

MOG Update

CIBO Environmental Committee

December 13, 2022

Skipp Kropp
Steptoe & Johnson PLLC

MOG Update

- PM2.5 and Ozone NAAQS
- Environmental Justice
- OTC Meeting
- Recent LADCO work and publications
- Revised CSAPR Update Appeal
- WV v EPA
- Proposed SIP Disapprovals / FIP

MOG Update

- PM2.5 and Ozone NAAQS

PM2.5 and Ozone NAAQS

- PM2.5- Current primary and secondary standards for PM2.5 (annual average standards) are 12.0 $\mu\text{g}/\text{m}^3$ and 15.0 $\mu\text{g}/\text{m}^3$, respectively
- PM2.5- 24-hour standard with 98th percentile form and levels of 35 $\mu\text{g}/\text{m}^3$
- PM10- 24-hour standards with one-expected exceedance form and levels of 150 $\mu\text{g}/\text{m}^3$
- On June 10, 2021, EPA announced it will reconsider the December 2020 decision to retain existing primary and secondary PM NAAQS

PM2.5 and Ozone NAAQS

CASAC Review of Review of EPA's Policy Assessment of PM2.5 Standard Reconsideration:

- Committee reached consensus on need to lower current annual standard (annual average 12ug/m³) to better protect public health but did not agree on a specific NAAQS level
- Majority favored NAAQS range of 8 to 10 ug/m³, consistent with the position taken by EPA staff.
- Minority group preferred somewhat higher NAAQS in the range of 10-11 ug/m³
- No specific recommendation from CASAC for annual NAAQS at 8 or 9 ug/m³
- Organized Labor favors NAAQS no lower than 10 ug/m³

PM2.5 and Ozone NAAQS

Several other aspects of the PM NAAQS to think about:

- Key statutory/implementation requirements (in particular, items that differ from ozone implementation) – nonattainment classifications, EPA's designation authorities/discretion; nonattainment deadlines; treatment of precursor emissions; major source definition; sanctions; most stringent measures, implications for PSD modeling/permitting in attainment areas;
- Potential sources impacted, including many smaller area sources;
- The challenge of addressing wildfires and other background sources under a tighter NAAQs; and
- EPA's monitoring program, including the rise of near-road monitors and their impact on the stringency of any standard

PM2.5 and Ozone NAAQS

Exceptional Events

- Smoke from wildfires has significantly impacted air quality across most of the US in the past few years, especially in the western US
- Six of the seven largest wildfires in California's recorded history have occurred since 2020
- Multiple midwestern states have submitted exceptional events demonstrations related to ozone impact of wildfire smoke

PM2.5 and Ozone NAAQS

Exceptional Events

- Detroit/EPA review of redesignation for ozone NAA due to presence of smoke as indicated by data at a SE Michigan monitoring station during one of the ozone episodes of regulatory significance in 2020
 - MI EGLE planning EE demo to address

PM2.5 and Ozone NAAQS

Scott Mathias, Director, Air Quality Policy Division, OAQPS
Statements to AAPCA September 29, 2022

- CASAC will be sending a letter to USEPA with its findings on possible revisions to ozone NAAQS which could impact on the outcome of EPA's decision
- EPA is waiting for OMB to complete its review of EPA PM2.5 proposal which will be published in the Spring of 2023 and is likely to include new considerations about designations and exceptional events.
- EPA's August 2022 approval of New Jersey Regional Haze Plan contains a template that other states should follow as they begin development of plans related to the 2028 3rd planning period.
- EPA expects final action on 2015 ozone NAAQS SIP disapprovals by December 15, 2022
- Final action on 2015 ozone NAAQS FIP is expected by March 2023
- EPA anticipates revising its approach to Exceptional Events as it releases the new PM2.5 NAAQS

PM2.5 and Ozone NAAQS

Dr. Tomás Carbonell, Deputy Assistant Administrator for Stationary Sources USEPA OAQPS Statements to AAPCA September 29, 2022:

- EPA anticipates finalizing the 2015 ozone NAAQS FIP in March 2023 to be consistent with the 2023 attainment deadline
- EPA acknowledges the urgency of placing new controls on mobile sources but recognizes that any such controls have a long lead-time.
- EPA recognizes the need to update its modeling with new emission data but it is not clear when that update would occur

•https://cleanairact.org/wp-content/uploads/2022/10/9_Carbonell_9.29.22-AAPCA-Carbonell.pdf

PM2.5 and Ozone NAAQS



2015 Ozone Transport SIP Status (as of 8/30/22)

- EPA has received SIPs for 49 of 56 states/jurisdictions.
 - Final approval action taken on 24 SIPs.
 - Proposed approval on 2 SIPs.
 - Proposed disapproval on 23 SIPs.
- EPA will continue to act on SIPs, consistent with deadlines established by consent decrees:
 - December 15, 2022, final action deadline applies for 1) eastern US states where EPA proposed a FIP by February 28, 2022, and 2) several western US states.
 - April 30, 2022, final action deadline for eastern states where EPA had not proposed a FIP.
- Action on SIPs is consistent with analytical framework used in the proposed ozone transport federal plan for 2015 ozone NAAQS.

12

Source: Scott Mathia presentation to AAPCA 9/29/22 (https://cleanairact.org/wp-content/uploads/2022/10/17_Mathias-AAPCA-Fall-2022-9-29-22-FNL.pdf)

11

PM2.5 and Ozone NAAQS



Good Neighbor FIP Proposal Overview

- Intended to ensure states meet their obligations under the Clean Air Act's "Good Neighbor" provision for the 2015 ozone National Ambient Air Quality Standards (NAAQS).
 - Would establish Federal Implementation Plan (FIP) requirements for states to eliminate their significant contribution to nonattainment, or interference with maintenance, of the NAAQS in downwind states where EPA has made a Finding of Failure to Submit or disapproves a Good Neighbor SIP.
- **Proposal applies a time-tested, judicially-reviewed framework** for establishing Good Neighbor requirements.
 - Updates to keep pace with more protective 2015 NAAQS, updated evaluation of ozone transport, and latest technical analysis.
 - Identifies 27 states that are linked to downwind air quality problems for purposes of the Good Neighbor provision.
 - **Determines required reductions in ozone precursor emissions (NO_x).**
 - 25 states with requirements for Electric Generating Units (EGUs) starting 2023 ozone season.
 - 23 states with requirements for certain industrial source categories (non-EGUs) no later than 2026 ozone season.
- EPA estimates the proposal would reduce ozone-forming NO_x emissions from the 26 upwind states by approximately 94,000 tons in the 2026 ozone season (May 1 – September 30).

11

Source: Scott Mathia presentation to AAPCA 9/29/22 (https://cleanairact.org/wp-content/uploads/2022/10/17_Mathias-AAPCA-Fall-2022-9-29-22-FNL.pdf)

PM2.5 and Ozone NAAQS



Ozone NAAQS Implementation Update

- Determinations of attainment by the 2021 attainment dates finalized this year.
 - 2008: 6 Serious nonattainment areas did not attain; 3 areas attained
 - New Severe area SIP requirements due 18 months after the effective date.
 - New Severe area attainment deadline is July 20, 2027.
 - 2015: 24 Marginal nonattainment areas did not attain; 12 areas attained
 - 1-year attainment date extension for Uinta Basin.
 - New Moderate area SIP requirements due January 1, 2023.
 - New Moderate area attainment deadline is August 3, 2024.
- Redesignations to attainment
 - 2008: Chicago (IL, IN and WI portions)
 - 2015: Cincinnati (OH portion); Door County-Revised, WI; Louisville (IN portion); Manitowoc County, WI

PM2.5 and Ozone NAAQS

PSAT Analysis- Alpine Geophysics modeling sponsored by American Petroleum Institute; Key Conclusions

- Much of the US will be impacted by lower standards
- Boundaries of nonattainment areas may be based in part on how EPA interprets monitored and modeled data
- Contributions of PM2.5 from EGU/point sources are lower today than previous years (<5% of total PM2.5 concentration nationally)
- Contributions from smaller and uncontrolled nonpoint sources are more significant

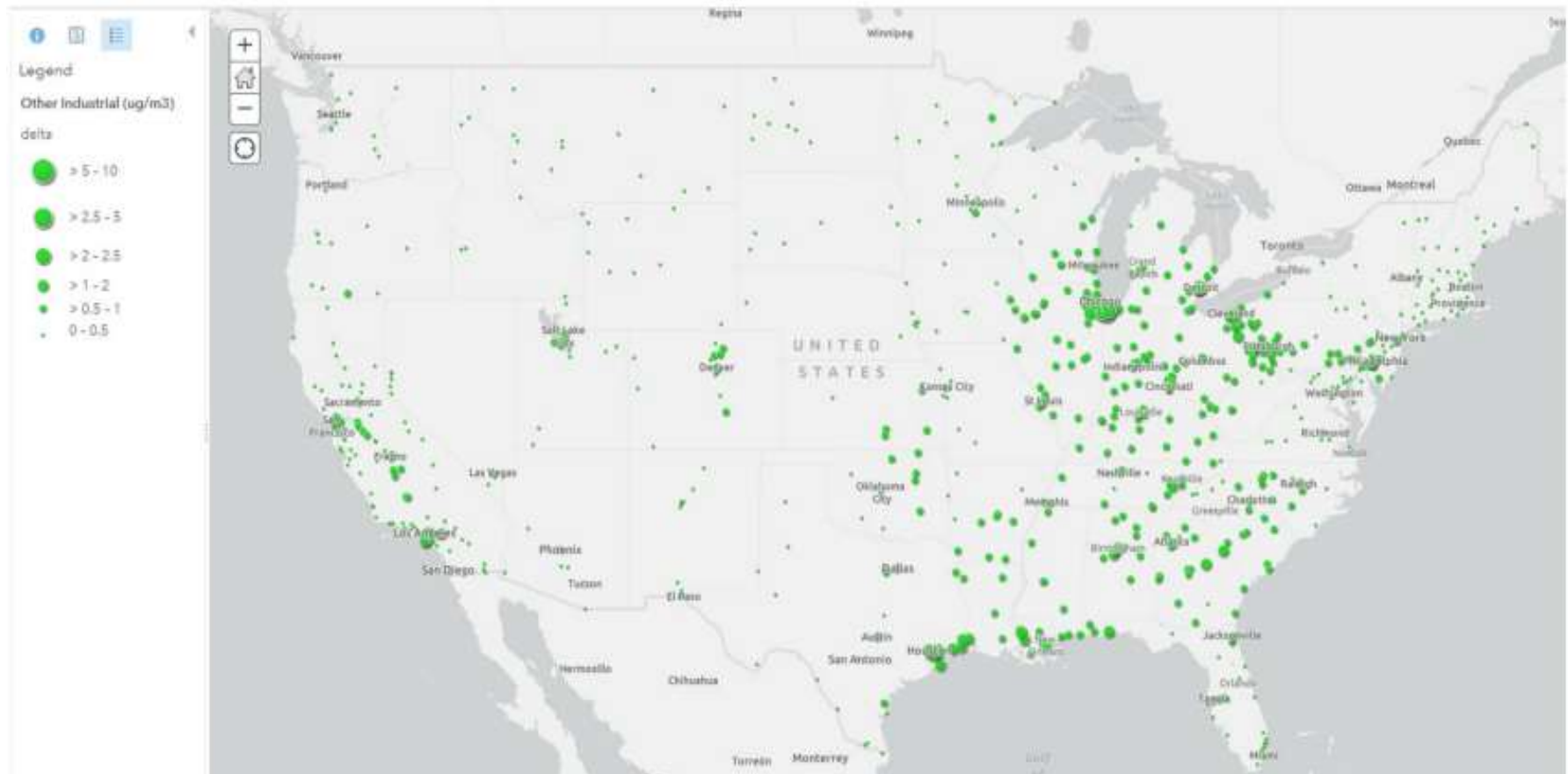
PM2.5 and Ozone NAAQS

PSAT Analysis- Alpine Geophysics modeling sponsored by American Petroleum Institute; Key Conclusions

- Controls from industrial, EGU, and mobile sources alone will be insufficient to attain lower PM2.5 standards
- Other background sources, as well as wildfires, are becoming more dominant contributors creating problems in achieving attainment
- Need for serious review of data sources (e.g., inventory) to understand uncertainty and limitations of the modeling inputs driving decisions

PM2.5 and Ozone NAAQS

PSAT Analysis- Alpine Geophysics modeling sponsored by American Petroleum Institute; Key Conclusions



PM2.5 and Ozone NAAQS

PSAT Analysis- Alpine Geophysics modeling sponsored by American Petroleum Institute; Key Conclusions

Source Sector Observations

- Nonpoint/dust/residential wood combustion large through most of the US
- Largest biogenic/fire concentrations in the west and southern/central Appalachians
- Boundary concentrations largest along in-flow regions
- California, Mexico Border, Southern Florida
- Agriculture largest in Midwest, CA Central Valley, northern ID
- Mobile sources largest in upper Midwest, cities, and along I-95 corridor in the northeast
 - Suggests that mobile source controls may have local benefits
- EGU contributions largest in Midwest and Appalachians
- Industrial concentrations largest around Chicago and Houston with smaller concentrations in west outside of Denver and Salt Lake City

PM2.5 and Ozone NAAQS

EPA Modeling Platform

Chet Wayland (at AAPCA meeting – Sept 29) indicated 2016v3 platform is complete and EPA modeling underway in support of final transport rule

- Data includes same projection years as before
- Both 2016 and projection year emissions are updated
- Anticipated early release of platform in December 2022
- Some updates to the platform include new boundary condition files (e.g., international emissions contribution) and updated biogenic emissions
- Includes updates to anthropogenic sources accepted as part of the comment period
- Unsure if preliminary release of future year DVs and significance calculations will occur with the platform availability

PM2.5 and Ozone NAAQS

EPA Modeling Platform

Chet Wayland (at AAPCA meeting – Sept 29) indicated 2016v3 platform is complete and EPA modeling underway in support of final transport rule

- EPA's emission inventory collaborative workgroup has not met since July of 2022
- MJOs have submitted request to OAQPS (P. Tsirigotis) for additional collaboration on next platform [no EPA response yet]
- 2016 too dated, 2020 bad year, 2023 not ready in time
- Possibility of interim year platform that maintains consistent level of emissions and alters year specific collection categories (EGU, onroad, fires, etc)
- Need projections for 2026, 2031 (ozone), and 2038 (RH)
- Request for consideration of projection methods
- More categories w/o growth and only control applied

MOG Update

- Environmental Justice

Environmental Justice

- USEPA will be announcing significant expansion and staffing of the Office of Environmental Justice, led by Director Matt Tejada.
- Environmental Justice is a topic embedded in many federal requests for grant/loan application, such as for hydrogen development and carbon capture and storage.
- Kathy Beckett (Steptoe & Johnson PLLC) met with the Senate Energy Committee to discuss implications of environmental justice on permitting.

Environmental Justice

Near Source Air Pollution

<https://www.epa.gov/ej-research/epa-research-environmental-justice-and-air-pollution>

Some communities are more impacted than others, making air pollution an environmental justice concern. Children, older adults, people with pre-existing cardiopulmonary disease, and people living in low socioeconomic communities are among those at higher risk for health impacts associated with living near:

- busy highways
- rail yards
- marine ports
- industries where pollutants are emitted from multiple sources

Environmental Justice

Wildfires

<https://www.epa.gov/air-research/research-near-roadway-and-other-near-source-air-pollution>

Smoke from wildfires is another close-by source of air pollution that is becoming more common as a result of the impacts of a changing climate. As a result, some populations who live in areas prone to wildfires are more vulnerable to the effects of wildfire smoke. Wildfires can become a regional air pollution concern as well since smoke can travel many miles to other locations.

Environmental Justice

Legal Tools to Advance Environmental Justice

May 2022, Legal Tools to Advance Environmental Justice, Office of General Counsel, U.S. EPA, describes opportunities and authority for EPA to address environmental justice in all EPA programs and includes separate chapters covering the Clean Air Act and other statutes.

<https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf>

Environmental Justice

In the May 2022 guidance, EPA references its policy and recommendations on environmental justice in the final rule preamble for the Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements (81 FR 58010, August 24, 2016):

- “Prioritize the selection of control measures that target reductions of direct PM_{2.5}, particularly from sources located in “at-risk” areas as part of the state’s RACM and RACT analysis (for Moderate nonattainment areas) or BACM and BACT analysis (for Serious nonattainment areas), as well as other measures needed to demonstrate attainment (see Sections III.D and V.D of this preamble, respectively, of this preamble for further discussion of this option);”

Environmental Justice

- “Improve the understanding of the potential impact of minor sources by improving or generating an emissions inventory for such minor sources, including sources that are not currently required to report emissions, to generate options on how emissions can be reduced in the target area;”
- “Design voluntary programs to reduce VMT and mobile source-related PM_{2.5} emissions (e.g., diesel retrofits);”
- “Incorporate environmental justice criteria into the alternatives analysis to ensure appropriate siting and require cumulative impact studies for proposed projects;”
- “Eliminate exemptions from and/or lower thresholds for minor source permitting;”

Environmental Justice

- “Prioritize targeted enforcement strategies;”
- “Develop a list of potential supplemental environmental projects (SEPs) that could be applied in the target area;”
- “Develop advisory boards and/or develop enhanced notice-and-comment requirements for low income and minority communities to assure meaningful involvement relative to projects that impact their communities;”

Environmental Justice

- “Provide special notice of important actions affecting target areas in appropriate languages and with attention to cultural barriers;”
- “Provide advance notification for low income and minority communities of upcoming opportunities for public comment on SIPs, ambient air monitoring plans, and other relevant actions such as permit actions;”
- “Maintain multi-lingual Web sites and offer translators for public meetings and hearings; and,”
- “Coordinate with the state’s EJ coordinator, if applicable, to assist with outreach efforts.”

Environmental Justice

Developing Decision Support Tools for Communities

<https://www.epa.gov/ej-research/environmental-justice-research-developing-decision-support-tools>

- Mapping (EnviroAtlas, EJScreen, etc.)
- Health Impact Assessments (HIAs)
- Citizen Science – low-cost environmental sensors, crowdsourcing, and GIS (geographic information system) mapping to engage overburdened communities and provide them with resources to monitor and assess local conditions.
- PurpleAir – measures particulate pollution (indoor/outdoor)
- National Stormwater Calculator
- Smoke Sensor App

MOG Update

- OTC Stakeholder Briefing

OTC VIRTUAL FALL STAKEHOLDER BRIEFING

September 21, 2022

Modeling Committee

Kevin Civerolo, New York State DEC

The OTC Modeling Committee, which has been co-chaired by Dr. Jeff Underhill of New Hampshire for at least the last ten years, now has two new co-chairs, Kevin Civerolo and Margaret LaFarr, both of NYSDEC.

Committee accomplishments include:

- a. tracking OTR O3 levels and preliminary attainment status through the current O3 season, completing 2016 & 2023 simulations with the CMAQ and CAMx–V1 emissions platforms
- b. performing tagged emissions contribution modeling with CAMx, and conducting 2018/19 episodic modeling on high electric demand days (HEDD).

OTC VIRTUAL FALL STAKEHOLDER BRIEFING

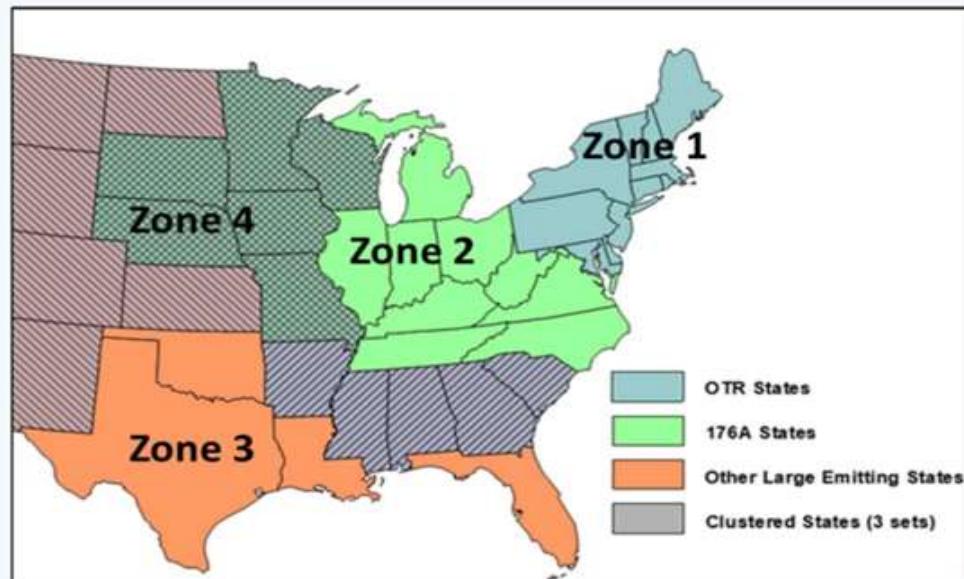
September 21, 2022

Modeling Committee

Kevin Civerolo, New York State DEC

CAMx modeling of tagged emission data is being conducted over the following

2023 Tagged Emissions Modeling - CAMx



State Emission Sectors

- Area-nonpoint
- EGU-ERTAC
- EGU-Peaking
- NonEGU
- NonRoad-diesel
- NonRoad-nondiesel
- OnRoad-diesel
- OnRoad-nondiesel
- Oil & Gas-point
- Oil & Gas-nonpoint
- Commercial Marine Vehicles
- Rail
- Airport/Airplane up to 3000'

Domain-wide Sectors:

- Agriculture
- Offshore CMV
- Offshore rigs
- Prescribed fire
- Biogenic
- Canada
- Mexico
- Boundary conditions
- Initial conditions
- Other

OTC VIRTUAL FALL STAKEHOLDER BRIEFING

September 21, 2022

Modeling Committee

Kevin Civerolo, New York State DEC

2023 Tagged Emissions Modeling Summary

Top Emission Sectors (almost always significant in OTR):

- Area
- OnRoad – NonDiesel
- OnRoad – Diesel
- NonRoad – NonDiesel
- NonRoad – Diesel
- EGU
- NonEGU
- Oil & Gas
- Rail
- Airport

Sometimes Significant Emission Sectors

- Commercial Marine Vessels
- EGU Peakers

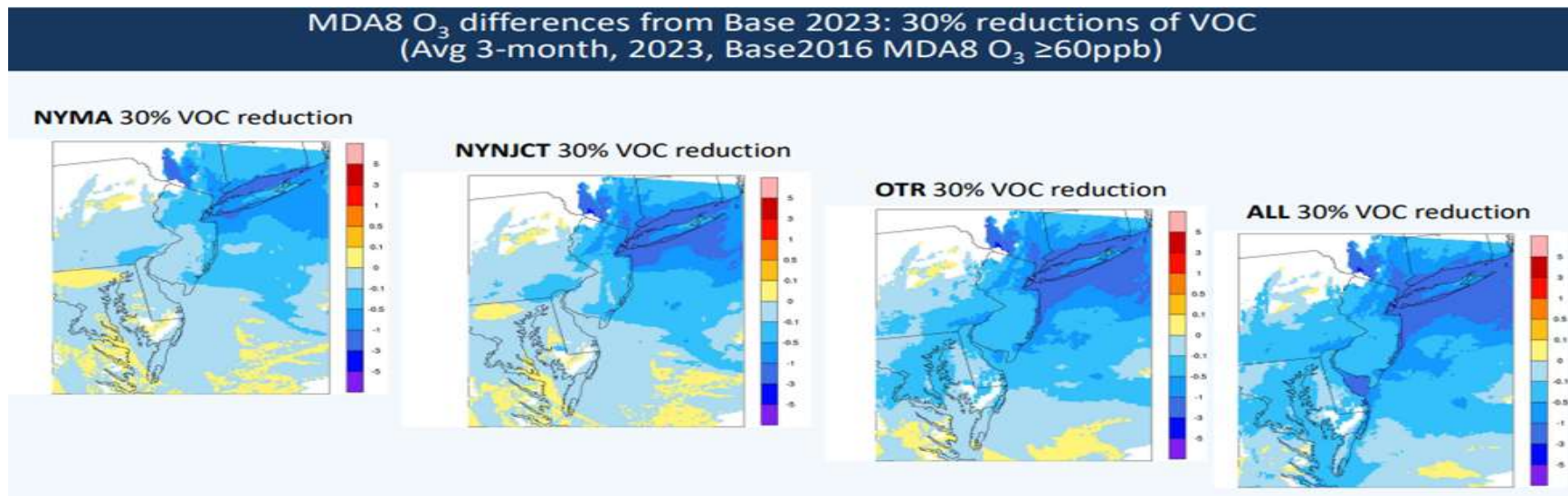
OTC VIRTUAL FALL STAKEHOLDER BRIEFING

September 21, 2022

Modeling Committee

Kevin Civerolo, New York State DEC

Since most of modeling domain is NO_x-limited (outside of NYC), regional NO_x emissions will lead to O₃ reductions, and sensitivity modeling results for a case using a 30% reduction in VOC emissions showed:



Conclusion- targeted VOC reductions in the NYC region will also help but may not provide much “bang for the buck” outside of NYC.

MOG Update

- Recent LADCO work and publications

Recent LADCO work and publications

Recent LADCO Publications

- Ozone TSD: <https://www.ladco.org/technical/ladco-internal/ladco-projects/ladco-2015-o3-naaqs-moderate-area-sip-technical-support-document/>
 - TSD prepared to support the development of attainment demonstration SIPs for 2015 ozone NAAQS moderate nonattainment
- Ozone Formation Sensitivity to NO_x and VOC Emissions in the LADCO Region:
https://drive.google.com/file/d/1Y_xF9v8xF4wBaE2Eyro0LHUGAbIBPhLf/view
 - Report applies a suite of analytical tools to air quality data in the Great Lakes region to determine whether ozone formation in the region is most sensitive to NO_x- or VOC-emissions changes and examines how the ozone-NO_x-VOC chemistry has changed over the past decades

Recent LADCO work and publications

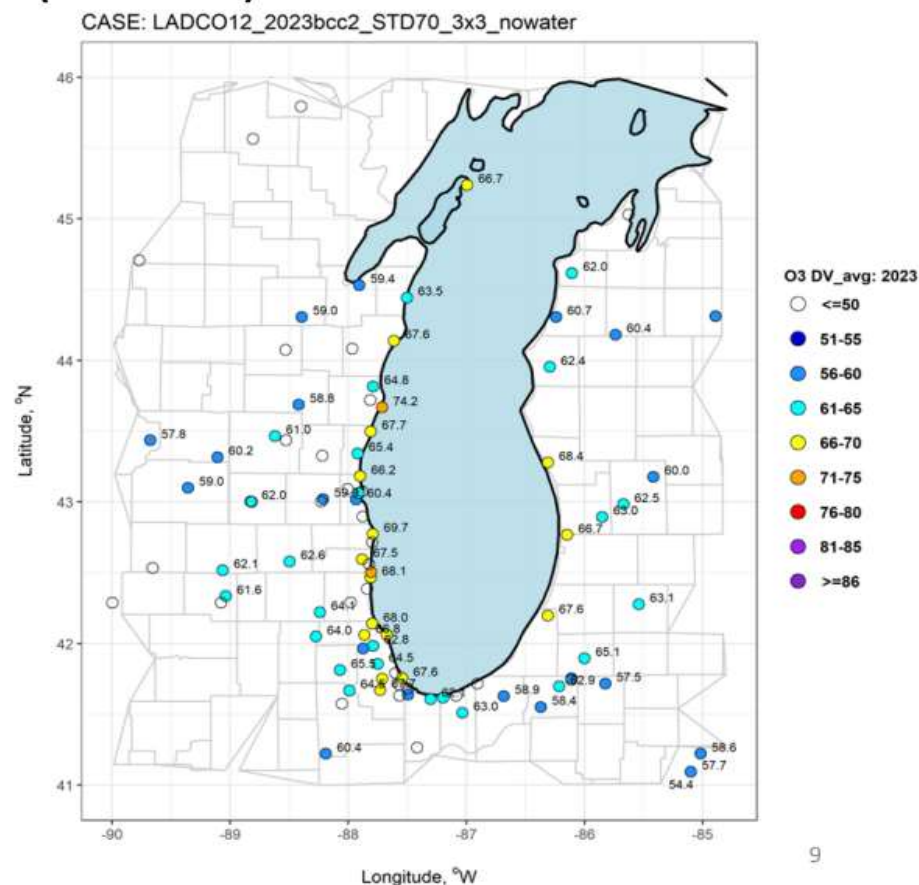
Ozone Attainment Demonstration TSD

- LADCO ran CAMx with EPA's 2016fh (v1) modeling platform with ERTAC EGU emissions (v. 16.2 beta)
- The LADCO 2023 CAMx simulation predicts that the Chiwaukee Prairie, WI and Sheboygan Kohler Andrae, WI monitors are the only two receptors in the region that will have an average future year design value (DV2023) that exceeds the 2015 O3 NAAQS

Recent LADCO work and publications

Projected Design Values (2023)

- The LADCO 2023 CAMx simulation predicts that two monitors in the region will have an average DVF2023 that exceeds the 2015 O3 NAAQS: Sheboygan Kohler Andrae in Sheboygan County, Wisconsin (DVF2023 = 75) and Chiwaukee Prairie in Kenosha County, Wisconsin (DVF2023 = 71)
- LADCO CAMx modeling projected all the monitors along the western shore of Lake Michigan and southern shore of Lake Erie, along with a few other areas of the region, to have 5-9% reductions in their DVF2023 values (RRFs = 0.91-0.95)
- Most of the monitors in the region are forecast to have 10-14% DVF2023 reductions (RRFs = 0.86-0.9)
- The figure to the right presents the DVF2023 values calculated from the LADCO 12-km CAMx modeling using a matrix of 3x3 grid cells surrounding each monitor and excluding water cells in the calculation



Source: Supplemental Materials, LADCO Attainment Demo Modeling TSD, 2022.

Recent LADCO work and publications

Ozone Formation Sensitivity to NO_x and VOC Conclusions

- In the southern areas of St. Louis, Louisville, and Cincinnati, areas of VOC-sensitivity or transitional chemistry in the city centers shifted to NO_x-sensitivity by mid-2000s, and ozone has decreased steadily since then
- The northern areas of Chicago, Detroit, and Cleveland had a dramatic drop in ozone concentrations accompanied by an apparent shift in ozone chemistry in the mid-2000s
- All these city centers appear to have had VOC-sensitive chemistry early in the study period
- Detroit and Cleveland appear to have mostly shifted to NO_x-sensitive chemistry, with decreasing ozone concentrations, although some areas of transitional chemistry may remain in the city centers

Recent LADCO work and publications

Ozone Formation Sensitivity to NO_x and VOC Conclusions

- In contrast, most of the Chicago area appears to have chemistry that is shifting from VOC-sensitive to transitional, resulting in ozone concentrations that are increasing over time
- These three northern areas also had larger reductions in ozone concentrations in outlying areas relative to the city centers
- Ozone concentrations along the Lake Michigan shoreline have decreased the most at areas far downwind (north) of Chicago, while locations closer to the city have decreased at a slower rate
- These trends likely result from the lower amounts of ozone precursors in the relatively isolated over-lake plumes transported from the Chicago area northward
- As ozone precursor emissions have decreased over time, the precursors in the plumes appear to be “used up” faster, resulting in decreasing concentrations in downwind portions of the plumes

MOG Update

- Revised CSAPR Update Appeal

Revised CSAPR Update Appeal

Issues:

- EPA presented no lawful basis for selecting 2021 as the analytical year upon which to base the revised rule.
- EPA must harmonize Good Neighbor Provision requirements with nonattainment and maintenance requirements of the CAA.
- Delayed controls in the nonattainment area are causing the nonattainment involved.
- The unbalanced circumstances of the Revised Rule justify a parallel extension of upwind states' Good Neighbor obligations.
- EPA's modeling decision does not warrant deference
- EPA's utilization of the straight-line or linear interpolation approach rather than state-of-the-science computer modeling is unsupported by law or science.

Revised CSAPR Update Appeal

Issues:

- EPA's attempt to justify its minimal comment period fails.
- EPA fails to justify why it did not consider air quality impacts of on-the-books ozone programs
- EPA's concession that it failed to account for exceptional events further indicates the fatal flaws in its analytical methods
- EPA's defense of its decision to base the Revised Rule on days in which downwind monitors attain the air quality standard is not compelling
- EPA failed to justify the development of its 12 state Group 3 trading program using a databased applicable to its Group 2 trading program with different units.
- The revised rule should be vacated in its entirety.

Oral Argument September 28, 2022

Decision? Perhaps by end of 2022

MOG Update

- WV v EPA

WV v EPA

Joint Motion to Govern

September 19, 2022, D.C. Circuit Court of Appeals ordered that: “in light of the Supreme Court’s decision in *West Virginia v. EPA*, 142 S.Ct. 2587 (2022), reversing this court’s judgment and remanding for further proceedings, the parties file motions to govern.”

The parties jointly requested the following:

- Withdraw the mandate issued on March 5, 2021, and associated order issued on February 22, 2021.
- For the petitions for review challenging the CPP Repeal Rule, the Court should revise its judgment entered on January 19, 2021, to reflect that the petitions for review should be denied consistent with the opinion of the Supreme Court. The Court should then issue a new partial mandate in accordance with the revised judgment.

WV v EPA

Joint Motion to Govern

- For the petitions for review by coal industry petitioners (North American Coal Corporation, Westmoreland Mining Holdings LLC, and the Robinson Petitioners), this Court's judgment denying those petitions is unaffected by the Supreme Court's disposition of the petitions for certiorari, and so the Court's reissued partial mandate should continue to encompass the denial of these petitions.
- For the petitions for review challenging the implementing regulations rule, this Court's judgment is unaffected by the Supreme Court's disposition of the petitions for certiorari, and so the Court's reissued partial mandate should continue to encompass the grant of these petitions.

WV v EPA

Hold in Abeyance Pending Challenges to ACE

“. . .given that EPA is presently undertaking a rulemaking process to replace the ACE Rule with a new rule governing greenhouse gas emissions from fossil-fuel-fired power plants, the undersigned parties agree that the pending challenges to the ACE rule should be placed in abeyance pending completion of that process. At this time, it is expected that EPA will issue a proposed rule by March 2023.

Signatories:

- US DOJ, AG Morrisey (WV),
- America’s Power (Brownell and Lin),
- U.S. Chamber of Commerce (Wood, Kelly and Maltz),
- National Rural Electric Cooperative Assn. (Schon),
- Appalachian Power and AEP Companies (Flannery, Beckett, Kropp and Smith),
- Indiana Energy (Flannery, Beckett, Kropp and Smith),
- International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers; International Brotherhood of Electrical Workers; United Mine Workers (Trisko);
- Power South Energy Cooperative (Moore and Barber);
- North American Coal Corporation (Wehland and Ubersax);
- Westmoreland Land Mining Holdings LLC (DeLaquil, Gorssman, Booher, Wilson);
- Consolidated Edison, Exelon Corporation, National Grid USA, New York Power Companies Climate Coalition, Public Service Enterprise Group Incorporated, and Sacramento Municipal Utility District (Polocarz)

WV v EPA

Democratic Attorneys General Request to EPA to Develop New CO2 NAAQS (OR, MN, DE, IA, ME, MI, NM, Guam) (July 28, 2022)

CAA Sections 108 and 110

- “In *WV v. EPA*, the U.S. Supreme Court limited the use of Section 111(d) of the Clean Air Act (the Act) to address greenhouse gas emissions from power plants, calling it an “ancillary” and “gap-filler” provision of the Act, and saying the Congress could not have intended such a provision to bestow broad powers on the EPA. **We urge you to consider a different section of the Act and approach - NAAQS** - to protect our air, and thus, our planet.”
- **Section 108 of the Act is explicit:** If a pollutant “may reasonably be anticipated to endanger public health or welfare,” and its “presence . . . in the ambient air results from numerous or diverse mobile or stationary sources,” the **EPA is authorized to establish NAAQS.**”

WV v EPA

Democratic Attorneys General Request to EPA to Develop New CO2 NAAQS (OR, MN, DE, IO, ME, MI, NM, Guam) (July 28, 2022)

- The AGs quote the Court in *WV v. EPA as follows*, “It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a **cap that must be based on some scientific, objective criterion, such as the NAAQS**. It is quite another to simply authorize EPA to set a cap itself wherever the Agency sees fit.”
- The AGs proffer that, “. . .**the Court’s invocation of the “major questions doctrine” would not apply to the NAAQS** and that the NAAQS was intended to have ‘vast economic and political significance,’ including generation-shifting, facility closures, and more.”

WV v EPA

Republican Attorneys General Response to Request to Develop New CO2 NAAQS

WV, KY, AL, AK, AR, GA, ID, IN, KS, LA, MS, MO, MT, NE, OH, OK, SC, TX, VA and WY (August 9, 2022)

- The request letter for a new NAAQS suggests EPA wield “newly discovered authority” under the Clean Air Act.
- The [*WV v. EPA*] Court’s opinion is a warning: Federal agency “asserti[ons] [of] highly consequential power beyond what Congress could reasonably be understood to have granted” will not be tolerated.”
- “To list CO2 as a ‘criteria pollutant, EPA must plan[] to issue [certain] air quality criteria’ based on ‘the latest scientific knowledge useful in indicating the kind of extent of all identifiable effects on public health or welfare which may be expected from the presence of ‘CO2’ in the ambient air, in varying quantities.”

WV v EPA

Republican Attorneys General Response to Request to Develop a New CO2 NAAQS

WV, KY, AL, AK, AR, GA, ID, IN, KS, LA, MS, MO, MT, NE, OH, OK, SC, TX, VA and WY (August 9, 2022)

- We have yet to find a way for a NAAQS for CO2 to protect public welfare or health from climate change without devastating the U.S. economy.
- The Supreme Court's decision this summer marks the second time the Court has rebuked EPA for novel interpretations of the CAA specifically that would give the agency "unheralded" power to regulate "a significant portion of the American economy."
- Note: The Response letter does not invoke "major question" doctrine.

MOG Update

- Proposed SIP Disapprovals / FIP

Proposed SIP Disapprovals / FIP

Proposed Federal Implementation Plan (87 Fed. Reg. 20,036 (April 6, 2022))

Non-EGUs

23 states involved: Arkansas, California, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.

Affected sources

- reciprocating internal combustion in Pipeline Transportation of Natural Gas sources
- kilns in Cement and Cement Product Manufacturing sources
- boilers and furnaces in Iron and Steel Mills and Ferroalloy Manufacturing sources
- furnaces in Glass and Glass Product Manufacturing sources
- high-emitting equipment and large boilers in Basic Chemical Manufacturing, Petroleum and Coal Products Manufacturing, and Pulp, Paper, and Paperboard Mills.

Subject to emissions rates but not trading

Proposed SIP Disapprovals / FIP

Issues Regarding Proposed FIP, Informed by WV v. EPA

- Does the FIP conflict with or undermine Congress's design?
- Is EPA exercising an authority that Congress had not delegated?
- Did Congress mean to confer on EPA the authority to decline to manage infrastructure SIPs and good neighbor SIPs with parity?
- Is the FIP inconsistent with the overall statutory scheme?
- Is the FIP a mismatch between EPA's action and its congressionally assigned mission and expertise?

Proposed SIP Disapprovals / FIP

Issues Regarding Proposed SIP Disapprovals, Informed by Revised CSAPR Update appeal

- Must EPA harmonize Good Neighbor Provision requirements with nonattainment and maintenance requirements of the CAA?
- Is EPA's revised modeling approach, e.g., use of linear interpolation, consistent with the Clean Air Act?
- Must EPA consider air quality impacts of on-the-books ozone programs in reviewing SIPs?
- Must EPA consider exceptional events in reviewing SIPs?

Proposed SIP Disapprovals / FIP

Schedule

- December 15, 2022 Final SIP disapproval
- December 2022 Release 2016 v3 emission platform
- March 2023 Release final SIP
- April 2023 Likely Federal Register FIP publication
- May 2023 Likely effective date of FIP controls
- **MOG will be assessing litigation options related to the SIP disapprovals and the FIP at its meeting on December 15**

Future Issues

Many moving parts at play may have significant implications for commercial/industrial boiler owner/operators

- A. PM2.5 NAAQS reconsideration
- B. Ozone NAAQS reconsideration
- C. Impact of EPA revised modeling platform and source apportionment results with new revised inventory
- D. Impact of electric grid reliability issue on EPA stationary source regulatory authority
- E. Democrat Attorneys General request to establish CO2 NAAQS and Republican Attorneys General Response
- F. Status of multiple state Good Neighbor SIP approvals/disapprovals
- G. Pending FIP
- H. Congressional action to codify boundaries of Supreme Court decision in WV v EPA regarding Major Question Doctrine

CONTACT INFORMATION

Skipp Kropp
Steptoe & Johnson PLLC
317.946.9882

Skipp.Kropp@Steptoe-Johnson.com