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CLEAN AIR, CLEAN CONSCIENCE: EVALUATING THE EARLY ACTION COMPACT PROGRAM UNDER THE SHADOW OF THE CLEAN AIR ACT IN THE FIVE-YEAR WAKE OF *WHITMAN V. AMERICAN TRUCKING ASSOCIATIONS, INC.*

AMANDA L. MARIS*

INTRODUCTION

For a little over four years now, a new compliance scheme for meeting the national air quality standard for ozone has been operating in its infancy in select areas around the country: the Early Action Compact (EAC).¹ The EAC is an alternative to the traditional regulatory scheme under the Clean Air Act used to bring areas within a state that exceed the eight-hour ozone standard back into attainment with that standard. It is an agreement between local, State and U.S. Environmental Protection Agency (EPA) officials that allow these areas to defer “nonattainment” status under the new eight-hour standard (and the associated regulatory burdens) in exchange for a commitment to control emissions from local sources earlier than would otherwise be required under the Clean Air Act.²

A year prior to the creation of the EAC program, the U.S. Supreme Court made a landmark ruling in *Whitman v. American Trucking Associations, Inc.*³ that significantly impacted how the EPA could implement its new eight-hour ozone standard. It ruled, among other things, that the EPA had unreasonably interpreted its authority to exclude an

* J.D. Candidate, 2006, North Carolina Central University School of Law; B.A., University of North Carolina at Chapel Hill, 2000. Special thanks to Professor Kevin C. Foy for suggesting I consider the Early Action Compact Program as a topic. Thanks also to the N.C.C.U. Law Journal and to those I interviewed in the Triangle and Triad for their contributions to this article. Also, a very special thanks to Professor Cheryl E. Amana for the experience I gained as her research assistant over the past two years. Thank you to my parents, sisters, family and friends for their love and support during law school. And finally, I especially want to thank my partner Gail for her patience, strength and unending support these past three years of law school.

1. See generally EPA, Early Action Compacts, available at <http://www.epa.gov/air/eac> (participating EAC areas in 14 states and more information on the EAC Program); Southern Environmental Law Center, Early Action Compacts, available at <http://www.southernenvironment.org/cases/compacts/background.htm> (providing more information on the EAC program).

2. The participating areas must also meet designated milestones under the compact described in full later.

3. *Whitman v. American Trucking Ass'ns, Inc.* 531 U.S. 457 (2001).

important subpart of the provisions of the Clean Air Act regulating nonattainment areas with its implementation of the new eight-hour ozone standard. While the *Whitman* court confirmed the EPA's right to revise the ozone standard from a one-hour standard to an eight-hour standard, it required the EPA to go back to the drawing board to re-draft its implementation rule for the new standard.

In the wake of *Whitman*, the EPA spent three years coming up with its first phase of an implementation rule of the new eight-hour standard, issued in April 2004,⁴ and just recently promulgated the second phase of the implementation rule in November 2005.⁵ Prior to the issuance of these implementation rules, especially the first one, the value of the Early Action Compact could not be fairly assessed. After *Whitman* left the implementation of the normal regulatory scheme for nonattainment areas in the drafting stage in 2001, it was impossible to know how it would operate or if it would be more environmentally effective than the Early Action Compact program. Now, with the new implementation rules and some four years into the new Early Action Compact program, an evaluation of the EAC program can be made. This article will evaluate the program by comparing it to the traditional regulatory compliance scheme for ozone attainment in nonattainment areas under the Clean Air Act. To illustrate how compliance with the ozone standard varies under each scheme, two areas in North Carolina, one of which is participating in the EAC and one of which is following the traditional regulatory scheme under the Clean Air Act, will be examined.

This article will be divided into six parts. Part I will offer background on the national ambient air quality standards (NAAQS) program under the Clean Air Act as it applies to attainment of the ozone criteria pollutant and nonattainment status. Part II will describe the relevant portions of *Whitman* and the implementation rules issued by the EPA in April, 2004 and November, 2005. Part III will explain the EAC program. Part IV will include an application of both compliance schemes to two nonattainment areas in North Carolina. Part V will be the analysis, and, Part VI, the conclusion of the article.

4. Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards, 69 Fed. Reg. 23, 858 (Apr. 30, 2004) (to be codified at 40 C.F.R. pt. 81), available at [http://www.epa.gov/ttn/naaqs/ozone/eac/fr_69\(84\)_23858.pdf](http://www.epa.gov/ttn/naaqs/ozone/eac/fr_69(84)_23858.pdf).

5. Final Rule to Implement the 8-hour Ozone National Ambient Air Quality Standard, 40 C.F.R. pts. 51, 52 & 80 (2005), available at http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/documents/finalrule/8hr_o3_imp_ph2_final_20051108.pdf.

PART I: BACKGROUND

The first law enacted to promote clean air in the United States was the Clean Air Act of 1963, passed by Congress forty-three years ago.⁶ Designed to protect the public health and welfare from the adverse health effects of air pollutants, it sets NAAQS for certain pollutants considered particularly harmful by the EPA. These “criteria” pollutants are carefully monitored throughout the country through the NAAQS program.⁷ The Act specifically provides for primary air quality standards that allow for “an adequate margin of safety. . . requisite to protect the public health” based on permissible concentration levels of each pollutant that can be emitted over a fixed period of time.⁸ Notably, the acceptable concentration of each criteria pollutant under the NAAQS is expressed as an average over a period of time, e.g., the current NAAQS for ozone is now an eight-hour standard.⁹ This method allows for a reading of each pollutant that accurately reflects its real presence in the air as opposed to a random sampling taken at any minute or number of minutes in time.

At its inception, the NAAQS program set national ambient air quality standards for five criteria pollutants.¹⁰ The current list now includes: carbon monoxide, sulfur dioxide, nitrogen oxides, particulates, lead, and ozone or volatile organic compounds.¹¹ Ozone was added to the list in 1979.¹²

The Ozone Standard (or NAAQS)

The first ozone standard established by the EPA was a one-hour standard. The EPA revised that standard in 1997 when scientific data encouraged the agency to change the time average to eight hours in the interest of increased protection of the public health and welfare.¹³ The “ozone” standard addresses ground-level ozone or what is commonly known as “smog” (*not* stratospheric ozone pollutants that con-

6. 42 U.S.C. §§ 1857-1857I (1964) (current version at 42 U.S.C. §§ 7401-7671q (2000)).

7. 42 U.S.C. §§ 7408, 7409 (2000); *see generally* Nixon Presidential Materials, Nixon Administration Timeline, *available at* <http://nixon.archives.gov/learn/timeline.html#1970> (listing President Nixon signing the Clean Air Act of 1970 on December 31, 1970, which is the time the NAAQS program began).

8. *See id.* at § 7409 (stating that the Clean Air Act also establishes secondary standards “to protect the public welfare from any known or anticipated adverse effects” of air pollution).

9. The 8-Hour Ozone NAAQS was promulgated at EPA. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38856, 38858 (July 18, 1997). Before this time, the ozone NAAQS was a one-hour standard.

10. Part of the reason only five were set is due to the regulatory burdens associated with each new NAAQS promulgated.

11. Note that volatile organic compounds mix with nitrogen oxides to form ground level ozone (such as smog) in the presence of heat and sunlight.

12. *See* 44 Fed. Reg. 8202 (Feb. 8, 1979).

13. *See supra* note 9 and accompanying text.

tribute to global warming due to the destruction of the earth's ozone layer by fluorocarbon emissions).

Ozone is actually a secondary pollutant formed by the reaction of nitrogen oxides (NO_x) and volatile organic compounds (VOC) in the presence of heat and sunlight.¹⁴ This is why we generally see a rise in incidents of respiratory health problems, like asthma, during the summer or warmer, brighter times of year. Unfortunately, the impact of ground-level ozone is disproportionately felt by those that are the most susceptible to respiratory problems, like children and the elderly.¹⁵

The sources of nitrogen oxides and volatile organic compounds that create ground-level ozone are both stationary and mobile sources. Stationary sources such as coal-fired power plants and other industrial sources contribute to the introduction of nitrogen oxides in the air. Mobile sources such as cars, buses, trains and trucks also contribute to nitrogen oxides. In fact, in North Carolina, these two sources equally contribute to the NO_x emissions in the Triangle area. Although NO_x emissions from mobile sources are expected to grow up to 76% by 2007 in the Triangle, and, in the Triad, mobile to stationary source emissions of NO_x are currently at 35-64%, with an expected mobile emission growth of up to 70% by 2007.¹⁶ VOC emissions are organic compounds that evaporate into the air from industrial processes, auto exhaust and natural sources.¹⁷ But, the largest contributor of VOC in North Carolina is biogenic or natural sources of VOC, (e.g. trees (oaks and pines), crops, decomposing processes in forests).¹⁸ Because of this, ozone control strategies focus on lowering emissions of nitrogen oxides.¹⁹

The State Role

The national ambient air quality standards do not maintain themselves. In fact, the primary regulatory mechanism for staying in attainment with them is carried out by the states.²⁰ The federal government, through the EPA, sets primary or secondary NAAQS, and within three years of the new or revised NAAQS, each state must

14. Christopher M. Kamper, *Colorado Addresses New EPA Ozone Standard*, 33 COLO. LAW 67 (Feb. 2004).

15. See *supra* note 4.

16. See *infra* notes 32 & 98.

17. Kamper, *supra* note 14.

18. See *infra* note 63.

19. *Id.*

20. The N.C. Dept. of Environment and Natural Resources submits the state implementation plan. For more information on state roles and responsibilities, see generally Laura Booth, NCDENR, *Air Quality Roundtable* (Nov. 2003), available at http://litre.ncsu.edu/CTE/NCAirQuality/NCDENR_Update.pdf.

submit a state implementation plan (SIP) showing how the standard will be implemented, maintained and enforced within their state subject to the EPA's approval. The beauty of the NAAQS program is that states have significant control over how to regulate air pollution in their jurisdictions because they choose the regulatory measures they want to include in their SIP.²¹

Once approved, a SIP is not only enforceable by the state but also acts as a group of federally enforceable state requirements under § 7413 of the Act.²² A SIP is essentially "a complex mix of state rules, statutes, orders, permits and plans, which the EPA has approved one by one for each state."²³ Among other requirements under the Act, a SIP must include:

- (1) enforceable emission limitations and other control measures, means or techniques as well as schedules and timetables for compliance;
- (2) provisions for establishing appropriate devices, methods or systems necessary to monitor, compile and analyze data on ambient air quality;
- (3) a program for enforcing the measures required under the SIP and for regulating the modification and construction of stationary sources (e.g. a power plant), including a permit program; and,
- (4) adequate provisions prohibiting interference with the efforts of other states to achieve compliance with the NAAQS, (e.g., the problem of upwind states' emissions drifting into bordering states and skewing their success at attainment under NAAQS²⁴).²⁵

The SIP must specifically illustrate for the EPA how it will meet the requirements of the Act. Otherwise, the EPA will not approve the state's regulatory approach to meeting the particular standard.

Nonattainment Designation

The Clean Air Act monitors a state's ability to meet a NAAQS by region or "area" within a state, e.g., in North Carolina: the Triad (Winston-Salem/Greensboro/High Point) or Triangle (Raleigh/Durham/Chapel Hill) area. The Act classifies these areas based on whether they meet the established NAAQS ("attainment") or exceed

21. See 42 U.S.C. § 7410 (2006).

22. Nat'l. Mining Ass'n. v. E.P.A., 59 F.3d 1351, 1363 (D.C. Cir. 1995) (citing to 42 U.S.C. § 7413: "Once included within the SIP, a state control becomes enforceable not only by the state which is its primary regulating authority, but also by the [EPA] Administrator.").

23. Stuart Arkley, Comment, *Changes In The Air: Innovation And Streamlining In The State Implementation Plan Process and Maintenance Of National Air Quality Standards In Minnesota*, 28 HAMLINE L. REV. 585 (Summer 2005).

24. See, e.g., Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule), 69 Fed. Reg. 4566 (proposed January 30, 2004) (now called the "Clean Air Interstate Rule" (CAIR)).

25. 42 U.S.C. § 7410(a)(2)(A)-(D) (2006).

the standards ("nonattainment") *unless* they have elected to participate in the fairly new Early Action Compact program, which defers nonattainment status even when an area is technically violating the ozone standard.²⁶ Areas that were once deemed nonattainment areas but have brought themselves within attainment once again are classified as "attainment-maintenance" areas.

Not considering the serious health implications of being in a nonattainment area, why would a region or area classified as nonattainment be motivated to work towards achieving maintenance status? The answer is simple: nonattainment status carries with it cumbersome regulatory burdens in addition to those normally imposed by the Clean Air Act that can potentially hurt economic development. The main additional burdens are: New Source Review and Transportation Conformity.²⁷ These additional requirements are best explained in association with pollutant source: stationary or mobile, e.g. a coal-fired power plant or a motor vehicle.

Under the Act, when there are plans to build or modernize (make major modifications to) major *stationary* industrial pollution sources such as power plants, they must meet "new performance standards" under the New Source Review (NSR) permitting program in order to obtain a permit for the construction or modification.²⁸ New Source Review requires that "new or modified" stationary sources in nonattainment areas do the following in order to obtain the nonattainment NSR permit: (1) meet the "lowest achievable emissions rate" (LAER) by installing emissions control technology or changing the raw material or manufacturing process itself to lower emissions; and (2) obtain emission reduction offsets from existing sources in the area.²⁹ Under the Act, a NSR program must also allow for public comment on any proposed permits.³⁰ Thus, nonattainment status adds additional costs

26. The EAC Program defers nonattainment status under certain conditions. EPA, Ozone Early Action Compacts, *available at* <http://www.epa.gov/ttn/naaqs/ozone/eac> (an area can be attainment for one pollutant but nonattainment for another because classifications are made on a pollutant-specific basis, based on concentrations of each criteria pollutant).

27. *See generally* Letter from J. David Farren, Senior Attorney & Sierra B. Weaver, Associate Attorney, Southern Environmental Law Center, to James A. Joy, III, PE, Chief of Bureau Air Quality, South Carolina Department of Health and Environmental Control (May 15, 2003), *available at* http://www.epa.gov/ttn/naaqs/ozone/eac/c_eac_selc-sc_20030515.pdf (avoiding the imposition of the New Source Review and Transportation Conformity by participating in the EAC).

28. *See* 42 U.S.C. § 7503 (2000) (listing the permit requirements for the New Source Review). The New Source Review program was created in the 1977 Amendments to the Clean Air Act. It requires "new or modified" major sources of air pollutants located in areas that fail to meet ambient standards (nonattainment areas) to obtain preconstruction permits and install modern pollution control technology.

29. *Id.*

30. EPA, *New Source Review (NSR)*, *available at* <http://www.epa.gov/nsr>.

to existing factories and may discourage new factories from locating in a nonattainment area due to NSR requirements.

Highway *Mobile* sources of pollution in a nonattainment area carry with them the Act's "Transportation Conformity" requirement.³¹ Transportation conformity makes sure that federal funding goes to transportation projects that do not adversely affect an area's ability to maintain the ozone standard. It requires that the "total motor vehicle emissions [projected for a transportation plan, transportation improvement program (TIP) or project funded by the Federal Highway Administration (FHWA) or the Federal Transit Administration (FTA)], including those from newly constructed highways, do not impede achievement of clean air" or "force the area to exceed the level of attainment."³² Conformity analyses (data modeling that estimates motor vehicle emissions) must be conducted to ensure that the transportation plans and highway projects conform to the SIP's "motor vehicle emissions budget" (a cap established in the SIP on the motor vehicle emissions that an area can produce and still attain the ozone standard).³³ This must first be done one year after nonattainment designation becomes effective in an area. If an area fails to show transportation conformity, federal highway funds will be suspended. The rationale of the requirement is that federal funding should not make additional emissions from mobile sources possible by funding transportation or highway projects in an area, i.e., more vehicles on the road equals more emissions. The gravity of failing to meet this requirement and losing federal highway and transportation project funding, e.g., funding for projects like the Triangle Transit Authority's (TTA) light rail plan, can be very serious considering how much money the federal government generally contributes to such projects!

One final requirement placed on nonattainment areas in addition to New Source Review and Transportation Conformity is an Attainment Demonstration. That is, an area must demonstrate to the EPA through modeling that it will attain the standard by the deadline for attainment in its SIP. (However, if an area expects to meet the stan-

31. Maintenance areas must also meet this requirement, which does not apply to off-road mobile sources.

32. David Farren & Gudrun Thompson, *Clean Air for the Triangle Area: An Action Agenda*, A Publication of the Southern Environmental Law Center, Chapel Hill, NC (2005), available at http://www.southernenvironment.org/newsroom/publications/triangle_air_report.pdf.

33. *Id.* The responsibility of achieving the transportation conformity through appropriate planning in a (non-EAC participating) nonattainment area is on the Metropolitan Planning Organizations (MPOs) within an urban area and the Rural Planning Organizations (RPOs) in the rural areas. The MPO develops the plans that must conform with the SIP emissions budget, so, in that sense, they are responsible for the conformity analyses as well, though they consult with local and federal air quality and transportation agencies and the EPA to make sure the area's emissions don't exceed the standard. *Id.*

dard before the scheduled deadline for attainment, it can avoid the Attainment Demonstration requirement by submitting a maintenance plan redesignation request to the EPA, which would show the EPA that the area is already in attainment and should be reclassified accordingly.)

Once an area has actually attained the standard and become an attainment-maintenance area, then it has to devise a "Maintenance Plan" in order to remain in attainment.³⁴ Under §175(a) of the Clean Air Act,³⁵ nonattainment areas must submit a revised SIP for maintenance of the NAAQS for the relevant pollutant for a ten-year period after applying for redesignation as an attainment-maintenance area. This requirement occurs twice. Thus, under the normal regulatory requirements for nonattainment under the Clean Air Act, a nonattainment area must continue to monitor the presence of a pollutant for which it has recently come into attainment, for a minimum of twenty years after reaching attainment.

PART II: *WHITMAN v. AMERICAN TRUCKING ASSOCIATION, INC.*
AND THE PHASE 1 AND 2 IMPLEMENTATION RULES

The CAA contains two sets of provisions - subpart 1 and subpart 2 - that address planning and control requirements for ozone nonattainment areas. Both were the subject of an important part of the *Whitman* holding and are found in title I, part D of the CAA.³⁶ Subpart 1 (which the EPA refers to as "basic" nonattainment) contains general, less prescriptive, requirements for nonattainment areas for any pollutant, including ozone, governed by a NAAQS. Subpart 2 (which the EPA refers to as "classified" nonattainment) provides more specific requirements for ozone nonattainment areas.

Whitman v. American Trucking Associations, Inc.

Section 109(a) of the Clean Air Act requires the EPA Administrator to promulgate national ambient air quality standards (NAAQS) for each air pollutant for which "air quality criteria" have been issued under §108.³⁷ Once promulgated, the Administrator must review the NAAQS (and the criteria on which it is based) "at five-year intervals" and make "such revisions . . . as may be appropriate."³⁸ Pursuant to §109(d)(1), in 1997, the Administrator revised the ozone and particulate matter NAAQS. In the EPA's implementation rule for the new

34. 42 U.S.C. § 7505a (2000).

35. *Id.*

36. *Whitman v. American Trucking Ass'ns, Inc.* 531 U.S. 457, 458-488 (2001).

37. 42 U.S.C. § 7409(a) (2000).

38. *Id.* § 7409(d).

eight-hour standard it said that the provisions of subpart 1 would immediately apply to the implementation of the new eight-hour ozone standard, but it said that subpart 2 would only continue to apply as a matter of law for so long as an area is not attaining the old one-hour standard.³⁹ Once the area reached attainment for the old standard, the rule read: “the provisions of subpart 2 will have been achieved and those provisions will no longer apply.”⁴⁰ Those requirements (subpart 2) established specific provisions for ozone nonattainment areas based on the degree or severity to which each area exceeded the NAAQS. Because subpart 2 was specifically based on the old one-hour ozone standard, the EPA used only subpart 1 (general nonattainment requirements) to implement the new standard.

In *Whitman*, private parties and states, American Trucking Associations, Inc., other private companies, Michigan, Ohio and West Virginia, challenged the revised NAAQS on several grounds in the Court of Appeals for the District of Columbia Circuit. The Court of Appeals found that, under the Administrator’s interpretation, §109(b)(1)—which instructs the EPA to set standards “the attainment and maintenance of which . . . are requisite to protect the public health” with “an adequate margin of safety”—delegated legislative power to the Administrator in contravention of the Federal Constitution, and it remanded the NAAQS to the EPA.⁴¹ The Court of Appeals also declined to depart from its rule that implementation costs may not be considered in setting a NAAQS by the EPA.⁴² The Court of Appeals also held that, although certain ozone NAAQS implementation provisions contained in subpart 2 did not prevent the EPA from revising the ozone standard and designating certain areas as “nonattainment areas,” those provisions, rather than more general provisions in subpart 1, constrained the implementation of the new ozone NAAQS.⁴³ The EPA’s argument that the Court of Appeals lacked jurisdiction to reach the implementation question because there had been no “final” implementation action was also rejected.⁴⁴

The U.S. Supreme Court held that §109(b) does not permit the Administrator to consider implementation costs in setting NAAQS nor does subsection (1) of §109(b) delegate legislative power to the EPA. The Court also held that the Court of Appeals had jurisdiction to con-

39. Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards, 69 Fed. Reg. 23, 858 (Apr. 30, 2004) (to be codified at 40 C.F.R. pt. 81), available at [http://www.epa.gov/ttn/naaqs/ozone/eac/fr_69\(84\)_23858.pdf](http://www.epa.gov/ttn/naaqs/ozone/eac/fr_69(84)_23858.pdf).

40. *Id.*

41. *Am. Trucking Ass’ns Inc. v. United States E.P.A.*, 195 F.3d 4 (D.C. Cir. 1999), *aff’d in part, rev’d in part sub nom.* *Whitman v. Am. Trucking Ass’ns Inc.*, 531 U.S. 457 (2001).

42. *Id.*

43. *Id.*

44. *Id.*

sider the implementation issue under §307 of the Clean Air Act, and, accordingly, the Court considered whether the EPA's implementation policy essentially excluding subpart 2 from the eight-hour ozone standard was lawful. The Court found that it was not lawful but disagreed with the Court of Appeals that subpart 2 of the Clean Air Act clearly controlled implementation of the new eight-hour ozone standard over subpart 1.

The Court framed the issue as follows: "The dispute before us here, in a nutshell, is whether subpart 1 alone (as the agency determined), or rather subpart 2 or some combination of subparts 1 and 2, controls the implementation of the revised ozone NAAQS in nonattainment areas."⁴⁵ The Court employed the *Chevron* statutory construction test: if the statute resolves the question of whether subpart 1 or subpart 2 applies to the revised ozone NAAQS, that ends the matter; but if the statute is "silent or ambiguous" with respect to the issue, the Court must defer to a "reasonable interpretation made by the administrator of an agency."⁴⁶ The Court found that the statute was ambiguous as to the application of subpart 1 and subpart 2, but that the EPA's interpretation of the statute was not reasonable.⁴⁷ The Court found that the EPA's interpretation would render subpart 2's carefully designed restrictions (as established by Congress in the 1990 Amendments to the Act) on EPA discretion "nugatory" once a new ozone NAAQS has been promulgated, and that this was not reasonable.⁴⁸

One principal distinction between the subparts is that subpart 2 eliminates regulatory discretion allowed by subpart 1 because subpart 2 was added by Congress to direct the EPA in the 1990 Amendments to the Clean Air Act. The Court found that the EPA could not construe the statute in such a way that its interpretation effectively nullified these textually applicable provisions meant to limit its discretion.⁴⁹ In addition, subpart 2 was obviously written by Congress to govern implementation for some time into the future based on the dates established for attainment, and under the EPA's interpretation of the act, "nothing would have prevented the agency from aborting the subpart the day after it was enacted."⁵⁰ The Court directed the EPA to develop "a reasonable interpretation of the nonattainment im-

45. *Id.* at 476.

46. *Id.* at 481 (quoting *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984)).

47. *Id.* at 481.

48. *Id.* at 484.

49. *Id.* at 485.

50. *Id.*

plementation provisions insofar as they apply to revised ozone NAAQS."⁵¹

EPA Phase 1 and 2 Implementation Rules

The EPA's Phase 1 and 2 Implementation Rules were in direct response to the *Whitman* decision. Together, these rules shed considerable light on the actions states, nonattainment areas and resident industries must take to be in compliance with the new eight-hour NAAQS for ozone. Phase 1 (issued on April 15, 2004) provided a process for classifying areas based on the severity of their ozone nonattainment (as either subject to subparts 1 or 2, clarifying *Whitman*), established deadlines for states to reduce ozone levels and reach attainment and set procedures for transitioning from the one-hour standard to the new eight-hour standard for ozone.⁵² The Phase 2 rule (issued November 8, 2005) outlined emission control and planning obligations that apply to areas under both subparts 1 and 2.⁵³

When the EPA changes or revises an NAAQS, as it did when it changed the ozone NAAQS from a one-hour standard to an eight-hour standard on July 18, 1997, it is required to issue new attainment classifications.⁵⁴ For the eight-hour NAAQS, however, the Transportation Equity Act for the 21st Century (TEA-21) extended the time for EPA to designate areas for the eight-hour NAAQS by an additional year requiring the EPA to designate areas by July 2000.⁵⁵ However, H.R. 3645 (the EPA's appropriation bill in 2000) restricted the EPA's authority to spend money associated with area designations until June 2001 or the date the Supreme Court ruled on the standard, whichever came first.⁵⁶ The Supreme Court decision in *Whitman* was issued in February 2001. After two more years without new designations, several environmental groups filed suit in district court in 2003 on the grounds that EPA had not met its statutory obligation to designate areas for the new eight-hour NAAQS. The EPA subsequently

51. *Id.* at 486.

52. Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards, 69 Fed. Reg. 23, 858 (Apr. 30, 2004) (to be codified at 40 C.F.R. pt. 81), available at [http://www.epa.gov/ttn/naaqs/ozone/eac/fr_69\(84\)_23858.pdf](http://www.epa.gov/ttn/naaqs/ozone/eac/fr_69(84)_23858.pdf).

53. Final Rule to Implement the 8-hour Ozone National Ambient Air Quality Standard, 40 C.F.R. pts. 51, 52 & 80 (2005), available at http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/documents/finalrule/8hr_o3_imp_ph2_final_20051108.pdf.

54. The process for designations following promulgation of a NAAQS is contained in section 107(d)(1) of the CAA.

55. See Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards, 69 Fed. Reg. 23, 858 (Apr. 30, 2004) (to be codified at 40 C.F.R. pt. 81), available at [http://www.epa.gov/ttn/naaqs/ozone/eac/fr_69\(84\)_23858.pdf](http://www.epa.gov/ttn/naaqs/ozone/eac/fr_69(84)_23858.pdf).

56. *Id.*

entered into a consent decree, agreeing to issue designations by April 15, 2004, which led to the first implementation rule.

On April 15, 2004, the EPA finally issued its final rule designating the attainment status of regions across the country with respect to the new eight-hour ozone standard. The 2004 rule was Phase 1 of the EPA's response to *Whitman*. The classifications made under the Phase 1 Implementation rule told nonattainment areas for the new ozone standard whether the implementation provisions of subpart 1 (the general nonattainment provisions) or subpart 2 (additional provisions for ozone nonattainment) at issue in *Whitman* applied to them.⁵⁷

Section 172(a)(1) of the CAA provides that EPA has the discretion to classify areas subject only to subpart 1.⁵⁸ The EPA does this by using design values, i.e. the figure used by the EPA to assess whether an area is in attainment with the ozone standard. Accordingly, areas that had an old one-hour design value that was less than or equal to 0.12ppm (parts per million) were classified under subpart 1 of Part D, Title I of the CAA and areas with a one-hour design value at or above 0.121ppm (the lowest one-hour design value in Table 1 of subpart 2) were classified under the subpart 2 classification scheme based on their new eight-hour design value.⁵⁹ Classifications under subpart 2 as listed in the Act range from marginal, moderate, serious, severe to extreme, but the highest designation actually made by the EPA was severe.⁶⁰ Each classification is linked to a set of control requirements that become increasingly more restrictive. The requirements are designed to bring areas into attainment by their specified attainment date.⁶¹ 877-282-3682

A design value is the figure used by the EPA to assess if an area is in violation of the ozone standard. How the design value is calculated has changed from the old one-hour standard to the new eight-hour standard.⁶² Under the new standard, three years of daily ozone readings from a monitor in a given area is used to calculate the eight-hour

57. Areas around the country were classified under the old one-hour standard prior to this time.

58. 42 U.S.C. § 7502(a)(1) (2005).

59. For the one-hour ozone NAAQS, design value is defined at 40 C.F.R. § 51.900(c) (2006). For the eight-hour ozone NAAQS, design value is defined at 40 C.F.R. § 51.900(d) (2006).

60. See Table 1, Classification and Attainment Dates, 42 U.S.C. § 7511 (2005) (including the classifications based on one-hour design value range). As described in the Phase 1 implementation rule, since Table 1 is based on one-hour design values, the EPA promulgated in that rule a regulation translating the thresholds in Table 1 of section 181 from one-hour values to eight-hour values. See Table 1, "Classification for eight-hour NAAQS" from 40 C.F.R. § 51.903 (2006).

61. Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards, 69 Fed. Reg. 23, 858 (Apr. 30, 2004) (to be codified at 40 C.F.R. pt. 81), available at [http://www.epa.gov/ttn/naaqs/ozone/eac/fr_69\(84\)_23858.pdf](http://www.epa.gov/ttn/naaqs/ozone/eac/fr_69(84)_23858.pdf).

62. *Supra* note 41.

design value.⁶³ An average is taken of three values: the fourth highest (daily) reading of the monitor for each of three years. Ozone monitors typically take daily ozone readings from April 1- October 30th, the high ozone time of year since NO_x and VOC combine to make ozone in the presence of heat and sunlight. Under the old standard, three years of daily ozone monitor readings were used, as well, except the readings were looked at collectively instead of by each year in the three-year period so that, in effect, the design value could be skewed if you had a “bad” ozone season.

When the EPA made its nonattainment classification in the April 2004 Phase I rule, the Triangle’s design value (based on 2001-2003 data) was 0.118ppm, thus it was designated into basic nonattainment under subpart 1.⁶⁴ The Triad’s design value (based on 2001-2003) data was 0.121, which is actually just above the 0.121 threshold the EPA established.⁶⁵ Therefore, the Triad was classified in subpart 2. The Triad was classified as a “marginal” area under subpart 2 and would have been subject to the attainment requirements associated with the “marginal” classification had it not opted to participate in the EAC program.⁶⁶

Note that the Triad was originally classified as a “moderate” area, but it requested that the EPA “bump” it down to a marginal classification pursuant to the April 2004 Phase I rule and was granted the “five percent bump down” on September 22, 2004 for reasons including that a majority of monitors in the Triad were already attaining the standard.⁶⁷ Under §181(a)(4) of the Clean Air Act, an ozone nonattainment area may be reclassified “if an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based.”⁶⁸ The section also states that “In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.”⁶⁹

63. Interview with Laura Boothe, Attainment Planning Bench Chief, N.C. Division of Air Quality, January 13, 2006.

64. *Id.*

65. *Id.*

66. See 42 U.S.C.A. § 7511(a) (2006) (citing plan submissions and requirements for marginal areas).

67. See *supra* note 4.

68. *Id.*

69. *Id.*

The requirements for areas classified in subpart 1 differ from those additional requirements placed on areas in subpart 2. Subpart 1 applies to any nonattainment area for any criteria pollutant, but the nonattainment restrictions on subpart 1 areas (e.g. the Triangle) are also less onerous. For example, a subpart 1 area must provide for the implementation of reasonably available control measures (RACM, including such reductions in emissions from existing sources in an area as may be obtained through the adoption, at a minimum, of reasonably available control technology) as expeditiously as possible to reach attainment, provide for “reasonable further progress” and comply with the general requirements for nonattainment state implementation plans generally, e.g., New Source Review.⁷⁰ “Reasonable further progress” means making “such annual incremental reductions in emissions of the relevant air pollutant” in order to reach attainment by the deadline.⁷¹ Furthermore, the recent November 2005 Phase 2 rule permits a subpart 1 area that can demonstrate attainment within five years from nonattainment designation to avoid implementing RACM.⁷² RACM only becomes required if the area cannot reach attainment during this first five-year period and requests an additional five years to attain from the EPA. At that juncture, they must implement RACM.⁷³

A subpart 2 area (e.g., the Triad), on the other hand, is required to meet more encompassing regulatory controls based on level of nonattainment. For example, a “moderate” nonattainment area (e.g., Charlotte area) must meet not only the “marginal” area requirements⁷⁴ that the Triad has to meet but there are also additional requirements for reasonable further progress (including lowering VOC emissions by 15% within six years from a baseline year of 2002 – while classified “moderate” in 2004, the period for attainment is from 2002-2008) and reasonably available control technology, a mandatory vehicle inspection and maintenance program and a general offset requirement whereby the total emission reductions of VOC and NO_x to total increases of VOC and NO_x emissions shall be at least 1.15 to 1 as compared to 1.1 to 1 for a marginal area.⁷⁵ (A subpart 1 area is only required to show an offset emission reduction to increase ratio of

70. 42 U.S.C. § 7502 (2000); *see also* 42 U.S.C. § 7503 (2000) (listing the permit requirements for the New Source Review).

71. 42 U.S.C. § 7501(1) (2000).

72. *See supra* note 63.

73. *Id.*

74. *Id.* (Remember: the Triad was classified as Subpart 2-Marginal but opted to participate in the EAC program).

75. *See* 42 U.S.C.A. § 7511(b) (2006) (citing plan submissions and requirements for moderate areas).

greater than 1.)⁷⁶ The permitting requirements for the nonattainment New Source Review requirement incorporates the regulatory requirements in subpart 2 classifications.

Phase 2 of the implementation rule for the new eight-hour ozone standard was issued on November 8, 2005. Specifically, it addressed: the use of modeling to demonstrate that nonattainment areas will achieve the eight-hour standard as expeditiously as possible; achievement of interim ozone reductions to show that progress toward attainment is occurring; adoption of all reasonably available control measures in state implementation plans (SIP); adoption of reasonably available emission control technologies; the requirement to meet revised new source review (NSR) standards, including minimum NSR elements in SIPs, adoption of a federal NSR program in states that lack an EPA-approved NSR program, and restrictions and bans on new construction in certain areas; and provisions to continue use of reformulated gasoline in nonattainment areas and continuation of the RFG opt-in provision for areas where the one-hour standard is revoked (this article will only address the Phase 1 implementation rule in detail.)⁷⁷

PART III: THE EARLY ACTION COMPACT PROGRAM

The Early Action Compact Program began when one state containing areas in violation of the new eight-hour standard proposed a novel idea to the EPA: what if an area that would otherwise be classified as nonattainment for the ozone standard could defer that status if it worked to reduce the precursors of ozone, NO_x and VOC emissions, earlier than would normally be required under the CAA?⁷⁸ This state was Texas. In March 2002, the Texas Commission on Environmental Quality (TCEQ) proposed the early action compact and submitted a protocol to the EPA. The EPA endorsed the protocol on June 19, 2002, and soon thereafter other areas in the country learned of the new program and wanted to participate, as well.⁷⁹ One of the areas that chose to participate in the EAC Program after learning of it in the fall of 2002 was the Triad region in North Carolina located in Greens-

76. See *supra* note 63.

77. Phase 2 addresses, more or less, slight revisions to established programs. See generally Final Rule to Implement the 8-hour Ozone National Ambient Air Quality Standard, 40 C.F.R. pts. 51, 52 & 80 (2005), available at http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/documents/finalrule/8hr_o3_imp_ph2_final_20051108.pdf.

78. For more information on the inception of the Early Action Compact, see generally 68 Fed. Reg. 70108 (Dec. 16, 2003).

79. *Id.*

boro, High Point and Winston-Salem.⁸⁰ The EPA revised the EAC Protocol on December 11, 2002, and all interested areas were then required to complete and submit their area compacts, signed by local, State (or Tribal), and EPA officials, by December 31, 2002, the first milestone of the EAC program.⁸¹

Under the program, regions in violation of the new eight-hour ozone standard that were attaining the prior one-hour standard can defer nonattainment designation as long as they meet the following "milestones" designated by the EPA:

December 31, 2002: No later than December 31, 2002, compacts must be completed, signed by local, State (or Tribal) and EPA officials, and formally submitted.

June 16, 2003: Compact areas identify/describe local control measures that are being considered during the planning process. Deadline for describing the control measures must be met to maintain program eligibility.

March 31, 2004: The resulting local plan, including control measures, must be completed and submitted to the State by this date for inclusion in the SIP.

December 31, 2004: States must submit a SIP consisting of the local plan, including all adopted control measures that demonstrate attainment of the 8-hour ozone NAAQS by December 31, 2007.

December 31, 2005: Compact areas must implement the local control measures that have been incorporated into the SIP.

June 30, 2006: Compact areas must certify progress toward attainment since previous milestone, e. g., continued implementation and progress toward improvement in air quality and emissions reductions.

December 31, 2007: Area must attain the 8-hour ozone NAAQS. Failure to attain by this date will result in the nonattainment designation becoming effective.⁸²

80. The counties that participated in the Triad EAC were: Guilford, Davidson, Randolph, Alamance, Caswell, Rockingham, Davie, Forsyth, Surry, Stokes and Yadkin. Three of those counties were not found to be nonattainment areas, however: Surry, Stokes and Yadkin.

81. Areas around the Triangle and Triad did not learn of the EAC Program until as late as October 2002. Because submitting an EAC requires the signatures of all local officials (which can include several local governments from numerous counties), among others, timing may have been a significant factor in whether areas opted to participate in the EACs. This certainly may have been the case for the Triangle area. Interview with John Hodges Coppel, Triangle J. Council of Gov't, January 11, 2006. Timing was a constraint on the Triad area who gathered the Resolutions in Support of the Triad EAC that constituted 97 pages of the 115 page application to create an EAC. Interview with Ginger Booker, Asst. Dir., Piedmont Triad Council of Gov't, January 11, 2006. See also Triad EAC Application, available at http://www.epa.gov/ttn/naaqs/ozone/eac/eac_nc_triad.pdf.

82. The EAC program defers nonattainment status three times during the EAC timeline. The first deferral was in April 2004 after fourteen EAC areas, including the Triad region, met a previous milestone. The second deferral was finalized in the EPA's August 16, 2005 Deferral Rule after the same areas met the December 31, 2004 milestone. See generally Extension of the Deferred Effective Date for 8-hour Ozone National Air Quality Standards for Early Compact Areas, available at http://www.epa.gov/air/eac/pdfs/fr050816_eac.pdf

The most significant milestone is the last one: the commitment to attain the eight-hour ozone standard years earlier than what is required of normal nonattainment areas under the Clean Air Act. Regions are willing to meet this early deadline because the alternative to EAC participation is nonattainment status and its associated regulatory burdens.

If an area meets all of the EAC milestones successfully, it will automatically receive attainment status at the end of the compact without ever having to be classified as nonattainment or suffering the related regulatory consequences. (This also means that no maintenance plan, typically in place for the two consecutive ten-year periods under the traditional regulatory scheme in the Clean Air Act, will be required to maintain attainment once a nonattainment area is classified attainment-maintenance.) If an area misses just one of these milestones, however, it will be brought back into the normal Clean Air Act regulatory process for nonattainment areas and be subject to all the requirements with some delay.

PART IV: APPLICATION

In North Carolina, three areas in danger of being regulated as nonattainment areas opted to try the EAC program instead of follow the normal regulatory requirements under the Clean Air Act: the Triad (Winston-Salem/Greensboro/High Point), Fayetteville and the Unifour area (Hickory/Morgantown/Lenoir).⁸³ An additional area in North Carolina, the Mountain area of Western NC (including five counties in and around Asheville, NC) also opted to try the EAC program though it was actually attaining the ozone standard simply because it wanted to implement local control measures to reduce ozone.⁸⁴ This section of the article examines the Early Action Compact steps taken by the Triad area and compares them to the process the Triangle (Raleigh/Durham/Chapel Hill area)⁸⁵ has been undergoing to reach attainment status under the traditional regulatory scheme for an ozone nonattainment area under the Act.

The Triangle Area

The Triangle (Raleigh-Durham-Chapel Hill) area was classified as nonattainment under subpart 1 with the promulgation of the EPA's

83. See generally Southern Environmental Law Center, Early Action Compacts, Background, at <http://www.southernenvironment.org/cases/compacts/background.htm>

84. See *supra* note 63.

85. The counties included in the Triangle nonattainment area: Durham, Wake, Orange, Johnston, Franklin, Granville, Person and Chatham (in Chatham, only the following Townships: Baldwin, Center, New Hope and Williams Townships).

April 2004 rule. This meant that it was subject to the general nonattainment requirements of the Clean Air Act, in particular, New Source Review and Transportation Conformity. Once nonattainment designations become effective, new source review becomes effective immediately and transportation conformity becomes operative a year later. The Triangle's status as nonattainment became effective in June 2004, and it began its journey to reach attainment of ozone. The Triangle must be in attainment by June 2009, one and a half years after the Triad region must reach attainment.

Nonattainment for the eight-hour standard also requires the state to develop a State Implementation Plan (SIP) establishing control measures needed to meet the standard that must be approved by the EPA. If attainment demonstration in 2007 (when the SIP is due), however, reflects that existing state and federal measures will be sufficient to bring the Triangle into attainment by the 2009 deadline the SIP will not need to include local emission control measures. This is unlike the Early Action Compact program, which requires an area to commit to implementing local control measures to reach attainment.

The SIP also includes a cap on pollution caused by the transportation sector. Under transportation conformity, which became effective in the Triangle in June 2005, transportation plans, including planned roadway projects, must demonstrate that they will not hinder an area from attaining or maintaining the national ambient air quality standards. In the April 29, 2005 Conformity and Analysis and Determination report prepared by the metropolitan and rural planning organizations in the Triangle, emissions expected from the implementation of long-range transportation plans (LRTP) and transportation improvement plans (TIPS) for ozone were determined to conform for all of the counties in the Triangle.⁸⁶ Where normally conformity analyses are conducted using the emissions "budget" (or cap) established in the state implementation plan, the state of North Carolina does not have to submit its state implementation plan to the EPA until June 2007 under the normal nonattainment compliance scheme. The conformity analyses were calculated based on projected emissions from base year emissions from travel (or on-road mobile sources) in 2002 as determined by each metropolitan or rural planning organization for their areas.⁸⁷ This report indicates that the emissions from motor vehicles or mobile sources of VOC and NO_x (which combine to make ozone) is expected to be in conformity with permissible emission levels of VOC and NO_x. It does not address the ozone emissions

86. Capital Area Metro. Planning Org., *Conformity Analysis & Determination Report* (April 29, 2005). Request copy from <http://www.campo-nc.us>.

87. *Id.*

from stationary sources, which falls within the permitting program of New Source Review.

Based on monitoring (“not quality assured”) data from the EPA from last year (2005), two out of the Triangle’s currently eight monitors recorded fourth highest daily ozone levels that exceeded the 0.08ppm level, one in Granville County and one in Wake County, both at 0.085 ppm.⁸⁸ Remember that attainment is based on an area’s design value, which is an average of the fourth highest daily value of each of three years. Attainment for the Triangle in 2009 will be based on data from the three prior years, 2006-2008. So, the fact that two monitors may have exceeded the ozone level in one year is not conclusive of the design value or determinative of a violation of the ozone standard. Also, the monitor readings could decrease in the coming years due to state and federal control measures recently put into place and expected to go into effect this year.⁸⁹ At least one publication cites data from modeling performed by the N.C. Division of Air Quality concluding that the Triangle would be expected to attain the eight-hour standard by December 2009 but only by a small margin.⁹⁰ However, data viewed directly from the Division of Air Quality’s website in a report prepared for a Triangle/Rocky Mount stakeholders’ meeting on July 13, 2005 shows projected design values for the Triangle meeting the eight-hour ozone standard by more than a small margin.⁹¹

The Triad Area

The Triad area (Winston-Salem-Greensboro-High Point)⁹² was classified as nonattainment under subpart 2 as a marginal area after the promulgation of the EPA’s April 2004 rule (and its request to be “bumped” down from a moderate designation was granted), however the Triad had previously opted to participate in the Early Action Compact program in 2002. It submitted its compact by the first milestone deadline, December 31, 2002, and began its journey towards

88. EPA, *Generating Reports and Maps*, available at <http://www.epa.gov/air/data/reports.html>.

89. For example, a new low-sulfur fuel federal rule goes into effect in 2006. It will reduce the sulfur content of gasoline to 30ppm. Most gasoline currently sold in North Carolina has a sulfur content of about 300ppm. Personal document of Sheila Holman, Piedmont Triad Council of Gov’t.

90. Farren & Thompson, *supra* note 32.

91. North Carolina Dep’t of Environment and Natural Res., *State Implementation Plan (SIP) Modeling for 8-hour Ozone*, available at http://www.daq.state.nc.us/planning/nc_sip.shtml (follow link to 2nd Triangle-Rocky Mount Stakeholder Mtg. 7-13-2005).

92. The Triad area participating in the Early Action Compact program includes the following counties: Guilford, Davidson, Randolph, Alamance, Caswell, Rockingham, Davie, Forsyth, Surry, Stokes and Yadkin. The last three were not designated out of attainment but participated in the Triad EAC.

early attainment of the new eight-hour ozone standard by December 31, 2007.

The Triad has successfully met all of the EAC milestones required up to this point, including: describing the local control measures to be used in the area, submitting the resulting local plan to the EPA, submitting a SIP including the local plan demonstrating attainment of the eight-hour standard by the 2007 deadline, and the most recent milestone, which requires compact areas to implement the local control measures incorporated into the SIP.⁹³

On August 17, 2005 the EPA announced that the Triad was one of 14 communities nationwide that were ahead of schedule in their efforts to reach attainment with the eight-hour ozone standard through an early action compact.⁹⁴ On that day, the EPA took final action to defer the effective date for nonattainment designations for those areas, including the Triad and the two other NC EACs, until December 31, 2006.⁹⁵ This marks the second deferral for these areas.⁹⁶ If they meet the eight-hour standard by December 31, 2007, they will receive the third and final deferral and be designated in attainment.⁹⁷

It appears that the Triad is on track to reach attainment by the 2007 deadline. Modeling by the North Carolina Division of Air Quality in the SIP submitted in 2004 projects that the Triad will attain the standard by the December 31, 2007, though just barely.⁹⁸ One monitor predicted to measure 0.083ppm, which is just below the 0.085ppm eight-hour standard.⁹⁹

On August 22, 2005, the EPA announced final action to approve revisions to the North Carolina SIP which includes the Triad's Early Action Compact attainment demonstration.¹⁰⁰ This effectively means that the EPA plans to approve the Triad's local control measures. The EPA also cited examples of three effective local ozone reduction strat-

93. For a list of the Triad's ozone reduction strategies, see generally Triad Ozone Reduction Strategies, at <http://www.ptcog.org/ozonereduction.html>.

94. EPA, Extension of the Deferred Effective Date for 8-hour Ozone National Ambient Air Quality Standards for early Action Compact Areas, available at http://www.epa.gov/air/eac/pdfs/fr050816_eac.pdf.

95. *Id.*

96. *Id.*

97. *Id.*

98. David Farren & Gudrun Thompson, *Clean Air for the Triad Area: An Action Agenda*, A Publication of the Southern Environmental Law Center, Chapel Hill, NC (2005), available at http://www.southernenvironment.org/newsroom/publications/triad_air_report.pdf.

99. *Id.*

100. Approval and Promulgation of Air Quality Implementation Plans; North Carolina; Attainment Demonstration of the Mountain, Unifour, Triad and Fayetteville Early Action Compact Areas, 40 C.F.R. pt. 52 (2005), available at [http://www.epa.gov/ttn/naaqs/ozone/eac/fr_20050822_70\(161\)_48874_eac_nc_all4areas.pdf](http://www.epa.gov/ttn/naaqs/ozone/eac/fr_20050822_70(161)_48874_eac_nc_all4areas.pdf).

egies (all from the Triad) in the August 22 final action.¹⁰¹ The EPA found the state and local strategies in the SIP demonstrated attainment of the eight-hour ozone standard with the EAC areas by 2007 and that they would maintain the ozone standard for five or more years beyond 2007, as required under the compact for post-attainment maintenance.

Under the Early Action Compact, the Triad must submit progress reports to the state and EPA twice a year showing its efforts towards attainment. On December 30, 2005, the Triad submitted its latest progress report detailing what steps had been taken on each of the local control measures submitted in the SIP. Substantial action has been taken on the ozone reduction strategies, including the following measures: purchase newer, less polluting vehicles and reduce fleet emissions; increased use of biodiesel in the region; add 20 park and ride lots; increase ridership on regional bus service; eliminate use of coal fired boilers during ozone season at R.J. Reynolds Tobaccoville Plant by switching fuel to natural gas during that time; encourage non-motorized transportation with sidewalks, greenways and bicycle routes; enhance mass transit facilities; begin a study of HOV/HOT (High Occupancy Vehicle/High Occupancy Toll) lanes; and many others.¹⁰²

PART V: ANALYSIS

Now that the EPA has met the *Whitman* directive and explained the implementation of the new eight-hour standard in its Phase 1 and 2 rules of 2004 and 2005, is the traditional regulatory scheme for nonattainment comparable to the benefits and risks of the new Early Action Compact program? Which one succeeds in accomplishing clean air and clean conscience? The data is not entirely determinative at this point, but the operation of the two compliance schemes is now much clearer.

Under a classic nonattainment area, the regulatory requirements will certainly include New Source Review, Transportation Conformity and an Attainment Demonstration. In addition, if the Phase 1 Implementation rule classified the area under subpart 2, additional regulatory measures could apply as well based on the area's level of nonattainment. If an area opts to participate in an EAC, none of the traditional requirements of nonattainment apply and area must simply meet the milestones set out in the compact, including the additional step of implementing local control measures that might not otherwise be required as a classic nonattainment area.

101. *Id.*

102. See Piedmont Triad Council of Gov'ts, *Triad EAC Progress Report*, available at <http://www.ptcog.org/files/Dec2005ProgRept2.pdf>.

The current projections for attainment of the new eight-hour ozone standard for both the Triangle and the Triad reflect the current success of both areas toward reaching attainment by their respective deadlines. If both are successful, then the Triad should theoretically reach attainment and cleaner air earlier in December 31, 2007. However, the Triangle could just as easily be in attainment with the ozone standard by that time without receiving actual attainment status. This is even more likely when once considers the current and anticipated state and federal measures reducing stationary and mobile sources of ozone emissions, including, the following:

State measures:

- The 1999 Clean Air Bill expanded the vehicle emissions inspection program from 9 counties to 48, and improved the testing method. Vehicles will be tested using the onboard diagnostic system, which will indicate NOx emissions, among other pollutants. The previously used tailpipe test did not measure NOx.
- North Carolina is participating in the 1998 NOx SIP Call, a federal measure requiring 22 states to reduce summertime NOx emissions from power plants and other industries by 69 percent between 2000 and 2006. The North Carolina Environmental Management Commission adopted rules requiring the reductions in October 2000.
- In June 2002, the N.C. General Assembly enacted the Clean Smokestacks Act, requiring coal-fired power plants to reduce annual NOx emissions by 77% by 2009. Power plants must reduce annual sulfur dioxide emissions by 49% in 2009 and by 73% in 2013. The reductions are required for year-round emissions. One of the first state laws of its kind in the nation, this legislation provides a model for other states in controlling multiple air pollutants from old coal-fired power plants.

Federal Measures:

- Federal Tier 2 vehicle standards will:
- *require all passenger vehicles, including light-duty trucks and SUVs, to meet an average standard of 0.07 grams of NOx per mile. Implementation will begin in 2004; most vehicles will be phased in by 2007 and the heaviest vehicles by 2009. The new standards require vehicles to be 77 to 95 percent cleaner than those on the road today.*
- Tier 2 rules will also *reduce the sulfur content of gasoline to 30 parts per million (ppm) by 2006.* Sulfur occurs naturally in gasoline but interferes with the operation of catalytic converters in vehicle engines. Lower-sulfur gasoline is necessary to achieve Tier 2 vehicle emission standards. Most gasoline currently sold in North Carolina has a *sulfur content of about 300 ppm.*
- New U.S. EPA standards designed to *reduce NOx and VOC emissions from heavy-duty gasoline and diesel highway vehicles* will begin to take effect in 2004. A second phase of standards and testing procedures, beginning in 2007, will reduce particulate matter from heavy-duty highway engines, and will also reduce highway diesel

fuel sulfur content to 15 ppm, because emission control devices are damaged by sulfur. The total program is *expected to achieve a 90% reduction in PM emissions and a 95% reduction in NOx emissions* for these new engines using low sulfur diesel, compared to existing engines using higher-content sulfur diesel.¹⁰³

So, if both the Triad and Triangle are successful at attaining the new eight-hour standard by their respective deadlines (or earlier), which compliance scheme is better? It depends on your perspective. From an environmental perspective, an early action compact area will not participate in New Source Review. This means that theoretically major stationary sources will be able to emit more NOx and VOC in that area. However, many plants will choose not to locate in a nonattainment area, so from an economic perspective, a community could lose jobs and economic opportunities because of New Source Review. In addition, North Carolina's 1998 NOx SIP Call and Clean Smokestack Act have already significantly lowered plant's emissions.¹⁰⁴ For example, because of the NOx SIP Call, the largest plant in North Carolina, Belews Creek in Stokes County (Triad area) went from emitting 300 tons of NOx a day to 30 tons/day in the summertime months.¹⁰⁵

Transportation conformity is not as burdensome a requirement for a nonattainment area not participating in an EAC because it simply requires that conformity analyses show that mobile sources of VOC and NOx emissions do not exceed a level that sustains attainment, and it does not have as direct an impact on a community's economic development like New Source Review. Also, reducing emissions from motor vehicles and other mobile sources can come about through a variety of reduction strategies, as illustrated in the Triad's compact and in the state and federal measures above, both of which are likely to reduce mobile source emissions.

The most significant difference between the EAC and regular nonattainment compliance besides the early attainment is that an EAC area must commit to implementing local emission control measures, whereas a non-EAC area does not have to take any local measures if attainment can be reached by state and federal measures alone. So, in a way, if an EAC is successful, it encourages nonattainment areas to be proactive and think of innovative community solutions to high ozone emissions. In addition, it allows an area to avoid the potential economic costs of New Source Review.

One other difference between the EAC and regular nonattainment compliance is that nonattainment areas newly classified as attainment

103. Personal document of Sheila Holman, Piedmont Triad Council of Gov't (emphasis added).

104. *Supra* note 63.

105. *Id.*

have to submit a SIP to the EPA ten years from the date of attainment, and then another ten years later, for a total of twenty additional years after coming into attainment in order to monitor their pollutant level. The EAC program, however, does not have the same maintenance plan. It currently appears to require that an EAC area demonstrating attainment in December 2007 submit a SIP to the EPA once, "at least five years" from the date of attainment in 2012.¹⁰⁶ It is unclear at this point if additional monitoring will occur for longer than this five year period under the EAC program, in general.¹⁰⁷ However, urban areas of a certain size are required to monitor their emissions of VOC and NOx regularly, so an area the size of the Triad will have monitors in place).¹⁰⁸ Also, the state of North Carolina has agreed to submit a maintenance plan to the EPA ten years from the date of redesignation to attainment status of an EAC area and will do one in another ten years as well.¹⁰⁹ So, at least in North Carolina, maintenance plans are currently consistent from an EAC participating to non-EAC participating area.

The costs of using an early action compact are more apparent when an area fails to meet one of the designated milestones and is returned to nonattainment status. When this happens, the area is, in effect, "behind" in meeting attainment under the normal Clean Air Act requirements. If an EAC area fails to meet an EAC milestone, for example, the Transportation Conformity requirement that would have taken effect in 2005 in a normal nonattainment area under the CAA will not operate until three years later (once the one year statutory delay after 2007 is taken into account). While New Source Review will become immediately effective upon nonattainment designation, years of regulating stationary source emissions could have passed.

PART VI: CONCLUSION

In the five-year wake of *Whitman v. American Trucking*, the EPA has given us two implementation rules explaining how a nonattainment area will meet attainment of the new eight-hour ozone standard and an alternative compliance scheme in the Early Action Compact program. It is now January 2006, and it will be two more years until EAC areas will be deemed to have met the attainment milestone on December 31, 2007. It will be another year and a half before a nonattainment area like the Triangle must meet the June 2009 attainment

106. An Agreement of Partnership by USEPA Region 4, North Carolina Dep't of Environment and Natural Res., Forsyth Co. Environmental Affairs Dep't and the Local Gov't in the Triad Area, p. 8 (2002), available at http://www.epa.gov/ttn/naaqs/ozone/eac/eac_nc_triad.pdf.

107. *Id.*

108. *Supra* note 63.

109. *Id.*

deadline. If the EAC areas attain the early deadline, it would appear that they have achieved clean air faster. If they fail, however, clean air in those communities will be delayed, and why? So that regulatory burdens could be escaped or so that local communities could attack attainment themselves with the implementation of local control measures not otherwise required under the traditional regulatory scheme?

There are serious concerns about the Early Action Compact Program when a participating area fails to meet the crucial attainment milestone in December 2007 because of the delay that will follow in imposing the traditional regulatory requirements. Ground-level ozone can have significant adverse impacts on public health, especially on children and the elderly, during that delay. On the other hand, the EAC program has made communities more aware of reducing emissions of VOC and NO_x by empowering them to approach the emissions themselves, and if the EAC area is successful at achieving attainment, then it has earned clean air earlier than non-EAC areas through local initiative instead of force-fed regulatory measures.

At this early stage of the EAC program, it may be that local and state officials are in the best position to decide which compliance scheme is right for their communities. There may not be a hard and fast rule. Communities should, first and foremost, be encouraged to take the route to attainment that is most likely to achieve a healthier, cleaner environment for the people living in the nonattainment area at the earliest point in time. Priority should not be placed on the approach with the lightest regulatory burden if higher burdens can achieve better community health without significant consequences to the local economy.

In closing, the goal of the Early Action Compact program to both ease regulatory burdens and achieve healthier air in a shorter time is certainly praiseworthy, but if time and experience show that participating areas are not achieving the intended results, reversion to the traditional regulatory measures set up for nonattainment areas under the Clean Air Act should be dusted off and enforced in these areas without hesitation now that the EPA has followed *Whitman* with clear rules for implementation of the new eight-hour ozone standard.