
On the Horizon: Expand the Ozone Transport Region?

Gale Lea Rubrecht

Recent letters from eight northeastern states including the District of Columbia to midwestern and southern states have raised the specter of an expanded Northeast Ozone Transport Region and Commission under sections 176A and 184 of the Clean Air Act (Act). The letters, dated May 30, 2013, were written by the Environmental Commissioners of Connecticut, Delaware, the District of Columbia, Maryland, Massachusetts, New York, Rhode Island, and Vermont and addressed to their counterparts in nine midwestern and southern states. The letters invite all or part of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to become a member of the Ozone Transport Commission (OTC) and to work together collaboratively to address ozone transported into the Ozone Transport Region (OTR). To date, the nine midwestern and southern states have either declined or ignored the invitation to join the OTC.

Congress added section 184 in 1990, creating the OTR to address the long-standing problem of ozone pollution in the Northeast. The OTR consists of northern Virginia and all of Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. Congress required specific controls for *all* areas (not only nonattainment areas, which are areas that do not meet the national ambient air quality standards for ozone) in the OTR and established the OTC for the purpose of recommending to EPA region-wide controls affecting *all* areas in the OTR. At the same time, Congress added section 176A, which authorizes the formation of transport regions for ozone and other pollutants, including fine particles, in other parts of the country. The general provisions of section 176A also apply to the OTR established under section 184. To date, the existing OTR is the only transport region for any pollutant that has been established.

The states sending the May letters complain they “have recorded incoming ozone at concentrations that significantly contribute to [their] nonattainment problems. On many days, the transported incoming ozone, itself, exceeds the ozone standard. Air quality modeling performed by EPA, [OTC] states and by states outside the [OTR], shows that well over 50 percent of the ozone concentration in [the seven OTC] states originates in upwind states that are outside of the [OTR].”

The letters advise that EPA has the authority under section 176A of the Act to add areas to the OTC upon receipt of a petition and close by setting a deadline of June 20, 2013, for the midwestern and southern states to advise if they are interested in joining the OTC (and in the case of Virginia, expanding its participation in the OTC).

In declining to join the OTC, the midwestern and southern states rely upon measures they have undertaken to reduce emissions within their borders and improve air quality downwind. To illustrate, Tennessee focuses on a 90 percent reduction in annual nitrogen oxides (NO_x) emissions by a large, in-state source and its commitment either to retire or install state-of-the-art controls on all of its currently existing coal-fired

generation in Tennessee by 2018. Illinois, Kentucky, Michigan, North Carolina, Ohio, Tennessee, and West Virginia explain that they are already working collaboratively with EPA and regional planning/multijurisdictional organizations, such as the Mid-Atlantic Regional Air Management Association, Lake Michigan Air Directors Consortium, and Southeast States Air Resources Managers, Inc. Illinois challenges the OTC states “to identify actions. . . taken to reduce ozone and fine particles, especially those above and beyond federal requirements, that have occurred or will occur in their states in regards to both stationary and mobile sources.” A listing of actions, Illinois writes, “would help. . . identify further measures that could be implemented and would help establish a level playing field.” Illinois also asks for the data and information the OTC states rely upon for upwind states’ impacts to downwind states and the extent to which this data and information incorporates emission-reduction requirements on the books or on the way, as well as actions underway or already taken, such as retirements of coal-fired power plants and conversions to natural gas.

As North Carolina’s response recognizes, additional regulatory requirements would follow if the midwestern and southern states were to join the OTC. In an expanded OTR, the same control requirements that apply throughout the OTR to emission sources of volatile organic compounds (VOCs) and NO_x (ozone precursors) would apply to attainment areas, i.e., areas that meet the ozone standards, as well as nonattainment areas in the midwestern and southern states. These control requirements include nonattainment new source review permitting requirements for new or modified sources of VOCs and NO_x, reasonably available control technology for sources of VOCs and NO_x, implementation of enhanced vehicle inspection and maintenance programs in metropolitan statistical areas with a population greater than 100,000, and Stage II vapor recovery (for vehicle refueling) or a comparable measure. While EPA has “restructured” or eliminated section 184 control requirements, EPA has done so only for Maine and New Hampshire after they demonstrated that the control measure would not significantly contribute to attainment in any other state in the region. *See, e.g.*, 66 Fed. Reg. 1871 & 1868 (Jan. 10, 2001).

The midwestern and southern states’ rejection of the OTC states’ invitation to join the OTC sets the stage for a petition from the governors of one or more of the eight of thirteen OTC states to the EPA administrator to expand the OTR. Upon petition from the governor of any of the OTC states, the EPA administrator would initiate rulemaking proceedings to determine whether to exercise her discretion to add some or all of the midwestern and southern states to the OTR. To add states to the OTR, the EPA administrator must have “reason to believe that the interstate transport of air pollutants from one or more States contributes significantly to a violation of a national ambient air quality standard in one or more other States”. CAA § 176A(a).

The EPA administrator may also add or remove states on her own motion, and the OTC may recommend the addition or removal of states. That the EPA administrator would do so on her own motion or that the OTC would make such a recommendation seems unlikely, however, given current tensions between EPA and states and the failure of five OTC states—Maine, New Hampshire, New Jersey, Pennsylvania, and Virginia—to sign onto the May 30 letters.

Assuming the governors of the eight OTC states submit a petition requesting the EPA administrator exercise her

discretion to add the midwestern and southern states to the OTR, then EPA would have eighteen months to determine whether to expand the OTR. The same timeline would likely apply if the EPA administrator initiates the proceedings on her own motion or if the OTC recommends EPA expand the OTR to include all or some of the midwestern and southern states. Of course, midwestern and southern states and sources would oppose any proposed rule that would add them to the OTR and challenge any final rule in court.

If the eight OTC states submit a section 176A petition and if the EPA administrator exercises her discretion to add some or all of the midwestern and southern states to the OTR, then the Act would require EPA to establish a transport commission composed of representatives from each state within the region to advise the administrator, including: (1) the governor of each state in the region or his designee; (2) the EPA administrator or her designee; (3) the EPA regional administrator (or the EPA administrator's designee) for each EPA Regional Office for each EPA region affected by the expanded transport region; and (4) an air-pollution-control official representing each state in the region, appointed by the governor. The OTC currently includes the EPA regional administrators for EPA Regions 1, 2, and 3, but if it were expanded by adding the midwestern and southern states it would also include the EPA regional administrators for EPA Regions 4 and 5.

The Act would also charge any expanded transport commission with assessing interstate pollution transport throughout the expanded transport region, assessing strategies for mitigating the interstate pollution, and making recommendations to the EPA administrator concerning control measures to attain and maintain the ozone standards in the expanded transport region. Decisions or recommendations and requests to the EPA administrator by the expanded transport commission, however, would require a majority vote of all members, excluding the administrator and the regional administrators or their designees. Thus, if EPA were to add all or some of the nine midwestern and southern states (including Virginia), they would each get a vote but would be outnumbered by the twelve OTC states (excluding Virginia).

An expanded transport commission could also ask EPA to issue a finding that the state implementation plan (SIP) of one or more states in the expanded transport region is inadequate. EPA would have eighteen months from receipt of such a request to approve, disapprove, or partially approve and partially disapprove it. If the EPA administrator approves the commission's request, EPA must issue the finding of inadequacy and SIP Call, i.e., call for the states to revise their SIPs, at the same time as the approval. In acting on such a request, EPA must provide an opportunity for public participation and address each specific recommendation made by the commission. EPA's approval or disapproval of a commission request constitutes final agency action subject to judicial review.

While the midwestern and southern states would be outnumbered, EPA does not believe it owes any deference to a transport commission's request that the Agency take specific action. In evaluating whether to approve, disapprove, or partially approve and partially disapprove an OTC recommendation, EPA considers all of the factual information available independently and applies two criteria specified in section 184: first, whether the additional control measures that the OTC recommends are necessary and, second, whether the additional control measures are consistent with the Act. In the past,

however, EPA has applied a rebuttable presumption in favor of approval. See, e.g., 59 Fed. Reg. 21,720 (Apr. 26, 1994) ("it appears appropriate for EPA to start with the position that it should approve the OTC's recommendation unless it has a sufficient factual basis to find that the . . . program is not necessary").

The approach being taken here by eight of the OTC states is reminiscent of the section 126 petitions filed by OTC states in the late 1990s as a backstop to EPA's first ozone transport rule, commonly called the NO_x SIP Call, which required twenty-two states and the District of Columbia to submit SIPs requiring statewide NO_x budgets from May through September to mitigate ozone transport in the eastern U.S. 63 Fed. Reg. 57,356 (Oct. 30, 1998). The section 126 petitions targeted large stationary sources in the Midwest and South, namely coal-fired power plants along the Ohio River, and requested EPA make findings and require them to decrease NO_x emissions that significantly contribute to ozone nonattainment problems in the downwind petitioning state. While the two rulemakings and subsequent legal challenges proceeded in tandem, in the end EPA implemented the NO_x SIP Call and not the draconian section 126 provisions, under which targeted sources must cease operating if they cannot reduce emissions within three years of EPA granting a section 126 petition.

Even if the eight OTC states submit a section 176A petition to EPA, I believe that it is unlikely the Agency will expand the OTR and OTC to include midwestern and southern states. Because all twelve OTC states (excluding Virginia) did not sign the letters, the letters do not represent an official OTC position. Expanding the OTR and OTC would address ozone, but not fine particles. Moreover, the section 176A/184 process is not the exclusive means to address interstate air pollution and other provisions of the Act provide ways to deal with transport. EPA's preferred approach has been transport rules, and the continuation of that approach seems probable now that the U.S. Supreme Court has granted review of the D.C. Circuit's ruling vacating EPA's most recent transport rule to address ozone and fine particle pollution. As EPA did with the section 126 petitions that were submitted in the late 1990s, I believe that EPA will address ozone pollution in the Northeast without expanding the OTR.

Ms. Rubrecht is a member of Jackson Kelly PLLC and practices in the firm's Charleston, West Virginia, office. She is a member of the editorial board of Natural Resources & Environment and may be reached at galelea@jacksonkelly.com.