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Legal Challenges to the New NAAQS

KATHRYN WILLIAMS SMITH*

We are talking about benefits and risks and there is a distinct benefit and risk associated with being a kind of clean up panel in a group like this. The benefit, of course, is that I could probably go through most of my slides in very short order because most of what I had planned to talk about has already been covered, at some length, by a number of panelists today. The risk is, you have absolutely nothing to say at the end of the day.

However, I do have a few things to add. As a representative of the industry perspective, I am able to offer a twist on some of the things that have been said. There has been a good balance in the previous groups. My approach is probably not as different as that of some of the other panelists.

William Pedersen, when he spoke earlier this morning, said that he was not going to put on his litigation hat, although he has represented some of the litigants in the NAAQS challenges.[1] However, he has graciously offered to

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1. This presentation was given on February 27, 1998. On May 14, 1999, a decision of a three-judge panel of the D.C. Circuit held that EPA's revised national ambient air quality standards (NAAQS) for ozone and particulate matter were unlawful. *See* American Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999).

backstop me since he spent more time in actual litigation. I started with CMA seven months ago. While I will be able to provide some of the background on the litigation, including where we are and the issues for industry, Mr. Pedersen has graciously offered to help me answer some of the more detailed questions that you might have. In addition, I would like to talk a little about a topic that has only been mentioned quickly and the law students may not have spent as much time on it as the others in the room. Litigation issues are popping up concerning both ozone transport and regional haze. I would like to discuss some non-litigation strategies and the influential events taking place in these areas.

We have talked a lot about the results of the standards. This slide gives you a sense, with ozone on the left and particulate matter on the right, of what has changed. Even though NAAQS established both primary[2] and secondary[3] standards (the primary being to protect human health[4] and the secondary standard to protect environment and property health[5]), in this debate, the primary and secondary standards of both ozone[6] and PM_{10}[7] are identical. Another thing that is of particular interest and concern to industry is that the transition

2. *See* Clean Air Act (CAA) § 109(b)(2), 42 U.S.C. § 7409(b)(2) (1994).

3. *See* CAA § 109(b)(2), 42 U.S.C. § 7409 (b)(1) (1994).

4. *See* CAA § 109(b)(1). Section 109(b)(1) defines a primary standard as one "the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria and allowing an adequate margin of safety, are requisite to protect the public health." *Id.*

5. *See* CAA § 109(b)(2). A secondary standard, as defined in section 109(b)(2) must "specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria, [are] requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air." *Id.* Section 302(h), 42 U.S.C. 7602(h), defines welfare effects as including, but not limited to, "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well being." *Id.*

6. *See* National One-hour Primary and Secondary Ambient Air Quality Standards for Ozone, 40 C.F.R. § 50.9 (1997); National Eight-hour Primary and Secondary Ambient Air Quality Standards for Ozone, 40 C.F.R. § 50.10 (1997).

7. *See* National Primary and Secondary Ambient Air Quality Standards for Particulate Matter, 40 C.F.R. §§ 50.6, 50.7 (1997).

from the one-hour standard,[8] which is the current standard, to the eight-hour standard,[9] will most likely create a patchwork of areas throughout the country. The fact that some areas will be required to comply with the one-hour standard[10] while other areas are working toward the eight-hour standard,[11] will create issues for industry.

This slide shows where industry is coming from, in terms of the effect of the Clean Air NAAQS.[12] There are going to be more non-attainment areas and higher standards in the existing non-attainment areas.[13] Currently, there are many areas of the country that are not in compliance or cannot meet the attainment level for the one-hour standard.[14] The individuals who have been working diligently and have made great strides toward achieving the one-hour standard are now going to be in the unenviable position of going back to square one in an effort to work toward a tighter standard. This means that there will, potentially, be greater process controls, solvent reformulation and boiler controls to meet the standards and potential loss of highway funds. There will be a greater focus on smaller sources because there is only so much that the large industrial sources can achieve. Ultimately, states are going to have to look to a wider range of sources to meet the attainment standards. There will be decreased economic development in the non-attainment areas. Companies will be forced not to modify where they would otherwise like to change their processes, because they would not be able to get permits in the various non-attainment ar-

8. *See* 40 C.F.R. § 50.9.

9. *See* 40 C.F.R. § 50.10, 50.7.

10. *See* Federal Implementation Plans to Reduce the Regional Transport of Ozone, 63 Fed. Reg. 56,394, 56,396 (1998) (to be codified at 40 C.F.R. pts. 52 and 98).

11. *See id.*

12. *See* 40 C.F.R. §§ 50.10, 50.7; *see also* Revised Requirements for Designation of Reference and Equivalent Methods for $PM_{2.5}$ and Ambient Air Quality Surveillance for Particulate Matter, 40 C.F.R. pts. 53 and 58 (1997).

13. *See* Federal Implementation Plans to Reduce the Regional Transport of Ozone, 63 Fed. Reg. at 56,397.

14. *See* Identification of Ozone Areas Attaining the One-hour Standard and to Which the One-hour Standard is No Longer Applicable, 40 C.F.R. pt. 81 (1998).

eas or the areas in transition that may or may not be classified as non-attainment. There is a real question as to what will happen with the new source review and Prevention of Significant Deterioration programs when there is a transitional period where it is not attainment, nor non-attainment.

The NAAQS standards were promulgated on July 18, 1997.[15] The first filings, challenges to the rule, were filed on July 18.[16] CMA is one of the groups in the industry that challenged the standards. The other groups included were as diverse as the American Petroleum Institute, the National Association of Manufacturers, the Automobile Manufacturers Association, as well as some of the utility groups.

There are several issues we are likely to raise. Currently, the briefs are being drafted so I cannot go into much detail. It is no surprise that we are going to raise issues concerning the sufficiency of the scientific basis for the change in the one-hour and eight-hour standard. Of concern is the scientific basis for tightening a standard that is, in many instances, working and is producing clean air, balanced against the cost. Although the EPA is not required to perform a cost analysis,[17] industry must justify or look at the cost implications.

You have also heard, that the change to the one-hour standard may result in other environmental impacts that the EPA did not consider. Certainly, the ultraviolet (UV) issue is of concern. Implementation may result in different requirements for different areas. We have the potential for a real patchwork of non-attainment transitional areas. For a company that has facilities all over the country, the implications

15. *See* Revised Requirements for Designation of Reference and Equivalent Methods for $PM_{2.5}$ and Ambient Air Quality Surveillance for Particulate Matter, 40 C.F.R. pts. 53 and 58 (1997).

16. *See Highlights*, Daily Envtl. Rep. (BNA) No. 184, at AA-1 (Sept. 23, 1997).

17. *See* 40 C.F.R. §§ 50.9, 50.10. *See also* Natural Resources Defense Council v. Administrator, 902 F.2d 962, 972-73 (D.C. Cir. 1990) (PM_{10}); Natural Resources Defense Council v. EPA, 824 F.2d 1146, 1157-59 (D.C. Cir. 1987) (*en banc*) (CAA Section 112 standards for vinyl chloride); American Petroleum Institute v. Costle, 665 F.2d 1176, 1185-86 (D.C. Cir. 1981) (ozone NAAQS); Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1148-51 (D.C. Cir. 1980) (lead NAAQS).

are uncertain as to the company's ability to come up with a cohesive implementation strategy.

There is a small business group that is raising Small Business Regulatory Enforcement Fairness Act (SBREFA)[18] issues. SBREFA was enacted in 1996 and will be an interesting piece of legislation for people to use in litigation postures. SBREFA requires EPA, before any rule is promulgated, to make an analysis of the impact of that rule on small businesses.[19] At CMA, we are not as concerned with SBREFA because we tend to represent large companies. However, there are many groups, particularly smaller associations, who are concerned about SBREFA. It will add an additional layer of delay to the regulatory process.

At the same time, there are many sources that claim that the EPA did not complete a sufficient SBREFA analysis.[20] As you will see later, SBREFA is going to creep up again. People are using SBREFA to require the EPA to go through yet another hurdle before promulgation. It is interesting that with SBREFA, you do not necessarily have to wait until the rule is final; you just have to wait until it is promulgated.[21] As a result of promulgation, agency action has occurred, or at least that is the argument in one case. I do not know if it will be successful or not.

Scientific studies do not adequately support tightening the PM_{10} standard.[22] The Clean Air Scientific Advisory Committee (CASAC) did not support the stringent level chosen by the EPA.[23] There is some concern, with at least some of the studies, that there is a misplaced correlation between indoor

18. 5 U.S.C. § 601 et seq. (1996).

19. *See id.*

20. *See* 40 C.F.R. § 50.6.

21. *See id.*

22. *See* Revisions to the National Ambient Air Quality Standards for Particulate Matter, 52 Fed. Reg. 24,634, 24,642-43 (1987) (to be codified at 40 C.F.R. pt. 50). The EPA stated that the data do not provide evidence of clear thresholds in exposed populations. Instead, they suggest a continuum of response for a given number of exposed individuals with both the likelihood (risk) of any effects occurring and the extent (incidence and severity) of any potential effect decreasing with concentration. *See id.*

23. *See* 28 ENVTL. L. REPORT 10361 (July 1998).

and outdoor exposures. There is a fairly new account for the influence of other pollutants, or confounders as they are called.[24]

For those of you who are not familiar with the Ozone Transport Assessment Group (OTAG), it is a group of state and federal officials and industry and environmental representatives who develop recommendations on ground level ozone transport cost for the states.[25] OTAG issued their recommendations on July 8, 1997.[26]

Basically, the OTAG recommendations included requiring NO_X reductions of between 55 and 85% for utilities.[27] The large non-utility sources are to produce reductions similar to those of other utilities and that concerns CMA. While the bulk of the recommendations will affect the utilities, many of our member companies have large boilers that will also be subject to the NO_X reductions. As we heard today, the states are required to conduct enhanced vehicle inspections and maintenance.[28] EPA and the states are to develop OTAG regional trading strategies for capping NO_X emissions. It has been alluded that the litigation, or at least the posture in this area, involves eight states that filed Section 126[29] petitions in

24. *See* 40 C.F.R. §§ 50.10, 50.7.

25. The Ozone Transport Assessment Group (OTAG), organized in May 1995, is a partnership between the US EPA, the Environmental Council of the States (ECOS) and various industry and environmental groups. ECOS is a national organization of environmental commissioners with members from 50 states and territories. The goal of the partnership is to develop assessment and consensus agreement for reducing ground-level ozone and pollutants causing ground-level ozone. OTAG explicitly addresses ozone transport over the eastern United States.

26. The final package of OTAG recommendations and comments entitled "Summary of OTAG Recommendations to the US EPA" was formally submitted to EPA on July 8, 1997. A news release announcing submission of the package was distributed on July 15, 1997.

27. *See id.*

28. The Clean Air Act Amendments of 1990 mandated the implementation of a fuel-neutral Clean Fuel Fleet Program (CFFP) beginning in Model Year 1998 for those non-attainment areas designated as serious, severe, or extreme or a design value above 16.0 ppm carbon monoxide.

29. *See* Clean Air Act § 126, 42 U.S.C. § 7426 (1997). In August 1997, the Northeast states filed petitions with EPA under section 126 of the Clean Air Act charging that pollution from the upwind Midwest states makes a significant contribution to the Northeast States' failure to achieve the federal air quality

order to force EPA to address the impact of out-of-state sources on the state's ability to meet the current Maximum Achievable Control Technology (MACT) standards.[30] The EPA issued a proposed State Implementation Plan (SIP) Call to the OTAG states in order to implement control measures necessary to address the ozone transport problem.[31] The EPA signed a Memorandum of Agreement (MOA) with eight states postponing the required EPA actions on the petitions.[32] Part of the reason for doing this is that it will allow the EPA time to act on the SIPs submitted by the states. If the EPA fails to approve the finalized SIPs by the year 2000, the petitions will be conditionally granted. The terminology gave the West Virginia Chamber of Commerce the ammunition it needed to say, "Well, what the heck do you mean by saying that you are going to agree to grant these petitions conditionally"? In fact, the West Virginia Chamber of Commerce filed a SIP challenging the MOA, stating that section 126 does not grant EPA the authority to do that and that the MOA did not go through notice and comment rulemaking.

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standard for ozone. Under section 126, EPA has 60 days to act on the petitions. If the Agency finds that upwind pollution does contribute significantly to downwind states' non-attainment, then EPA must order upwind states to develop a plan for mitigating the pollution within three years. On September 3, 1997 the Midwest Ozone Group (MOG) sent a letter to EPA Administrator Carol Browner, urging EPA to deny the petitions. In the alternative, MOG said EPA should at least extend the 60-day period to decide how to respond to the petitions. In response, then EPA Air Director Mary Nichols said in an August 8, 1997 letter to a New Hampshire environmental official, that under section 307(d) of the Clean Air Act, the EPA may take an additional 6-months to respond to the petitions. The Agency response would be a "notice and comment" rulemaking, which means that EPA can then take six months following the proposal to issue a final rule. On November 7, 1997 the EPA published proposed rulemaking entitled "Finding of Significant Contribution and Rulemaking for Certain States in the OTAG Region for Purposes of Reducing Regional Transport of Ozone," 62 Fed. Reg. 60,318 (1997) (to be codified at 40 C.F.R. pt. 52). This was followed by a Supplemental Notice for the Finding of Significant Contribution and Rulemaking for Certain States in the OTAG Region for the Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 25,902 (1998) (to be codified at 40 C.F.R. pts. 51, 76 and 96) ("OTAG SIP Call").

30. *See* CAA § 112, 42 U.S.C. § 7412 (1997).

31. *See* Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport, 63 Fed. Reg. 24,058, 24,060 (1998) (to be codified at 40 C.F.R. pt. 52).

32. 40 C.F.R. §§ 50.9, 50.10.

In addition, there is regional haze. The Regional Haze Regulation was proposed on July 31, 1997,[33] and the goal was to protect visibility in 156 Class 1 federal areas around the country. It applies to all fifty states. The regulation would require more stringent emission reductions than $PM_{2.5}$ and the reductions would be required sooner. Many states are concerned that a fifty state program will create a much wider area around the Class 1 areas and extend the requirements to reduce. If you do not have a Class 1 area in your state, it does not necessarily mean that you will not be affected by the Regional Haze proposal.

That is where some of the litigation is headed. The West Virginia Chamber of Commerce, the Virginia Chamber of Commerce, and the West Virginia Manufacturers Association have challenged the SIP Call on SBREFA grounds.[34] They argued that EPA, once again, did not look at small business issues when they proposed the SIP Call. EPA would respond that the SIP Call is actually a call to the states to look at their own implementation strategy and to come up with a plan, and EPA did nothing to small businesses in that process. It will be interesting to see if in fact EPA's actions in initiating the SIP Call will be deemed to affect small businesses.

From CMA's perspective, there are non-litigation strategies that industries are looking at in terms of this debate. The OTAG SIP Call comments are due March 9th.[35] CMA is hoping that EPA will be able to adopt an equitable strategy for NO_X reductions. CMA sees itself as somewhat different than utilities, however, the strategy for regulating us is not. The chemical industry and boiler users hope that EPA will be

33. *See* Regional Haze Regulations, 62 Fed. Reg. 41,138 (1997) (to be codified at 40 C.F.R. pt. 51) (proposed July 31, 1997).

34. *See* Commonwealth of Virginia v. EPA, 108 F.3d 1397 (D.C. Cir. 1997).

35. *See* Notice to Re-open Comment Period for Certain Issues Raised in the Proposed Rulemaking for the Nitrogen Oxides (NO_x) State Implementation Plan (SIP) Call, 63 Fed. Reg. 17,349 (1998) (to be codified at 40 C.F.R. pt. 52). At the time of this symposium, comments to the EPA OTAG SIP Call were due March 9, 1998. EPA subsequently issued a notice to extend the comment period to June 25, 1998.

able to accommodate their differences by affording these groups some flexibility.

These areas are contentious, but from CMA's perspective, we have always taken the position that emissions trends show that the air is getting cleaner and that substantial progress has been made in reducing ozone PM emissions. Even EPA's science advisors have stated, in some of the documents, that the existing ozone standard is protective of human health. The debate is over how much better can we get, how much farther can we go and how much more protective we can be. And that is where we say, "Yes, you probably can get down to zero risk, zero emissions. Is that the goal?" There is an associated cost that will initially be borne primarily by industry. However, ultimately the cost is transferred back to consumers and the cost will expand to other industries.