



MOG Update-

Implications for CIBO Members

CIBO Virtual Meeting
June 9, 2021

Skipp Kropp
Steptoe & Johnson PLLC
Skipp.Kropp@Steptoe-Johnson.com
317.946.9882



Revised CSAPR Update (2008 ozone NAAQS)

Implications for 2015 ozone NAAQS

New York 126 petition

Other MOG Initiatives

Role of ozone programs in climate change debate



Revised CSAPR Update (2008 ozone NAAQS)

CSAPR Update

October 12, 2016:

- Because of time limits EPA developed CSAPR Update - a partial plan assessing only short-term SCR controls on EGUs with respect to the 2008 ozone NAAQS
- Concluded that \$1,400/ton represented the point at which upwind “NOx reduction potential and corresponding downwind ozone air quality improvements are maximized with respect to marginal cost”





CSAPR Close-out

December 6, 2018 – Final Cross-State Air Pollution Rule Close-Out
(83 Fed Reg 65878)

- EPA used 2023 modeling to determine that the existing CSAPR Update fully addresses certain states' interstate pollution transport obligations for the 2008 ozone NAAQS.
- Rule appealed



Revised CSAPR Update

- September 13, 2019- *Wisconsin v. EPA*, (D.C. Circuit; 938 F.3d 303) – D.C. Circuit vacated rule and directed EPA to address “non-EGUs” so that there would be a “full-remedy”
- October 1, 2019- *NY v EPA* (D.C. Circuit No. 19-1019) DC Circuit vacated CSAPR Close-Out, stating “the Close-Out Rule rests on an interpretation of the Good Neighbor Provision now rejected by this Court. At the same time, the rule imposes no obligations, so vacating it will cause no disruption.”



New Jersey et al v EPA, (U.S. District Court, S.D. NY 20-cv-1425, July 28, 2020)

- February 19, 2020, New Jersey, Connecticut, Delaware, and New York; the Commonwealth of Massachusetts; and the City of New York sued EPA alleging:
- EPA failed to fulfill a nondiscretionary duty to FIP states of Illinois, Indiana, Michigan, Ohio, Pennsylvania, Virginia and West Virginia for failure to file 2008 ozone NAAQS Good Neighbor SIPs
- July 28, 2020, District Court granted Plaintiffs' Motion for Summary Judgment and imposed schedule on EPA to promulgate a complete-remedy rulemaking addressing its outstanding statutory obligations by March 15, 2021 (less than 8 month)



Revised CSAPR Update

- October 30, 2020 – EPA proposed (85 Fed Reg 68964) Revised CSAPR Update Rule
- March 21, 2021- EPA announced final Revised CSAPR Update Rule
- April 30, 2021- EPA published final Revised CSAPR Update Rule (86 FR 23054) - effective June 29, 2021



Revised CSAPR Update

Major Concerns:

- Reduced budgets from proposed rule and from prior rules
- Short compliance period
- EPA’s “short-cut” technical approach
 - Inadequate time to develop a rule of this kind (artificially driven by court order)
 - No air quality modeling of 2021 analytical year
 - Failure to address on-the-books controls
 - Failure to consider alternate significance levels
 - Selection of Connecticut monitors as the only problem monitors behind the rule



Revised CSAPR Update

Major Concerns:

- Failure to align downwind compliance dates with Good Neighbor Deadlines (New York SCCTs)
- Implications for future transport rules

Appeal deadline: June 29, 2021



Implications for 2015 ozone NAAQS



EPA “Framework”

Scott Mathias, EPA OAQPS, AAPCA webinar April 22, 2021

- With finalization of Revised CSAPR Update EPA is “now able to turn attention to the framework for assessing the 2015 ozone NAAQS Good Neighbor provisions
- Evaluation of the “framework” will require consideration of deadlines imposed by “court order” or “settlements” for review of state plans



EPA “Framework” (cont.)

Scott Mathias, EPA OAQPS, AAPCA webinar April 22, 2021

In response to question about the timing of any new transport rule, Mathias said:

- OAQPS is talking with the new administration about the new framework
- new framework will call for consistent action on review of state SIP plans
- “failure to submit” states will be addressed by January 2022
- should SIPs be disapproved, a “2-year clock” begins for triggering a FIP (like CSAPR)



EPA Options For Addressing Good Neighbor SIP Obligations

- New transport rule: sources not considered in Revised CSAPR Update
- Promulgate a FIP by January 2022 for unresolved plans related to Maine, New Mexico, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia
- 126 Petitions (Maryland, New York)
- Approval of state GNS submittals



New York 126 Petition



New York v EPA, (DC Cir. No. 19-1231, July 14, 2020)

- March 2018-New York filed CAA Section 126(b) petition asking EPA to find that approximately 350 sources of NO_x (229 Non-EGUs) in nine States were contributing significantly to nonattainment in the New York Metropolitan Area under the 2008 and 2015 NAAQS
- October 19, 2019- EPA denied New York petition (84 Fed Reg 56058)
- July 14, 2020- D.C. Circuit Court vacated EPA’s denial of the NY Petition and remanded petition to EPA for further proceedings “not inconsistent with this opinion”
- Dissenting opinion adopted MOG argument that the EPA should have raised in denying the petition that its scope was too large – provides an additional basis for denying the petition again on remand



Other MOG Initiatives



Other MOG Initiatives

- OTC Recommendation for controls on Pennsylvania comments (4/7/21)
- Delayed deadline for NY SCCT controls comments (3/29/21)
- Exceptional events demonstrations for Chicago and Cincinnati comments (1/22/21 and 3/11/21)
- Cleaner Truck Initiative comments (7/6/20)
- Individual state Good Neighbor SIPs



Role of ozone programs in climate change debate



Ozone as Surrogate for CO2

- December 2, 2009- Center For Biological Diversity petitioned EPA to declare CO2 a criteria pollutant and set a NAAQS at 350 parts per million (ppm). (Global CO2 today is slightly above 400 ppm)
- January 19, 2021- EPA Administrator Wheeler denied 2009 petition by Center for Biodiversity
- March 4, 2021- Acting Biden EPA Administrator Jane Nishida letter to Center for Biodiversity Climate Law Institute Director Kassie Siegel saying the agency is “withdrawing the denial of your petition” by the Trump administration, “as the agency did not fully and fairly assess the issues raised by the petition. The EPA intends to further consider the important issues raised by your petition before responding.”



Ozone as Surrogate for CO2

- 2021- Joe Goffman, formerly with EPA and Harvard Law School Environmental and Energy Law Program, is now back at EPA as Principal Deputy Assistant Administrator, Office of Air and Radiation
- *NY et al v EPA* (No 21-1028, D.C. Circuit)- Challenge to EPA Final Decision to retain ozone NAAQS by fifteen States (NEW YORK, CALIFORNIA, CONNECTICUT, ILLINOIS, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, and WISCONSIN), the District of Columbia, and the City of New York
- Case now consolidated with *American Academy of Pediatrics, et al v. EPA* (No 21-1060, D.C. Circuit)



Ozone as Surrogate for CO2

- *NY et al v EPA* (No 21-1028, D.C. Circuit)- BRIEF OF ENERGY POLICY ADVOCATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT
 - “Records show that after Goffman arranged for consultation, Mr. Bachmann* then explained at length the reasons for and means of using a secondary ozone NAAQS as the ‘backdoor’ method to obtain the desired regulation of greenhouse gases.”

* 33 years with EPA's Air Programs, as the Associate Director for Science Policy and New Programs for EPA OAQPS, and known for “innovative” approaches to setting NAAQS



Ozone as Surrogate for CO2

- *NY et al v EPA* (No 21-1028, D.C. Circuit)- BRIEF OF ENERGY POLICY ADVOCATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT
 - “[R]ecommending that climate be considered in setting a secondary PM NAAQS as a basis for recommending the same thing for ozone during public comments I’ll deliver in person at CASAC’s December 5th meeting down here. Ozone is short lived climate forcer, and it would force more attention on methane as a precursor. We can test run a GHG NAAQS right now.....”



Ozone as Surrogate for CO2

- *NY et al v EPA* (No 21-1028, D.C. Circuit)- BRIEF OF ENERGY POLICY ADVOCATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT
 - “Proposed Amicus respectfully states that Petitioners and Respondent have no interest in maintaining the standard that went into effect in December after the most recent notice and comment rulemaking.”
 - “In addition to using the replacement ozone NAAQS, which this suit seeks to necessitate, as a Trojan Horse to import the politically elusive regulatory regime for greenhouse gases, public records demonstrate an improper and illegitimate intended use of the regulatory process here.”



IMPLICATIONS FOR CIBO MEMBERS

1. If the EPA technical short cuts in the Revised CSAPR Update Rule are upheld in litigation, they would be used by EPA for a 2015 ozone NAAQS transport rule
2. Ozone as a surrogate for CO₂ and greenhouse gas reductions will likely result in significant reductions in operations of non-EGU sources because there is no control technology for CO₂