

**U. S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Energy and Air Quality
Honorable Joe Barton, Texas, Chairman**

Hearing on “Bump Up Policy Under Title I of the Clean Air Act”

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INTRODUCTION AND SUMMARY

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to provide information on the application of EPA’s Downwind Extension Policy as an alternative to reclassification, or “bump up” as the appropriate mechanism to extend the attainment date under Section 181 of the Clean Air Act (the “Act”). As an attorney with the Southern Environmental Law Center, which has an office in Atlanta, I have worked closely over the past decade with conservation groups, other citizen organizations, and health professionals in Georgia on issues related to air quality.

The Atlanta area has never achieved the “one-hour” National Ambient Air Quality Standard (NAAQS) for ground level ozone, an important step in the effort to protect the health and quality of life of the Atlanta area’s four million residents. The Eleventh Circuit Court of Appeals ruled last month that the Downwind Extension Policy is illegal as applied to the Atlanta area. For the following reasons, I urge this Sub-committee not to recommend changes to the Act that would undermine its carefully crafted deadline-driven scheme:

- The failure to achieve attainment of the one-hour ozone NAAQS in Atlanta has very little to do with pollution transport and, instead, results overwhelmingly from the failure timely to institute available controls on local sources of pollution. In fact, only 9% of the violation days in Atlanta are contributed to by transport.
- Georgia officials project that Atlanta will achieve the “one-hour” ozone standard by 2004, which will avoid any additional consequences under the Act that would result from the failure to meet the 2005 deadline applicable to “severe” nonattainment Areas.
- Reclassification creates a planning opportunity to ensure that the “one-hour” standard is attained no later than 2005. In addition to the mandatory measures specified in the Act for “severe” areas, Atlanta can choose to implement other measures of its choosing to attain the “one-hour” standard and also to make progress toward meeting the new “eight-hour” standard, which EPA has determined to be necessary to protect public health.
- The prompt reduction of ozone pollution in Atlanta will result in significant public health benefits, increased productivity and reduced health care costs. A study published in the Journal of the American Medical Association co-authored by an Atlanta pediatric pulmonologist found that reducing ozone precursors during the 1996 Olympics led to a significant decline in acute respiratory illness.

HISTORY OF DELAY IN ATLANTA

Ground-level ozone, one of the main harmful ingredients in smog, is produced when its precursors, volatile organic compounds (“VOCs”) and nitrogen oxides (“NOx”) from motor

vehicles, smokestacks, and other sources, react in the presence of sunlight. In the thirty years since EPA established the first national ozone standard in 1971, Georgia has never adopted an effective strategy for achieving the pollution reductions necessary to bring the Atlanta area into attainment with the “one-hour” ozone standard. Under the 1990 Amendments to the Clean Air Act, the Atlanta area was designated a “serious” ozone nonattainment area and was given almost a decade, until November 15, 1999, to develop and implement a plan to control air pollution to attain the NAAQS for ground-level ozone. Unfortunately, the history in Atlanta has been to delay the adoption and enforcement of readily available local controls on ozone precursors. As a result of this failure, hundreds of thousands of Atlantans continue to suffer the adverse health effects associated with ozone, despite the passage of the 1999 deadline for Georgia to implement the emissions reductions required for attainment of the NAAQS.

The 1990 Amendments established a 1994 deadline for Georgia and other states to submit to EPA a plan that would provide for attainment of the NAAQS by the 1999 deadline. See 42 U.S.C. § 7511a(c)(2)(A). It was not until five years after this submittal deadline, October 28, 1999, that Georgia finally submitted for approval its proposed State Implementation Plan (SIP). Even then, EPA proposed to disapprove the SIP unless Georgia included additional pollution control measures to achieve further emissions reductions. See 64 Fed. Reg. 70,478 (Dec. 16, 1999).

A revised SIP with various modifications was not submitted until July 17, 2001, six years after the submittal deadline and almost two years after the deadline for actual attainment. Rather than demonstrating timely attainment of the NAAQS by 1999, this SIP purports to demonstrate attainment by the year 2004 based on EPA’s 1998 “Guidance on Extension of Attainment Dates for Downwind Transport Areas” (the “Downwind Extension Policy”). Thus, the delay in

attaining the ozone NAAQS in Atlanta is the result of Georgia's delay in developing and implementing a plan to address the longstanding local air pollution problem in Atlanta.

TRANSPORT IS A VERY SMALL FACTOR IN ATLANTA'S OZONE POLLUTION

Never formally adopted as a rule by EPA, the Extension Policy permits the extension of the attainment date without "bump up" for some "moderate" and "serious" nonattainment areas based on EPA's belief that certain of these areas have been hindered in their attempts to meet air quality standards by pollution transported from other states. The Extension Policy, however, does not require a showing of "but, for" causation. To be eligible for a waiver of the attainment deadline, the 1999 Federal Register notice announcing the policy explains that downwind areas only need show that transport "significantly contributes to downwind nonattainment," not that transport has rendered attainment by the deadline impossible or even impracticable. 64 Fed. Reg. 14,441 (March 25, 1999).

For Georgia, by example, to be eligible for the policy, it was not required to demonstrate that it was unable to attain the NAAQS in Atlanta by 1999 through more aggressive control of local pollution. In addition, EPA was exceedingly liberal in its interpretation of the "significantly affected" standard for application of the policy. In fact, EPA found that "upwind controls are predicted to reduce the number of exceedances in Atlanta by 9 percent." 63 Fed. Reg. 57,446 (Oct. 27, 1998). This means that over 90% of violation days in Atlanta result from local emissions. If Congress were to change the Act to allow extensions based on small amounts of transport, as occurred with Atlanta, almost any area could claim that it is somewhat affected, delaying public health protections for many millions of American families.

As Georgia acknowledges in its most recent SIP revision, the "worst ozone episodes" occur during "multiple day stagnation and recirculation events." In other words, the smog days

result from extended periods of calm weather where local pollutants hover in the air, not on days where the wind is bringing in emissions from out of state. Thus, it is clear that the most effective way to achieve the public health protections of ozone pollution reduction is to focus on local controls, which Georgia has been reluctant to do.

According to Georgia's submitted SIP, the majority of the emissions that cause ozone in Atlanta come from motor vehicles rather than from transport or stationary sources. The nature of the transportation network, the resulting number of vehicle miles traveled in the nonattainment area and the failure to address this issue are directly related to the severity of the ozone pollution problem. As Georgia acknowledges in its SIP, smog in the area "is spreading outward in the shape of a giant doughnut," and is greatly exacerbated by the fact that Atlantans drive about 35 miles per day for every man, woman and child -- more miles per capita than in any other major city in the United States.

Unfortunately, Georgia has been extremely reluctant to address transportation emissions. For example, just this spring it further delayed the implementation of a new low-sulfur fuel rule in the Atlanta nonattainment area at the request of interest groups within the oil industry. In addition, Georgia has repeatedly fallen through on promises to provide funding for transportation options to single occupant vehicle driving, such as commuter rail, HOV lanes and other air-quality beneficial transportation investments. Further, the Atlanta transit system languishes with the highest fare in the country, service cutbacks and no support from the State or suburban counties. Georgia has not attempted to develop and implement timely strategies and programs that have been shown to effectively reduce vehicle travel and motor vehicle emissions. Many such strategies are identified in the Act itself, 42 U.S.C. § 7408(f)(1)(A), and even are illustrated in Georgia's SIP as capable of achieving prompt reductions in summer ozone levels in Atlanta.

GEORGIA CAN READILY ACHIEVE THE “ONE HOUR” STANDARD IN ATLANTA WITH LOCAL CONTROLS

The proposed SIP for Atlanta based on the extension policy, recently struck down by the Eleventh Circuit, projected that air quality will be improved sufficiently to meet the one hour standard by 2004, after out of state power plants institute required controls under the national NOx SIP call agreement. Thus, the strategy chosen by Georgia for Atlanta was to sit back and do less to control pollution locally, based on the extension policy, rather than institute more strategies to achieve the NAAQS by 1999.

While this choice for Atlanta is now a fait accompli, it has consequences for the area, the primary one being the delay in public health benefits. The failure to attain also means that Atlanta must be reclassified to “severe” status and prepare a new SIP, which contains certain additional control measures. Because Atlanta had projected that it could attain the “one-hour” standard even under the prior SIP by 2004, Georgia faces little danger of not meeting the 2005 deadline for “severe” areas. These additional control measures, however, should in no sense be considered superfluous, as they are required under the Act to ensure attainment by the new deadline. In addition, the additional measures will necessary to meet EPA’s new “eight-hour” ozone standard beginning next year.

Further, to the extent that transport is a small contributor to nonattainment in Atlanta, many of the appropriate controls are in the process of being implemented. For example, Alabama, the largest source of transport that affects Atlanta, has begun this year to implement NOx controls for most of its power plants. Of course, the most effective way to reduce stationary source pollution in Georgia would be to require further reductions from in-state stationary sources, which are second only to transportation emissions as a source of ozone precursors in

Atlanta. For example, two of the older power plants in Georgia, McDonough and Yates, lack the post-combustion NOx controls of modern facilities.

SUBSTANTIAL PUBLIC HEALTH BENEFITS CAN BE ACHIEVED THROUGH PROMPT OZONE REDUCTION

Ozone is a lung-scarring irritant that affects everyone in the Atlanta region and which can cause or exacerbate serious health problems. For example, people with asthma and others who experience breathing difficulties must limit outdoor activities on days with high ozone levels. Frequently during the spring and summer months, air quality in Atlanta fails to meet the ozone NAAQS established by EPA for the protection of public health.

According to EPA, in 1999, the year established under the Act for attainment, Atlanta violated the existing “one-hour” ozone standard on 23 days and exceeded the “eight-hour” standard on 69 days. See Georgia Environmental Protection Division air quality data posted at <http://www.air.dnr.state.ga.us/tmp/99exceedences/old/index.html>. (Due to more favorable weather conditions in the last couple of years, the number of violation days has been lower, as has occurred during previous periods of especially favorable weather patterns.) This means that on many summer days in Atlanta it is not safe for kids to go outside for recess, for the elderly to be working in their gardens and walking in the neighborhood or for healthy adults to exercise outdoors.

Evidence regarding the adverse health effects attributable to ozone pollution strongly influenced the adoption of the 1990 Amendments to the Act. Expert testimony presented to Congress included evidence that:

Ninety percent of the ozone breathed into the lung is never exhaled. Instead, the ozone molecules react with sensitive lung tissues, irritating and inflaming the lungs. This can cause a host of negative health consequences, including chest pains, shortness of breath, coughing, nausea, throat irritation, and increased susceptibility to respiratory infections. *** Some scientific evidence indicates that

over the long term, repeated exposure to ozone pollution may scar lung tissue permanently. ... Ultimately, emphysema or lung cancer may result. *** Young children may be especially vulnerable to both the acute and permanent effects of ozone pollution.

H.R. Rep. No. 101-490 (1990), reprinted in Environment and Natural Resources Policy Division of the Congressional Research Service, Legislative History of the Clean Air Act Amendments of 1990 3021, 3223 (1993).

The frequent, dangerously high ozone levels in Atlanta during warmer months affect not only children and persons with impaired respiratory systems, but also healthy adults. As the former EPA Administrator concluded: “Exposure to ozone for six to seven hours at relatively low concentrations has been found to reduce lung function significantly in normal, healthy people during periods of moderate exercise. This decrease in lung function is accompanied by such symptoms as chest pain, coughing, nausea, and pulmonary congestion.” 60 Fed. Reg. 4712, 4712 (Jan. 24, 1995). In reviewing more recent evidence of the harm caused by ozone, EPA published a lengthy notice summarizing the adverse health effects of both short-term and long-term ozone exposure. According to the Agency, the effects of short-term exposure on healthy individuals include reduced lung function, chest pain, reduced productivity, increased susceptibility to respiratory infection, and pulmonary inflammation. 66 Fed. Reg. 57,268, 57,274-75 (Nov. 14, 2001). With respect to repeated and long-term exposure, the finding is ominous:

EPA has concluded that repeated occurrences of moderate responses, even in otherwise healthy individuals, may be considered to be adverse since they could well set the stage for more serious illness.

Id. at 57,275.

These general findings by EPA have been underscored by additional research conducted in many cities, including Atlanta. One recent study published in the prestigious peer-reviewed

Journal of the American Medical Association on February 21, 2001 demonstrates that when ozone was reduced in Atlanta by encouraging alternatives to motor vehicle travel during the 1996 Olympic Games, the number of children requiring emergency or urgent care for asthma decreased dramatically. There was a 41.6% decline in visits for Medicaid claimants, a 44.1% decline for HMO enrollees and a 19.1% decline in overall hospital asthma admissions. A copy of this study is appended to this testimony, which is entitled “Impact of Changes in Transportation and Commuting Behaviors During the 1996 Summer Olympic Games in Atlanta on Air Quality and Childhood Asthma.”

The study specifically tied the positive public health results to the lower ozone concentrations due to a reduction in vehicle emissions. Overall, during the Olympics there was a 27.9% decrease in ozone and no violations of the “one-hour” standard. In contrast, the standard was violated on five days immediately before and after the games. While favorable weather conditions contributed somewhat to the lower pollution levels, this dramatic percentage decrease in ozone pollution and emergency care was substantially contributed to by the 22.5% decrease in peak morning traffic counts resulting from travel demand strategies, increased transit service and other programs encouraged in the Act to reduce transportation emissions.

CONCLUSION

“Bump up” of Atlanta to “severe” is an example of the Act working as Congress intended: if a deadline is not met, a new SIP with additional controls is required to ensure that a new deadline is met. The most recent Supreme Court case addressing the Clean Air Act statutory scheme noted that the NAAQS is the “engine that drives nearly all of Title I of the CAA,” *id.* at 468, and characterized the attainment deadline provisions as the “backbone” of the ozone control requirements for nonattainment areas. Whitman v. Am. Trucking Ass’ns, Inc.,

531 U.S. 457 (2001). Codification of EPA's extension policy would fundamentally weaken the deadline and incentive structure in the Act carefully crafted by Congress in 1990. Instead, it would reward officials, at the expense of many citizens-including the four million residents of Atlanta, who fail to take all appropriate steps to address local ozone pollution. This would set a dangerous precedent that would undermine the Act at a time when the scientific consensus is that more, rather than less, must be done to protect the public from ozone pollution.