



D a v i s G r a h a m & S t u b b s L L P

**MEMORANDUM**

TO: Ken Lloyd –RAQC  
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CC: Paul Tourangeau –APCD  
Curtis O. Rueter –Noble Energy  
Phillip Schlagel –Anadarko Petroleum

FROM: John Jacus and Abby Gaffney

DATE: May 20, 2008

RE: Comments of Anadarko Petroleum and Noble Energy on the Role of Non-attainment Boundaries in Ozone SIP Development

We are writing to you on behalf of our clients Noble Energy and Anadarko Petroleum concerning ongoing ozone State Implementation Plan (“SIP”) development for the Denver 8-hour Ozone Non-attainment Area. This memorandum contains preliminary research in response to the Air Pollution Control Division’s suggestions for implementing statewide ozone controls on the oil and gas industry, as opposed to implementing controls strictly within the ozone non-attainment area. More specifically, this memorandum considers the Clean Air Act (“CAA”) provisions and related guidance concerning how non-attainment area boundaries are determined and how those boundaries are related to the control measures outlined in a state’s SIP. We appreciate your extensive efforts in the ozone SIP development process, and look forward to working together to develop an approvable ozone SIP.

**Clean Air Act Definition:**

The CAA defines a non-attainment area as “any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant.” CAA §107(D)(1)(A)(i). Under the CAA, when an area is designated non-attainment for ozone the State must submit a state implementation plan to EPA demonstrating how the area will come back into attainment within a certain timeframe. There is an implicit connection between a non-attainment area and the resulting controls that are needed to bring the area back into attainment: controls that are not connected to or contributing to the non-attainment area’s violations are irrelevant to an area’s demonstration of how it intends to conform to the federal ozone NAAQS.

EPA's Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards

EPA has issued guidance explaining how to define the boundaries of a non-attainment area. *Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards (NAAQS or Standard,* dated March 28, 2000 from John S. Seitz to Air Directors, Regions I-X (“Boundary Guidance”). Based upon the CAA’s definition for non-attainment areas, the Boundary Guidance explains: “EPA believes any county with an ozone monitor showing a violation of the NAAQS and any nearby contributing area needs to be designated as nonattainment.” Boundary Guidance, at 3. According to the Boundary Guidance, the presumptive boundary for a non-attainment area should be the Metropolitan Statistical Area or the Consolidated Metropolitan Statistical Area (“C/MSA”). *Id.* EPA acknowledges that there may be some instances when it is appropriate for the non-attainment area to be smaller or larger than the C/MSA. *Id.*

In these instances, EPA lists eleven factors that the state should consider. *Id.* at 4. These factors are:

- Emissions and air quality in adjacent areas;
- Population density and degree of urbanization including commercial development (significant difference from surrounding areas);
- Monitoring data representing ozone concentrations in local areas and larger areas (urban or regional scale);
- Location of emission sources (emission sources and nearby receptors should generally be included in the same non-attainment area);
- Traffic and commuting patterns;
- Expected Growth (including extent, pattern and rate of growth);
- Meteorology (weather/transport patterns);
- Geography/topography (mountain ranges or other air basin boundaries);
- Jurisdictional boundaries (e.g., counties, air districts, existing 1-hour non-attainment areas, Reservations, etc.);
- Level of control of emission sources; and
- Regional emission reductions (e.g., NO<sub>x</sub> SIP call or other enforceable regional strategies).

### Colorado's Ozone Non-attainment Boundary History:

On June 30, 2003, Colorado provided EPA with its recommendations for designating areas within the State for the 8-hour ozone standard. In its letter to EPA, Colorado recommended that all areas of the state be designated attainment for ozone. EPA disagreed, indicating that preliminary measurements at three monitors in the Denver metro area were in violation of the 8-hour standard. *Letter to Governor Owens from EPA Region 8 Administrator Robert E. Roberts*, Ref: 8P-AR. EPA explained that it intended to modify Colorado's recommended designation with respect to the Denver metropolitan area and to a non-attainment boundary. *Id.* EPA wrote:

In the case of the Denver metropolitan area, the CMSA should be the starting point for considering the nonattainment boundary. This would include the following boundaries: Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, Jefferson, and Weld. In addition we recommend that Elbert, Larimer, and Morgan counties also be added. While these counties are outside the CMSA, they are adjacent to the Denver-Boulder-Greeley CMSA and may be contributing to 8-hour ozone violations.

*Id.* Colorado responded with a letter of its own. The Governor's office wrote:

The Clean Air Act defines a nonattainment area as any area that does not meet or that contributes to ambient air quality in a nearby area that does not meet a national air quality standard. It is important that the boundary of the area capture those areas that are experiencing or significantly contributing to the problem. It is not clear from the information developed to date that all of the areas EPA is proposing need to be within the nonattainment area under those criteria. In particular, there are areas within the proposed boundary that do not contain significant sources of ground-level ozone precursors, or that due to topography, meteorology, or other factors do not contribute to the problem. Areas that do not contribute to the problem should not be subject to the burdens of a possible nonattainment designation.

Letter from Douglas Benevento, responding for Governor Owens, to Mr. Robert E. Roberts regarding the Proposed 8-hour Ozone Standard Nonattainment Boundary, dated February 5, 2004.

As an alternative to EPA's suggested non-attainment boundary, Colorado suggested a non-attainment area consisting of all of Broomfield, Boulder, Denver, Douglas, and Jefferson counties, parts of Adams, Arapahoe, Larimer, and Weld counties, and none of Morgan and Elbert counties. *Id.* In an enclosure to its letter, Colorado further explained that certain portions of EPA's recommendation "should be excluded from the nonattainment area due to the lack of sources that emit ozone precursor emissions, and due to terrain features that logically exclude these areas from being considered as part of the airshed." *Id.* In the words of Colorado, "It is

important that the boundary of the area capture those areas that are experiencing or significantly contributing to the problem.” *Id.*

In the final non-attainment area listed in the Federal Register, EPA heeded Colorado’s concerns by including all of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson counties, and parts of Larimer and Weld counties. 69 Fed. Reg. 23858, 23890. Colorado’s experience with the Denver Metropolitan Area’s ozone non-attainment boundary underscores that the non-attainment area and the resulting controls on ozone precursors should only be imposed on areas that are actually contributing to the violations of the NAAQS.

*Louisiana Environmental Action Network v. EPA*, 382 F. 3d 575 (5th Cir. 2004).

In addition to the CAA definitions, the EPA Boundary Guidance, and the correspondence between EPA and the State of Colorado concerning the ozone non-attainment boundary, existing case law further demonstrates the need for controls included in a State’s ozone SIP to be reasonably shown to aid the non-attainment area in coming into compliance with the NAAQS. In *Louisiana Environmental Action Network*, an environmental group challenged EPA’s approval of Louisiana’s ozone SIP because the SIP contained a substitute contingency measure for a facility located outside the non-attainment area. More specifically, the group claimed that reductions outside the Baton Rouge non-attainment area could not qualify as a contingency measure in the SIP without a finding that such reductions would actually improve air quality within the non-attainment area. *Id.* at 584-85. The court explained that EPA’s “naked assertion” that emissions reductions from the facility would reasonably aid the non-attainment area “in its quest for attainment” was insufficient to justify the approval of the SIP. *Id.* Because there was no record to demonstrate that reductions from outside the non-attainment area would reasonably aid the area in coming into attainment, the court remanded the case back to the agency for further investigation. This case demonstrates how controls implemented as a part of a state’s ozone SIP must have a connection with the non-attainment area, and how controls imposed on a source outside the non-attainment area must be shown to be contributing to the non-attainment area’s violation of the NAAQS.

We appreciate the opportunity to provide these comments on behalf of Anadarko and Noble, and we welcome your response, if any, to them.

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