



Georgia
Bar

Journal

June 2004 ■ Volume 9 ■ Number 6

Special Issue: Environmental Law

A Look at the Law

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Speaking Whale:

The Impact of Georgia's New Nonattainment Designations on the Georgia Business Community

While it is often said that “life imitates art,” it is much less frequently observed that the Clean Air Act (CAA) imitates fish. In fact, this article may be a first in that regard. Novelty notwithstanding, there is a scene in Pixar’s recent animated movie *Finding Nemo* that bears the observation out.

In the movie, Dory and Marlin (two star-crossed fish adventurers), encounter a whale and Marlin wants to ask it about his missing son, Nemo. Dory, Marlin’s addled blue fish companion, is confident that she “speaks whale” and proceeds to whistle, groan, click and squeak at the whale. The whale of course doesn’t understand much, if any, of what Dory is saying and goes about its business (mostly eating krill), until it swallows Dory and Marlin whole.



Photo by Kevin B. Smith

Strangely enough, the discourse between regulators charged with implementing CAA programs and the regulated community is often similar to this misguided fish-whale discussion. The CAA is filled with legal and technical jargon—words and concepts like *nonattainment areas*, *offset ratios*, *emissions netting*—that are often foreign (or at least unfamiliar) to many business owners and operators. When it comes to understanding the practical impact of air quality related changes on business decisions, the message often comes out as, well... whale-speak.

Recently, for example, the Georgia Environmental Protection Division (EPD) recommended that more than 20 counties in Georgia be designated as “nonattainment” for the new federal 8-hour ozone standard, and a number of major cities face nonattainment status for the new particulate

matter (PM) 2.5 standard. Even after considerable public outreach by the U.S. Environmental Protection Agency (EPA) and, especially, EPD, there continues to be uncertainty as to the impact of nonattainment designations on Georgia businesses and the future growth of Georgia’s cities. Even when the jargon becomes familiar, there is an additional layer of translation that remains, namely, how does an area’s attainment status for a particular pollutant affect the siting, operating, and modification decisions for companies operating in those areas?

DESIGNATION OF NONATTAINMENT AREAS

The genesis of the nonattainment issue lies in federal ambient air quality standards established

pursuant to the CAA. Section 109 of the CAA authorizes EPA to establish new National Ambient Air Quality Standards (NAAQS) for certain pollutants and to revise those standards periodically.¹ To date, EPA has established standards for ozone (which includes nitrogen oxides (NOx) and volatile organic compounds (VOCs)), carbon monoxide (CO), and PM, among others.²

Upon promulgation of a new or revised NAAQS, CAA § 107 requires EPA to determine which areas of the country do not meet (or “attain”) those standards.³ Toward that end, states are required under Section 107(d) to submit to EPA a recommended list of areas for designation as attainment, nonattainment or unclassifiable.⁴ The Act specifies that nonattainment areas shall include “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.” The CAA further specifies a timetable for action on designations. Specifically, states must submit recommendations within one year after promulgation of a new or revised standard.⁵ After receiving a state’s recommended list of nonattainment areas, EPA may approve the list or modify the designations.⁶

Several years ago, EPA determined that the current standard for ozone (the “1-hour ozone standard”) was not adequately protective of human health and the environment. As a result, EPA established a new criteria for ozone – the “8-hour ozone standard.” About the same time, EPA promulgated a new standard for fine particulate matter, or PM_{2.5} (currently there is only a standard for larger particu-



late matter, or PM₁₀.) It is anticipated that considerably more cities, counties, and businesses will be affected by EPA's new NAAQS for ozone under the 8-hour standard and for PM_{2.5}.

There are currently 13 counties that are part of the 1-hour ozone nonattainment area in metro Atlanta. The number of counties designated under the 8-hour standard is nearly double that number of counties. The designations for nonattainment under the new PM_{2.5} standard are likely to center not only around Atlanta but also Macon, Athens, Rome, Columbus and, perhaps, Augusta.

NEW STANDARDS FOR OZONE AND PARTICULATE MATTER

In 1997, EPA determined that the 1-hour ozone standard was not adequate in protecting human health and the environment from the effects of ozone.⁷ At that time, EPA determined that a more stringent standard based on an 8-hour period would be more beneficial to air quality. This standard is 0.08 parts per million averaged over an 8-hour period, rather than the former standard of 0.12 parts per million averaged over a one-hour period. The new 8-hour standard allows no more than three exceedances at any monitor in the area in a year, or there is a "violation" of the standard.

In the case of *American Trucking v. EPA*, the 8-hour ozone standard was challenged by a number of businesses, the U.S. Chamber of Commerce, and industry groups, but the Supreme Court eventually upheld the constitutionality of the

8-hour ozone standard and EPA's interpretation of the CAA. In March 2002, the D.C. Circuit Court rejected all remaining challenges to the 8-hour ozone standard allowing EPA to begin implementation of the revised NAAQS.⁸

Therefore, after a lengthy legal battle, the path was cleared for EPA to implement the 8-hour ozone standard. The process for designating areas as attainment or nonattainment of the 8-hour ozone standard is through a federal rule-making with final designations published in the Federal Register. As a result, EPA established a deadline of July 15, 2003, for states to submit their recommendations for areas within their states that they believe should be designated as nonattainment areas under the 8-hour ozone standard.⁹ EPA responded to these recommendations on Dec. 4, 2003, agreeing with some designations and modifying others pursuant to CAA § 107. EPA issued final nonattainment area designations on April 30, 2004.¹⁰

States with areas that are designated as nonattainment must submit a State Implementation Plan (SIP) by 2007 that outlines how they will meet the 8-hour ozone standard. The areas' deadlines for meeting the 8-hour standard will range from 2007 to 2021 depending on the severity of the ozone problem. To aid areas in transitioning from attaining and maintaining the one-hour ozone standard to implementing the 8-hour ozone standard, EPA proposed an implementation rule in June 2003 that outlined the requirements nonattainment areas must meet and procedures for transitioning to the 8-hour standard.¹¹

On July 15, 2003, Georgia submitted its recommendations to

EPA for designating areas in the state as nonattainment under the 8-hour ozone standard.¹² On Dec. 3, 2003, EPA responded to Georgia's 8-hour ozone nonattainment recommendations which included several modifications to Georgia's recommended designations and boundaries.¹³ First, EPA stated that all counties that are part of an Early Action Compact (EAC) that contain a violating ozone monitor should be included as part of the nonattainment area. EPA stated, however, that in its proposed rule to implement the 8-hour standard, the agency plans to defer the effective date for these areas for as long as the areas continue to meet the milestones required for EAC areas. As a result of its decision to include the EAC areas in the nonattainment designated area, EPA modified EPD's recommendation to include Catoosa County in the Chattanooga area.

On April 30, 2004, EPA announced that it is designating the following counties in Georgia as nonattainment areas under the 8-hour ozone standard: Barrow, Bartow, Bibb, Carroll, Catoosa, Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Hall, Henry, Monroe (only a portion of the county), Murray (only that portion of Murray that is in the Class I area), Newton, Paulding, Rockdale, Spalding and Walton.¹⁴

The NAAQS for PM was established in 1971 and first revised in 1987 when EPA changed the standard to regulate inhalable particles, or PM₁₀, which are smaller than or equal to 10 micrometers in diameter (approximately one-quarter of the size of a single grain of table salt). In 1997, EPA further revised the PM standards by separating standards for fine particles (PM_{2.5}) from PM₁₀.¹⁵

As part of the challenge to the 8-hour ozone standard in *American Trucking*, the petitioners also challenged EPA over a 1997 revision of the PM standard.¹⁶ As described, the Supreme Court in 2001 overturned the court of appeals decision in *American Trucking* and upheld the EPA's authority to set NAAQS.¹⁷ As with the ozone standard, in March 2002, the Court of Appeals for the DC Circuit rejected all remaining challenges to the 1997 PM standard.¹⁸

Like the new 8-hour ozone standard, the first step in the process of designating PM_{2.5} nonattainment areas was EPA's request that states and tribes provide a list of recommended nonattainment area designations to EPA by Feb. 15, 2004.¹⁹ Following those submissions, EPA intends to respond to these recommendations in July 2004. Following EPA's announcement of modifica-

tions to the states' PM_{2.5} nonattainment area designation recommendations, EPA will allow 120 days for states and tribes to comment on any modifications that EPA makes to the recommended designations.

EPA intends to publish final PM_{2.5} nonattainment area designations by Dec. 15, 2004. In addition, under a consent agreement with nine environmental groups, EPA must designate nonattainment areas and issue proposed regulations regarding the PM standards by March 31, 2005, and a final rule by Dec. 20, 2005.²⁰ In compliance with the consent agreement, EPA plans on issuing the final PM_{2.5} implementation rule by the end of 2004.


Based on data gathered since 1999, several cities in Georgia may be considered nonattainment for PM_{2.5}. These include metro Atlanta, Athens, Rome, Columbus and Augusta. Macon, Savannah

and Albany are considered borderline.²¹ The areas that are ultimately subject to the PM_{2.5} NAAQS will face new nonattainment requirements once Georgia revises its SIP to include the statutory provisions in CAA § 189.²²


WHAT DOES NONATTAINMENT MEAN?

Assuming an area is designated as nonattainment, what's next? Once nonattainment area designations are established, the CAA requires states to submit a SIP to EPA which includes a detailed roadmap for how the state will achieve the NAAQS.²³ SIPs are then subject to review by EPA which must determine whether the proposed SIP includes all statutorily required elements to bring the area into attainment of the


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NAAQS.²⁴ In short, if an area does not meet the required standards, a state is required to submit a plan to EPA outlining steps to reach these standards.

To demonstrate what a nonattainment area means as far as the statutory requirements associated with the designation, Atlanta's current nonattainment status for ozone provides a good example of the types of SIP requirements that may apply in nonattainment areas. Because the metro Atlanta area is already considered a nonattainment area for ozone under the 1-hour standard, Georgia was required to include various statutory requirements in its SIP to bring the area into attainment. These include:

Enhanced vehicle inspection and maintenance program to reduce NOx and hydrocarbon emissions. An inventory of actual emissions from all sources.

Implementation of Reasonably Available Controlled Technologies (RACT) for existing major sources. RACT is defined as "devices, systems, process modifications, or other apparatus or techniques that are reasonably available taking into account (1) the necessity of imposing such controls in order to attain and maintain [the NAAQS]; (2) the social, environmental, and economic impact of such controls, and (3) alternative means of providing for attainment and maintenance."²⁵ In order to implement RACT, EPA has developed guidelines for various categories of major sources.²⁶ These guidelines are in turn implemented by states in their SIPs.

The imposition of New Source Review (NSR) permitting requirements for new and "modified" stationary sources. The NSR permit program requires that major

new sources or major "modifications" at those sources apply for and receive NSR construction permits prior to construction of the new major source or modification. The NSR program requires the permit to include requirements for the installation of often expensive pollution control technology defined as the "lowest achievable emission rate" (LAER). LAER is defined as the most stringent emission limitation contained in any SIP or that is achievable in practice by the same or similar source category, whichever is more stringent. The NSR program also requires that NSR construction permits include provisions for the emissions of the nonattainment pollutant from the new or modified source to be offset by emission reductions elsewhere at a specific ratio. This requirement is to ensure progress towards attainment of the NAAQS. These offsets must be in effect and enforceable by the time the new source or modification commences operation.²⁷ For "serious" nonattainment areas, the offset ratio required is 1.2 to 1. Therefore, for every ton of new emissions, sources must obtain (either internally or from other sources) emissions reductions of 1.2 tons.

Demonstration of progression toward control of NOx.

Regulation of vehicle refueling (Stage Two).

Enhanced ambient air quality monitoring.

Implementation of a clean fuel vehicle program.

Implementation of transportation control measures, or "transportation conformity." This means the state must submit for the nonattainment area both

long-term plans and short-term transportation improvement plans to demonstrate that planned and federally-funded road projects will not worsen air quality or interfere with the goals of the SIP.²⁸

For emitting sources these new requirements mean that lower emission standards and more stringent permitting requirements will be imposed. As part of these stringent permitting requirements, new sources or existing sources wishing to make modifications will need to obtain offsets as described above. Often times these offsets are difficult to obtain in the market place and cannot be generated internally.

This onerous requirement may make it difficult for new businesses to locate into nonattainment areas or for existing businesses to expand. In addition, it will become more difficult for local and state government to accomplish road projects because the projects will have to conform to and be a part of long and short-range EPA-approved transportation plans. Finally, citizens living in the area will also be affected on an individual basis as automobiles will become subject to enhanced vehicle inspections and maintenance.

A MATTER OF PERCEPTION

Despite the permitting and transportation conformity concerns described above, the *perception* of the negative impacts of nonattainment designations are often out of touch with the actual effects. At a recent meeting at the Metro Atlanta Chamber of Commerce, EPA Administrator Mike Leavitt held up a map of the United States. The map highlighted in red the areas in

the U.S. that were designated as nonattainment for ozone. Leavitt observed that he was familiar with such maps from his work on air quality issues as governor of Utah and described the red markings as “warning beacons” for business and community development.

While Leavitt was correct in his observation that nonattainment status may serve as a warning beacon—businesses certainly should be aware of the unique issues associated with nonattainment areas—it is not a stop sign for development and growth. To borrow from our aquatic theme, nonattainment is not like the Great White Shark in *Jaws*, waiting to gobble up unsuspecting Georgia businesses treading the economic waters of the state. Under EPA’s proposed class, option 2, based on 2001-03 air quality data, Atlanta would be classified as “marginal” for the 8-hour standard.

Yet misinformed perceptions regarding nonattainment impacts continue to worry Georgia businesses. For industrial operations, the ability to expand, change and adapt is rightly seen as the key to long-term financial viability. When that ability to change is impaired, a company’s ability to survive and thrive is similarly impaired. In many cases, companies are faced with an “expand or shut-down” scenario, that is, the ability to change operations to fit market demand is necessary to continue long-term viability. Faced with this scenario, plant operators are concerned that company executives may conclude that their plant is now a poor candidate for future expansion.

“Operating units within major corporations are always competing for investment dollars,” commented one environmental plant man-

ager from Augusta. “When the new designation recommendations were announced, there was a real concern that if corporate headquarters believed that permitting is going to be more difficult due to a new nonattainment status, that those investment dollars will be given to other plants, and the Georgia plants would be passed over for future expansion plans.”²⁹

However, the truth is that nonattainment is hardly a regulatory girdle to growth. And one of the best illustrations of this fact is Atlanta. Since it was initially designated nonattainment in 1978, Atlanta has experienced tremendous growth. Despite its nonattainment status, between 1980 and 2000, population in the Atlanta Metropolitan Statistical Area increased by 1.9 million—an 84 percent growth rate.³⁰

But the perception of the air quality situation in Atlanta is skewed by

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the regulatory jargon. Because the Atlanta metropolitan area failed to attain the 1-hour ozone NAAQS by the statutory deadline of 1999, the Atlanta area was recently “bumped up” from a “serious” nonattainment area to a “severe” nonattainment area for ozone.³¹ As a result of this change in nonattainment status, Atlanta faces even more stringent requirements.

What is ironic about these fairly draconian measures is that the air quality in Atlanta is getting better, not worse. When it comes to communication issues, Kevin Green of the Metro Atlanta Chamber of Commerce commented that this fact is difficult to convey.

“There’s a real disconnect in the language of nonattainment and what’s going on in Atlanta,” he said. “It’s counterintuitive to think that Atlanta’s air quality is improving at the same time EPA is down-grading its status, but that’s precisely what’s happening. Even after decades of tremendous growth, Atlanta’s air quality is steadily improving. Our programs are working.”

COMMUNICATION AND A PROACTIVE RESPONSE ARE CRITICAL

Correcting misperceptions and taking on nonattainment issues head-on is key to managing nonattainment status. One good example of such a proactive response was the city of Augusta and Richmond County. When industrial sources in Augusta and Aiken learned that Richmond County was facing nonattainment status, they quickly organized a committee to try to address the problem head-on. In July of 2003, a committee consisting

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— Kevin Green, Metro Atlanta Chamber of Commerce

of representatives from 15 industrial sources in the Augusta area was created to evaluate local options and to educate local government on the effects of nonattainment.

For areas that comply with the 1-hour peak ozone standards of 0.12 but not the new 8-hour ozone standard of 0.8, there is a deferral options known as an Early Action Compact (EAC). The EAC is designed to give local areas flexibility to design their own approaches to comply with the 8-hour ozone standard by Dec. 31, 2007. The goal of the EAC is to improve air quality faster and avoid the rigid compliance conditions normally imposed on nonattainment areas.

In the case of Augusta and Richmond County, the EAC approach—coupled with good monitoring data over the past few years—was a success. After reviewing the resulting monitoring data and receiving agreement from the EAC industry team to continue its efforts, EPD revised their recommendation for the area to attainment. EPA responded and removed the area from the ozone nonattainment list.

The Augusta example illustrates that outreach is a two-way street—industries and local governments

need to clearly communicate their concerns to regulators. Simply listening to EPA and EPD is not enough. “Educating businesses and local communities regarding air quality rules and regulations is a vital part of what we do at Georgia EPD.” Commented Ron Methier, air director for EPD. “But an important part of any outreach effort is to listen to concerns from businesses and local communities. Businesses and local governments do need to consider how they will factor nonattainment designations into their planning decisions.”


But Methier also stressed that such planning should not be limited to cities/counties that have been formally designated as nonattainment. “Air quality is largely a regional issue. Just because an area is identified as attainment, it doesn’t mean that it is immune from nonattainment regulations. In Georgia, it may be necessary to include some attainment areas as part of the SIP plan to address nonattainment issues in neighboring areas.”

Taking on those issues proactively in the present may pay big dividends in the future. Methier stated that many of these areas are “pretty border-line” and could

achieve attainment within a few years if progress is demonstrated.

CONCLUSION

So what is the message behind the whale-speak? First, being designated as nonattainment is not a death-knell for the expansion of businesses and communities in Georgia. As Sam Williams of the Metro Chamber recently observed, air quality issues are largely the products of strong economic growth and a public perception of a good quality of life, *i.e.*, areas have air quality issues because people want to live in and work in those areas.

Nonattainment status does, however, mean that industrial sources in these areas must consider new SIP requirements in their planning and expansion plans. Yet these additional considerations are manageable through a proactive approach by the regulated community and local governments. Perhaps the greatest hurdle in addressing the nonattainment issue is overcoming misinformed perceptions about nonattainment designation. As these new designations are implemented in Georgia, it is critical that city and county governments, industrial sources, and environmental agencies work cooperatively to educate the public—and one another—about the real world impacts of nonattainment. 



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26. 42 U.S.C. § 7511(b)
27. 42 U.S.C. § 7503
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29. A 1997 study by Research Atlanta, Inc., summarized the issue for the Atlanta area as follows: There are any number of cities in the southeastern United States that do not have Atlanta's air quality problems. Industry seeking to relocate would find it less expensive to locate in those cities than to locate in the Atlanta metropolitan area, an area burdened by sanctions for not meeting air quality standards. "The Costs of Nonattainment: Atlanta's Ozone Imbroglio." Research Atlanta, Inc. (1997).
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