, the State of New York under a Republican administration, criticized EPA’s extension policy. The State noted the inequity of allowing some states to avoid achieving timely clean air while other states – also affected by transported pollution like New York – were already undertaking necessary, effective control steps:

“[T]hese more effective control steps [required for higher nonattainment classifications] already have been implemented in many areas of the country and have been proven to reduce the emissions of ozone precursors. Implementation of these measures would help level the playing field among the states, provide some

localized relief of ozone levels, and help the affected areas in their efforts to achieve the revised eight-hour ozone standard.”³

In 1999, the State of Ohio, also under a Republican administration, criticized this same attainment date extension policy and approach:

“U.S. EPA is rewriting one of the most important and substantive measures placed in the 1990 CAA. . . .”

“Ohio EPA does not believe that the CAA intended that extensions be granted to areas which have not demonstrated attainment. In some cases, these areas have not implemented current CAA requirements and would not achieve the 1-hour ozone standard even after transport had been addressed. These areas need an additional level of local controls, which is the precise purpose of the bump-up provisions of the CAA.”⁴

Thus, a roll back of pollution control requirements under a policy will harm the public health of citizens locally and regionally by delaying more rigorous ozone pollution abatement measures needed to meet clean air standards.

In its unsuccessful defense of its extension policy, EPA claimed that deadline extensions and bump-up waivers for some areas are justified because those areas are impacted somewhat by pollution transported from other areas (generally within the same state). But other cities with higher classifications -- and therefore stronger local pollution control requirements -- are *also* impacted by transported pollution -- in some cases to a much greater extent. For example, transported emissions account for a smaller percentage (24%) of the ozone problem in the Washington D.C. area than in areas that were previously classified as severe, such as Baltimore (56%), Philadelphia (32%), or New York (45%). Conversely, EPA's data for Atlanta shows that implementation of the NOx SIP call controls would eliminate only 9% of the days with expected ozone

³ Letter from Carl Johnson, Deputy Commissioner, Office of Air & Waste Management, New York State DEC (April 16, 1999).

violations. For Baton Rouge, EPA has found that only 7% of ozone exceedance days between 1996 and 2000 were potentially associated with transported pollution from Houston.

This situation was also true when Congress adopted the 1990 amendments and established the classification system with its consequences for failure to attain air quality standards. Indeed, Congress was aware of EPA's assessment of the ozone transport problem in its post-1987 attainment date analysis of the reasons why ozone areas failed to attain, and adopted into law EPA's decision "not to allow a delay in the submittal of the post-1987 ozone attainment demonstrations and revised SIPs for areas affected by [regional transport]." 52 Fed. Reg. 45,874.

Current circumstances make EPA's extension policy even less defensible

EPA's policy was ill-advised when it was adopted in 1999, for many of the same reasons given by Ohio and New York above. But whether or not the policy was a good idea then, circumstances have changed in such a way that its codification now would be a terrible idea. Technical advances reflected in EPA's new MOBILE VI emissions estimation model are showing that many areas have much larger local emissions problems than were previously thought, and greater local emission reductions will therefore be needed. Moreover, with the upcoming implementation of EPA's more protective 8-hour ozone standard, the areas affected by EPA's policy, and many other areas as well, will need to implement the suite of protective control measures required in the 1990 Clean Air Act Amendments, in addition to reductions in transported pollution. Many of the areas for which EPA has sought to avoid the stronger pollution control

⁴ Letter from Christopher Jones, Director, Ohio EPA, to EPA Air & Radiation Docket (April 27, 1999).

measures associated with reclassification are already exceeding the 8-hour ozone standard repeatedly each year. It is insupportable to delay local control measures needed to reduce these annual exceedances, thereby exacerbating local air quality and public health problems, and forestalling the meaningful steps that will be necessary to attain the 1-hour and 8-hour ozone standards.