BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:) Final Rule to Implement the 8-Hour) Ozone National Ambient Air Quality) Standard - Phase 1))	Docket ID No. OAR- 2003- 0079

PETITION FOR RECONSIDERATION

I. Introduction

The American Petroleum Institute (API), the American Chemistry Council (ACC), the American Iron and Steel Institute (AISI), the National Association of Manufacturers, and the U.S. Chamber of Commerce (Chamber) ("Petitioners") hereby petition the Administrator to reconsider and extend the attainment deadlines in EPA's final rule to implement the eight-hour ozone standard, 69 Fed. Reg. 23951 (April 30, 2004) (the "Ozone Implementation Rule", or "Implementation Rule"), along with the accompanying nonattainment designations, see 69 Fed. Reg. 23858 (April 30, 2004).[1]

[1] API is a national trade association with over 400 members engaged in all aspects of the oil and natural gas industry, including exploration and production, refining, marketing, pipeline, marine, and associated industries. API members own numerous sources of ozone precursors that will be regulated under the framework established by the Ozone Implementation Rule. ACC represents the leading companies engaged in the business of chemistry. The Council is committed to improved environmental, health, safety and security performance through Responsible Care®, common sense advocacy, and health and environmental research and product testing. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. AISI's member companies represent approximately 75 percent of both U.S. and North American steel capacity and have many steel facilities that are located in non-attainment areas for the 8-hour ozone standard. Sources within these steel facilities may be required to reduce emissions of ozone precursors through the State Implementation Plans developed to reduce ozone emissions. The National Association of Manufacturers is the nation's

EPA's own data and analysis show that these deadlines conflict with reality. They also conflict with sounder expressions of EPA policy, as embodied most notably in the recent Clean Air Interstate Rule (CAIR, formerly the Interstate Air Quality Rule) proposal, 69 Fed. Reg. 4566 (Jan. 30, 2004).

Petitioners believe that the law provides more flexibility to create common-sense approaches to ozone attainment than EPA has recognized. Our petition describes five different legally defensible approaches to resolving the deadline problem in whole or in part. Other solutions may exist as well. We would be pleased to explore this matter further with you in a face-to-face meeting.

Petitioners realize that there are some nonattainment areas that expect to attain the 8-hour ozone standard on schedule or even several years ahead of schedule. In fact, for some areas, EPA already has announced that it has agreed to reclassify certain areas to a lower nonattainment classification in recognition of these areas' commitments to attain the standard three years early. This petition is not intended to preclude these or other areas from seeking solutions that make sense for those areas.

This petition meets the standards set by §307(d)(7)(B) of the Clean Air Act for the reasons explained by the National Petroleum Refiners Association in an earlier petition addressing similar topics. See Letter from Slaughter to Leavitt, June 29, 2004

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largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country. The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses of every size, sector, and region. The Chamber serves as the principal voice of the American business community.

(transmitting reconsideration petition). As that petition explains, EPA has extensively re-analyzed the difficulties of ozone attainment since the close of the comment period on the Implementation Rule. EPA's new analysis shows that the difficulties of attaining the eight-hour ozone standard on the schedules and under the conditions that the Implementation Rule prescribes are far greater than was appreciated at the time of Implementation Rule proposal. That central fact provides the foundation for this petition's analysis and recommendations. These recommendations are also presented to EPA in the exercise of Petitioners' general right to petition the government. Petitioners urge EPA to consider them in the general exercise of its rulemaking discretion even if the Agency concludes that this petition does not qualify under §307(d)(7)(B).

This petition begins by describing the Ozone Implementation Rule's attainment framework. It then shows how that framework conflicts with the facts and EPA's own policies, and outlines the contradictory and destructive results of those conflicts. Finally, it explains why EPA has the legal flexibility to avoid these results, and suggests five possible amendments to the Implementation Rule to address the attainment deadline problem.

II. Ozone Attainment under the Implementation Rule

Section 181 of the Clean Air Act, as amended in 1990, required EPA to classify all ozone attainment areas as "Marginal", "Moderate", "Serious", "Severe", in one of two categories, called "Severe-15" and "Severe-17", or "Extreme," depending on the degree to which they exceeded the one-hour ozone standard on the date of enactment

of the 1990 amendments. It prescribed the deadlines by which each type of area needed to submit State Implementation Plan (SIP) revisions to demonstrate how the standards will be attained, and to actually attain them. It prescribed in some detail the contents of SIPs for each nonattainment classification.

The Implementation Rule follows this basic pattern. Specifically:

A. It uses the same six nonattainment categories as the statute for areas that exceed both the old one-hour standard and the new 8-hour standard.[2] However, the statutory "cut points" keyed to the 120 ppb one-hour standard make no sense if applied directly to the 80 ppb 8-hour standard (i.e., the 1-hour standard cutpoints do not extend down to 80 ppb.) Accordingly, EPA established new cut points keyed to the 8-hour standard corresponding to the same fractional exceedance of that standard as the statutory cut points did of the one-hour standard. For example, the statute provides for classifying as "Moderate" areas that exceed the one-hour standard by between 15% and 33%. The Implementation Rule accordingly classifies as "Moderate" areas that exceed the **8-hour** standard by the same percentages.

B. This approach classifies the vast majority of areas with significant ozone attainment problems as "Moderate". There are 30 such areas, with only four in higher classifications – all in California. Boston, New York City, all of New Jersey, Philadelphia, Washington, D.C., Chicago, St. Louis, Dallas, and

[2] EPA selected a different approach, which Petitioners support, for areas that exceed only the 8-hour standard.

Houston are classified "Moderate", along with many other cities. EPA recently approved petitions from nine "Moderate" areas, not including any of the named major cities, to be reclassified as marginal areas. By contrast, the 1990 statute classified 32 areas as "Moderate" with 27 areas in higher classifications.

C. The Implementation Rule incorporates the statutory planning and attainment deadlines unaltered. It starts them as of June 15, 2004 - the effective date of eight-hour ozone nonattainment designations. Under that approach, "Moderate" areas must submit SIP amendments by June 15, 2007 providing for attainment by June 15, 2010. "Moderate", "Serious" and "Severe" areas must all submit with their SIPs an "attainment demonstration" showing the standard will be met on schedule.

D. The Implementation Rule requires areas to demonstrate attainment with three years of monitored air quality data. Since ozone seasons typically run from May to October, Moderate areas with an attainment date of June 15, 2010 must submit ambient monitoring data for the 2007-8-9 ozone seasons to demonstrate attainment. In other words, they must begin gathering data to show attainment before the SIPs attainment demonstrations have been submitted to EPA.

E. "Serious" areas must meet the standards in 2013. "Severe-15" areas must meet them in 2019, and "Severe-17" areas in 2021. For the reasons just

given, "Serious" areas will need to show attainment with 2010-11-12 data, and "Severe-15" areas with 2016-17-18 data.

F. Areas can get two one-year extensions of the attainment deadline if they can show that the design value for the attainment year itself (and for the second extension, the year after) remains below the standard.

G. If an area fails to submit an adequate SIP or cannot make an adequate attainment demonstration on schedule due to lack of available emission reductions, EPA must impose "sanctions", which consist of tighter new source permitting requirements, and eventually a cut-off of highway funds. The Implementation Rule also allows States to request a voluntary "bump up" to a higher classification to avoid these sanctions. If an area does not attain the standard on schedule, it will be "bumped up" to the next higher attainment classification.

III. The Ozone Implementation Rule Conflicts with Reality

EPA studies and studies by others have shown repeatedly that many areas will not be able to achieve the eight-hour standard within the time that the Implementation Rule allows.

1. EPA's analysis of this issue in its CAIR proposal concluded that even with CAIR reductions and a host of other federal measures, such as cleaner fuels and engine standards, 47 counties in the 28 States plus the District of Columbia covered by CAIR would be nonattainment for the 8-hour ozone

standard in 2010, including the New York, Philadelphia, Baltimore, Washington, D.C., Houston, and Milwaukee metropolitan areas. In 2015 there would be 26 nonattainment counties including these same metropolitan areas. 69 Fed. Reg. 4369-40 (Tables IX-5 and IX-6).

2. Independent studies by Envair[3], the Ozone Transport Commission[4], and the Lake Michigan Air Directors Consortium[5] show similar results in various metropolitan areas across the country.

IV. The Ozone Implementation Rule Conflicts with EPA's Own Policies

A. Background

In the preamble to the Implementation Rule, 69 Fed. Reg. 23953, EPA indicates that it was written to implement the following four policies:

- "to emphasize national and regional measures to help areas come into attainment, and, where possible, reduce the need for those local controls that are more expensive than national and regional measures";
- "to provide flexibility to States and EPA on implementation approaches and control measures while ensuring that the implementation strategy is supported by the CAA" ;

[3] Reynolds, S.D., Blanchard, C.L. and Ziman, S.D. "*Understanding the Effectiveness of Precursor Reductions in Lowering 8-Hour Ozone Concentrations*," Journal of the Air & Waste Management Association, Vol. 53, 195-205 (2003) and "*Understanding the Effectiveness of Precursor Reductions in Lowering 8-Hr Ozone Concentrations - Part II. The Eastern United States*," Journal of the Air & Waste Management Association, In press (2005).

[4] "CALGRID Modeling Overview, A First Look -- A Modeling Effort by the OTC Modeling Committee." Presented by: Jeffrey Underhill, Ph.D., NHDES, at the OTC/MANE-VU Annual Meeting, Philadelphia, PA. July 21-23, 2003

- "to establish a basic, straightforward structure that could be communicated easily"; and

- " to provide reasonable but expeditious attainment deadlines" [6]

In our view, the Implementation Rule in its present form does not achieve **any** of these goals as applied to many areas classified as "Moderate". To show that, we will begin by reviewing EPA's approach to "national and regional measures."

B. The Implementation Rule Conflicts with EPA's Own Approach to National and Regional Measures

1. The CAIR Rule

Our developing understanding of ozone control has made clear (a) that NOx control is generally more important to reducing ozone than control of VOCs, and (b) that both NOx and ozone itself can travel across State boundaries.

Since States will not be as eager to control emissions within their borders for the benefit of other States as they will be to control them for the benefit of their own citizens and voters, EPA has taken the lead in requiring interstate controls. In 1998

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[5] "Initial $PM_{2.5}$/Haze/O_3 Air Quality Analyses: Results." Presentation of the Midwest Regional Planning Organization and Lake Michigan Air Directors Consortium, June 2003

[6] EPA's Implementation Rule preamble also articulates two additional goals somewhat duplicative of those set out in the text. These are :

- "protect public health, provide incentives for expeditious attainment of the 8-hour ozone NAAQS and avoid incentives for delay", and
- "provide a smooth transition from implementation of the 1-hour ozone NAAQS to implementation of the 8-hour ozone NAAQS"

69 Fed. 23953.

Although in the interest of simplicity we will not discuss these goals, Petiitioners believe for the reasons outlined in the text that the Implementation Rule will not accomplish them either. At the very least, the changes recommended later in this Petition would be as consistent with these goals as the Implementation Rule in its current form.

EPA issued the NOx SIP Call to control interstate NOx emissions. 63 Fed. Reg. 57326 (Oct. 27, 1998). In January of this year EPA followed the SIP Call with its CAIR proposal.

EPA's CAIR preamble began by stating:

> Reducing upwind [ozone] precursor emissions will assist the downwind ...8-hour ozone nonattainment areas in achieving the NAAQS. Moreover, attainment would be achieved in a more equitable, cost-effective manner than if each nonattainment area attempted to achieve attainment by implementing local emission reductions alone.
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> 69 Fed. Reg. 4566.

EPA added that by adopting the CAIR rule "in advance of the time that States must adopt local nonattainment plans, [EPA] will make it easier for States to develop plans to reach attainment of the standards."

For two reasons, CAIR's NOx reduction requirements will apply only to electric generating units (EGUs). First, EPA has found that among stationary sources, EGUs emit more NOx than any other industry sector. They account for over half of stationary source NOx emissions and about a quarter of total NOx emissions.

Second, EPA concluded that substantial NOx emissions reductions can be achieved far more cost-effectively at EGUs than at other sources. EPA specifically examined the possibility of controlling non-EGU boilers and turbines, and concluded (a) that no "highly cost-effective controls" could be identified, as they could for utilities, and (b) that these sources were less worth controlling because "projected emissions of NOx

from these sources in 2010 are much lower than those projected from EGUs". 69 Fed. Reg. 4610.

EPA has proposed a compliance deadline of 2010 for the first stage of CAIR, which will require a 50% reduction in state NOx emissions , and a 2015 deadline for the second stage, which will require a 65% reduction. EPA set this schedule "for engineering and financial reasons." 69 Fed. Reg. 4616. EPA was concerned that there were not enough workers with the right skills to make a tighter schedule possible, and that a tighter schedule might lead to operational disruptions. id. at 4616-7. EPA also stated that it

> recognizes that the power sector will need to devote large amounts of capital to meet the control requirements of the first phase... [Phase 2] controls will need to be installed at more plants and under more challenging circumstances. We believe that deferring the second phase to 2015 will provide enough time for companies to overcome these technical challenges and raise additional, reasonably-priced capital needed to install controls.
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> id. at 4617.

2. Mobile Source Controls

Mobile sources account for about half of all NOx emissions. The Clean Air Act significantly restricts most State regulation of these sources and their fuels, assigning that responsibility to the Federal government.

EPA has issued three major mobile source rules in the past four years. All of them will provide most of their NOx emissions reductions on schedules inconsistent with EPA's ozone attainment requirements. They are:

a. Tier 2/Low Sulfur Gasoline, issued at the beginning of 2000, 68 Fed Reg. 6697 (Feb. 10, 2000). In the preamble to the final rule EPA stated, " . . .we project a reduction in oxides of nitrogen emissions of at least 856,000 tons per year by 2007 and 1,236,000 tons per year by 2010, the time frame when many states will have to demonstrate compliance with air quality standards." id. at 6698. However, these will be less than half of the total reductions expected. The preamble continues: "Emission reductions will continue increasing for many years, reaching at least 2,220,000 tons per year in 2020 and continuing to rise further in future years." id.

b. Highway Diesel Rule, issued at the beginning of 2001, 68 Fed. Reg. 5000 (Jan. 18, 2001). The preamble states "By 2030, this program will reduce annual emissions of Nitrogen oxides...by a projected 2.6 million tons..." id. at 5002,. Table II.C-1 indicates that NO_x from HDVs will be reduced annually by 58,000 tons in 2007 and by 1,820,000 in 2020. id at 5028. While the diesel fuel standards will be phased in beginning in mid-2006, Table II.C-1 shows that the early reductions will be very small – the 2007 reduction will be only 3% of the 2020 reduction and only 2% of the 2030 reduction.

c. Non-Road Diesel, issued earlier this year, 69 Fed. Reg. 38957 (June 29, 2004). The preamble states, "Today, EPA is adopting new emission standards for nonroad diesel engines and sulfur reductions in non-

> road diesel fuel that will dramatically reduce harmful emissions and will directly help States and local areas recently designated as 8-hour ozone nonattainment areas to improve their air quality...We are now projecting that by 2030, this program will reduce annual emissions of nitrogen oxides ...by 738,000 tons..." id. at 38958. Table I.B-1 indicates that in 2020 the NO_x reduction will be 444,000 tons. id at 38968. The diesel fuel standards for non-road and locomotive and marine (LM) engines will be implemented in two steps. The first step for fuel control is 2007 while the second step for non-road diesel is 2010 and for LM engines is 2012. Engine standards will be phased in beginning in 2008. EPA's reduction estimates show that the reductions from this program come in the later years as both the fuel and engine standards become more stringent.

Clearly, the majority of the emissions benefits from mobile source controls will not be realized until after 2010, by which time all but 4 of the 8-hour ozone nonattainment areas must attain the standard.

3. <u>The Ozone Implementation Rule Schedules Make Reliance on National and Regional Controls Impossible</u>

The Implementation Rule requires "Moderate" areas to demonstrate attainment in 2010 with 2007-8-9 data. CAIR reductions will not even **begin** until 2010. Accordingly, none of the 30 areas classified as "Moderate" under the Implementation Rule will be able to rely on the CAIR rule reductions either in planning, or to

demonstrate attainment. Similarly, the three mobile source rules just discussed provide by far the major part of their emission reductions after 2015. States will not be able to rely on much of the significant reductions these rules will provide in planning or in attainment demonstrations.

The Implementation Rule makes little use of the "Serious" and "Severe" classifications. Such classifications would help ameliorate this mismatch if used more widely, but would not necessarily cure it. "Serious" attainment demonstrations based on 2010-11-12 data will not reflect any second stage CAIR reductions, and only marginally increasing benefits from the mobile source rules. However, areas with Severe-15 and above classifications would benefit from the CAIR reductions and much more significant mobile source reductions.

C. The Ozone Implementation Rule Schedules Will Reduce State Flexibility Rather than Increasing It

The Petitioners applaud EPA for the flexibility included in many aspects of the Implementation Rule. Although regional and national strategies should play a significant role in support of this flexibility, they cannot when State discretion in SIP planning is constrained by the too-short deadlines in the Implementation Rule.

As EPA states, interstate transport can be an important source of ozone nonattainment. Accordingly, it is unfair and unworkable – and in a number of cases impossible -- to expect States to attain the ozone standard solely by controlling local sources.

EPA claims that CAIR and the mobile source rules will address this problem. Yet the mismatch of schedules between these rules and the Ozone Implementation Rule means it will have precisely the **opposite effect.** States **know** that interstate and significant mobile source reductions will not be available by the required compliance date. To meet their statutory obligations they therefore will have to focus their control efforts entirely on local sources – precisely the result EPA says it wants to avoid.

The CAIR rule will reduce State flexibility in controlling local stationary sources as well. Almost everywhere, EGUs represent the largest sector of stationary sources of NOx emissions, and the CAIR proposal establishes as short a schedule for implementation of controls as EPA deemed feasible. Yet the CAIR rule signals unmistakably that these sources will be controlled by EPA on an EPA schedule inconsistent with the State's attainment requirements. CAIR therefore will focus the States on short-term stationary source controls on non-EGU sources – precisely those sources that EPA found too small and too costly to regulate in drawing up the CAIR rule itself.

Aggressive implementation of the tighter NAAQS standards may result in more areas requesting specialty fuels as local emissions reduction measures. API is concerned that implementation of the new 8-hour ozone NAAQS requirements could lead to a large increase in the number of specialty fuels. If a State were to determine that a fuel modification for a nonattainment area was needed to meet an unrealistic deadline and no other areas served by the regional distribution system used that fuel,

the State would be creating a "boutique fuel." This would place additional demands on refineries and potentially reduce the efficiency of the distribution system, thus creating the likelihood of future supply problems.

EPA's Implementation Rule preamble defends these short deadlines by stating that:

> Our repeated experience over the past three decades is that market forces stimulated by the CAA have repeatedly led to technological advances and learning through experience, making it possible over time to achieve greater emissions reductions at lower costs than originally anticipated.
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> 69 Fed. Reg. 23959

This rhetorical statement conflicts fundamentally with the more careful and factual analysis in the CAIR and mobile source rules. In those rules, EPA did not conclude that "stimulation" and "learning" made short-time deadlines practicable. Instead, it analyzed the facts and made a judgment based on them.

EPA has not identified any highly cost-effective emission controls for non-EGU sources as it has for CAIR. The financial challenges and technical obstacles their owners will face are at least as great as those faced by regulated public utilities. Indeed, installing NOx controls on industrial sources will require use of the same work force that EPA has found too small to support NOx control of utilities on a tighter schedule than 2010-2015.

Yet the Implementation Rule will effectively focus State control efforts on exactly these sources, and on boutique fuels, and require their control on a shorter deadline than EPA has found feasible for CAIR and the mobile source rules.

Those local controls, when instituted, may become redundant within a few years, as CAIR controls and mobile source measures take full effect. Further, these cost-inefficient local controls likely will become permanent due to anti-backsliding constraints.

D. The Implementation Rule Does Not Establish a "Basic, Straightforward" Attainment Structure

The Implementation Rule's attainment matrix cannot be "straightforward" because it inherently conflicts with the physical and policy realities as described above.

EPA suggests that States can avoid some of these conflicts by requesting a "bump up" to a higher classification. But EPA's approach, which assigns areas a classification that does not fit their attainment realities, and then relies on States to correct that misclassification by requesting a bump-up – which is always politically difficult - cannot be described as straightforward. Nor is it straightforward for EPA to call on the States to request bump-ups to correct a problem that arises in large part from EPA's flawed approach that establishes attainment deadlines that are incompatible with other existing and proposed EPA rules.

EPA also suggests that States can alleviate this problem by requesting the two one-year extensions the statute allows. But even if these extensions were granted, they would be too short to correct the problems just described.

Moreover, a State will not know until the attainment year itself whether it even potentially qualifies for the first extension. If the first extension is granted it will not know until the second year whether it qualifies for the second extension. Such an

uncertain schedule conflicts with any effort at long-term planning and certainly cannot be described as "straightforward."

E. The Implementation Rule Deadlines Cannot be Fairly Described as Either "Reasonable" or "Expeditious"

For all the reasons just given, the deadlines in the Implementation Rule cannot be fairly described as either reasonable or expeditious.

V. EPA has Legal Flexibility to Amend the Ozone Implementation Rule to Reach a More Reasonable Result

The Petitioners do not challenge EPA's decision to base the Implementation Rule attainment matrix largely on Subpart II of Part D of Title I of the Clean Air Act. However, our collective understanding of ozone pollution's causes and cures has advanced dramatically since Congress enacted Subpart II in 1990. As EPA pointed out in publishing the Ozone Implementation Rule:

> Congress enacted subpart 2 with the understanding that all areas (except for a few marginal areas ..) would have to employ additional local controls to meet the 1-hour ozone NAAQS in a timely fashion. Since then, many local, regional and national control measures have been implemented, our understanding of the importance of interstate pollution transport has improved, and we have promulgated interstate NO_x transport rules to address transported pollution. . . .

69 FR 23960.

In 1990 Congress focused control efforts almost exclusively on efforts to reduce VOC emissions within State boundaries, although provisions to control interstate pollution and NOx control provisions also were included or reaffirmed. Today, those

NOx controls that were of secondary emphasis in 1990 have become the primary focus of our control efforts.

Acting on this new understanding calls for addressing a post-1990 set of emissions sources by post-1990 methods. Control efforts focus far more heavily on large NOx sources than they did in 1990, and make far more use of economically efficient market-based approaches than previously.

EPA also has changed the ozone standard since 1990, lowering its level and changing it from a one-hour "exceedance" form to an eight-hour "average concentration" form. The record shows that 8-hour ozone levels decline at a much slower rate in response to control efforts than 1-hour ozone levels. "As reported in the EPA's report 'Latest Findings on National Air Quality: 2002 Status and Trends', national average levels of 1-hour ozone improved by 22 percent between 1983 and 2002 while 8-hour levels improved by 14 percent over the same time period." 69 Fed. Reg. 4572 (footnote omitted). Published research provides an explanation for this difference. A review of 1-hour ozone nonattainment areas where NOx and/or VOC controls have been in place over time indicates that as emissions of ozone precursors are reduced, the number of hours characterized by peak ozone concentrations (i.e., greater than 0.10 ppm^3) is also reduced; however, the number of hours at "mid-level" ozone concentrations (i.e., 0.06-0.09 ppm^3) decrease at a relatively slower rate.[7] This difficulty in reducing "mid-level" ozone concentrations may be the result of the peculiar atmospheric chemistry of ozone formation.

Reynolds, *et. al.*[8] have found that the efficiency of ozone formation increases as the concentration of NOx decreases. Therefore, the more precursor emissions are reduced, the slower the rate of reduction in resultant ozone concentrations will be. Given the lower concentration of the new 8-hour standard (0.08 ppm^3 versus 0.120 ppm^3 for the 1-hour standard), the new 8-hour standard will be much more difficult to attain.

The courts should and we believe will give EPA wide latitude to interpret the Clean Air to accommodate these changed realities, so that the programs that implement the Act make policy sense.

This Petition deliberately does not offer a single solution approach to the problem that it outlines. The Petitioners believe this complicated issue would benefit from further discussion among those concerned. In the hope of getting that discussion started, our next section offers five possible approaches to mitigate or resolve the deadline issue. Although these approaches vary in the extent to which they would solve the underlying problem, they would all make a contribution. We believe all of them are legally defensible. As EPA itself points out in its discussions of why it chose certain options, EPA's proposed Options 1 and 2 and Alternatives A and B "are all legally supportable under the CAA." 69 FR 23958. Two of these options were variations of options suggested by API. See API's comments, letter from

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[7] Lefohn, A.S., Shadwick, D.S., and Ziman, S.D.. 1998. The Difficult Challenge of Attaining EPA's New Ozone Standard. *Environmental Science and Technology*. 32(11):276A-282A.

[8] Reynolds, S.D., Blanchard, C.L., and Ziman, S.D.. 2003. Understanding the Effectiveness of Precursor Reductions in Lowering 8-Hr Ozone Concentrations. *Journal of the Air and Waste Management Association*. Volume 53, February 2003; 195-205.

Howard J. Feldman, dated August 1, 2003, on the proposed rule, pp.12 – 13. Unfortunately, EPA rejected these options. In this Petition, we request the Agency to reconsider.

Because our intent is to show the possibilities, and not to present a full legal argument for a specific result, we will not develop the supporting arguments in full detail.

VI. Specific Suggestions

A. Extend Attainment Deadlines to Reflect EPA's Own Schedule for Controlling Interstate Pollution

In the landmark case of *NRDC v. EPA*, 22 F 3d. 1125, 1135 (1994), the D.C. Circuit held that States could not be held to the deadline in Subpart II for submitting new vehicle "inspection and maintenance" (I&M) programs when EPA had failed to issue the guidance needed to design those programs.

Since 1970, CAA §110(a)(2)(E) has required SIPs to contain all measures needed to stop pollution in one State from preventing attainment in another. Since the 1998 NOx SIP Call EPA has effectively taken over the responsibility for implementing these provisions. Given the likely reluctance of any given State to control its sources for the benefit of outsiders, that was and is the only practical approach.

But now that control of interstate pollution has been fully accepted as a federal responsibility, the *NRDC* case teaches that State obligations must be adjusted to the manner in which those Federal obligations are performed. According to EPA, SIP revisions to incorporate into SIPs requirements to prevent emissions in one State

from preventing attainment of the 8-hour ozone standard in another "were required in 2000 (three years after the 1997 [promulgation of the]...8-hour ozone NAAQS." 69 Fed. Reg. 4578. Clearly, this did not happen.

Just as the State deadline for submitting I&M programs was adjusted because of the delay in issuing the necessary Federal guidance, so the deadline for State SIP controls can be extended to reflect the schedule for Federal controls of interstate sources.

B. Promulgate Higher Initial Classifications

The National Petroleum Refiners Association and the National Association of Manufacturers recently petitioned EPA to amend the Implementation Rule to adopt a different method of computing nonattainment categories.[9] Their suggested approach would place many more areas in higher nonattainment categories, thus giving them more time to plan for and install controls.

The remedy proposed in the NPRA/NAM petition has merit. We also renew our own suggestion for a similar approach, namely that areas in nonattainment for the one-hour standard should keep their classification under the eight-hour ozone standard unless the State affirmatively shows it should be changed.[10] Either alternative would reflect the attainment needs of areas more accurately than the current approach.

[9] Letter from Slaughter to Levitt, June 29, 2004 (transmitting reconsideration petition)

[10] API comments, August 1, 2003 at pp. 12 –13, and API comments, letter from Howard J. Feldman; letter from Howard J. Feldman, November 3, 2003, pp. 2 and 5.

These approaches have been presented to EPA before and rejected. However, we believe the reasons EPA has given are not persuasive. We urge the Agency to take another look. Here are EPA's main reasons and our brief responses

1. Areas that Need More Time Can Bump Up or Get an Extension

We addressed this point earlier, showing that reliance on bump-ups and extensions makes the attainment matrix far more complex, and represents an EPA failure to address a problem largely created by its own actions.

2. Higher Nonattainment Classifications Would Make Burdensome Control Requirements Applicable in Areas that Didn't Need Them

API believes a closer look would have shown this concern is exaggerated:

- Most of the areas that would be classified higher under the NPRA approach **already** are in higher classifications under the one-hour standard. Under our approach, all areas would retain their existing one-hour classification. A higher eight-hour classification for these areas than the Implementation Rule currently provides would simply preserve existing control requirements. (Indeed, virtually all these requirements will be preserved anyway under EPA's anti-backsliding policies.)

- Pointing to the possible extra burdens is not a good argument by itself for rejecting a higher nonattainment classification. A too-short control deadline imposes burdens of its own. These consist of the very strong pressures for inefficient short term controls on non-EGU sources that will result from a too-short deadline, and the disruption from changing rules and uncertainty

when the attainment deadline is missed, leading to bump-up, as EPA acknowledges is likely. Perhaps most importantly, without the benefit of the CAIR and mobile source rules, many States will not be able to submit acceptable SIP attainment demonstrations, and may become subject to sanctions, as discussed above.

3. Higher Classifications Would Conflict with the Requirement to Attain "As Expeditiously as Practicable"

EPA also claims that higher classifications would give some areas more time than they need to attain the standard and thus conflict with the statutory directive to attain "as expeditiously as practicable."

This argument makes no sense. Areas set to attain the standards in the relatively near future will attain it whatever their classification due to the effect of programs long adopted and in operation. The prospect that they might get more attainment time than they "need" (without any impact on their actual attainment date) should not outweigh the real costs imposed on areas with more challenging control tasks by a too-tight attainment deadline.

Moreover, as others have pointed out, the Subpart II attainment deadlines are outer limits subject to the basic statutory command to attain "as expeditiously as practicable." Accordingly, if EPA thinks attainment deadlines for a given area are too extended, it can always require their adjustment.

C. Clarify that Sanctions Do Not Apply When Nonattainment is Due to Lack of Adequate Controls on Interstate Pollution and/or Mobile Source Emissions

Subpart II requires areas classified "Moderate" and above to submit an "attainment demonstration" with their SIP showing that the standards will be achieved on schedule, and subjects them to sanctions for an inadequate demonstration. Accordingly, the need to submit an attainment demonstration by itself could still cause States to adopt inefficient short-term controls.

However, CAA §182(j) provides that if a State is in a "multi-State ozone nonattainment area", and makes acceptable efforts to coordinate with the other States in the area, it will not be sanctioned for failure to submit an acceptable attainment demonstration if that was due to the failure of other States to do their part.

EPA's new approach to ozone nonattainment in effect looks on all the States covered by the CAIR rule as part of the same ozone nonattainment area. Accordingly, EPA should invoke §182(j) to make it clear that States in this area will not be sanctioned for failure to submit a nonattainment demonstration if the predicted nonattainment would be due to emissions from other States.

Furthermore, sanctions should not be invoked when nonattainment is due to mobile source emissions, if the predicted reduction of those emissions resulting from existing national mobile source rules will bring the area into attainment.

D. Allow Proof of Standards Attainment With One Year of Data, Not Three

The Ozone Implementation Rule requires States to provide three years of data showing attainment of the ozone standard in order to demonstrate that they have attained that standard by the prescribed deadline. That in effect requires States to

attain the standards three years before the prescribed date in order to avoid being in default. That problem outlined could all be solved by allowing States to base their attainment demonstrations for Moderate areas on data from the year 2009 alone[11], combined with a showing that emissions in 2010 and 2011 would be no higher than in 2009, thus allowing the results monitored in 2009 to be maintained. That attainment demonstration would stand unless results from the years 2010 and 2011 showed that 2009 was in fact a year of violation. Nothing in Subpart II, or the Clean Air Act, forbids this result.

E. Shift the 2010 and Later Attainment Dates from June until November

Under Subpart II as originally enacted, "Moderate" areas had to attain the standards six years after the enactment of the 1990 Clean Air Act Amendments. Since those amendments were enacted on November 15, attainment was required as of November 15, 1996.

The "ozone season" during which compliance or noncompliance with the ozone standard is measured generally runs from May to October. Accordingly, given EPA's three year requirement, the 1996 attainment demonstration could be made with data from the 1994, 1995, and 1996 ozone season.

However, the Implementation Rule attainment date for Moderate areas is June 15, 2010. That date is too early for use of 2010 ozone season data. Accordingly, 2007-8-9 data will need to be used to demonstrate attainment.

[11] States should be allowed to adjust that data for clearly unrepresentative and idiosyncratic

EPA has stated, without giving reasons, that it lacks authority to adjust these attainment deadlines. 69 Fed. Reg. 23967. We urge EPA to reconsider. Under the 1990 approach, areas had 71 months – from November 1990 until October 1996 -to apply the controls and generate the data needed to show attainment. Under EPA's current Implementation Rule, Moderate areas would have only 64 months – from June 2004 to October 2009 – to generate this data. This is, effectively, a seven month abridgement of the compliance deadline from Congress' express 1990 intent. Shifting the attainment date until December would give six additional months, a lesser abridgement of Congressional intent even measured in purely quantitative terms.

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meteorological events. See 40 CFR Part 50 Appendix I ("Whether to exclude, retain, or make adjustments to [air monitoring] data affected by stratospheric ozone intrusion or other natural events is subject to the approval of the appropriate Regional Administrator.")