UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LOUISIANA ENVIRONMENTAL
ACTION NETWORK

VERSUS

CHRISTINE TODD WHITMAN, in her
official capacity as Administrator,
United States Environmental
Protection Agency

CIVIL ACTION

NO. 00-879-A

**RULING ON MOTION
FOR SUMMARY JUDGMENT**

This matter is before the court on a motion by plaintiff, Louisiana Environmental Action Network (LEAN) for summary judgment (doc. 10). Defendant, the United States Environmental Protection Agency (EPA), and intervenors, the Louisiana Department of Environmental Quality (LDEQ), the City of Baton Rouge / Parish of East Baton Rouge (City-Parish), Entergy Gulf States, Inc. and Entergy Gulf South, Inc. (jointly as "Entergy"), Louisiana Chemical Association (LCA), and Louisiana Mid-Continent Oil & Gas Association (LMOGA), oppose the motion. On August 29, 2001, United States Magistrate Judge Docia L. Dalby issued a report and recommendation that the motion be granted in part and denied in part (doc. 88). All parties except the EPA have filed objections.[1] The EPA agrees with the report and

[1]Doc. 89, "Plaintiff's Partial Objection and Limited Request for Modification of the Recommendation of the Magistrate Judge," filed by Louisiana Environmental Action Network; doc. 91, "City of Baton

recommendation and has filed a response to the objection filed by LEAN.[2] There is no need for oral argument. Jurisdiction is based upon §304(a)(2) of the Clean Air Act, 42 U.S.C. §7604(a)(2).

On February 19, 2002, oral argument was presented by all parties.

The procedural and factual background of this matter is fully outlined by the magistrate in her report. LEAN claims that the EPA has failed to discharge its duty to publish a determination that the Baton Rouge Ozone Nonattainment Area, as defined in 56 Fed. Reg. 56,694, 56,768, failed to attain the National Ambient Air Quality Standard for ozone by November 15, 1999. LEAN seeks an order requiring the EPA to publish, within 20 days of the order of the court, a determination in the Federal Register that the Baton Rouge Ozone Nonattainment Area failed to attain the ozone standard by the November 15, 1999 deadline. LEAN further seeks an order requiring the EPA to publish, within 30 days of the order of the court, notice of reclassification pursuant to 42 U.S.C. §7511(b)(2)(B).

The magistrate judge recommended that the court enter a final judgment ordering the EPA to: (1) make, no later than 45 days after the date of the court's

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Rouge / Parish of East Baton Rouge Objection to Magistrate Judge's Report," filed by the City of Baton Rouge / Parish of East Baton Rouge; doc. 93, "Objection to Report and Recommendations by the Magistrate on the Motion for Summary Judgment filed by the Petitioners," filed by the Louisiana Department of Environmental Quality; doc. 96, "LCA and LMOGA's Joint Objection to Magistrate Judge's Report," filed by the Louisiana Chemical Association and the Louisiana Mid-Continent Oil & Gas Association; doc. 97, "Entergy Louisiana, Inc. and Entergy Gulf South, Inc.'s Objection to Magistrate Judge's Report," filed by Entergy Louisiana, Inc. and Entergy Gulf States, Inc.

[2]Doc. 103.

order, a determination pursuant to 42 U.S.C. §7511(b)(2) as to whether the Baton Rouge Ozone Nonattainment Area attained the applicable ozone standard by November 15, 1999; and (2) publish in the Federal Register no later than six working days after said determination notice of a final action reflecting both the determination and any reclassification of the area required as a result of the determination.

**Objection by LEAN**

LEAN objects to the following portion of the magistrate judge's report:

> The Court further should deny plaintiff's request for an order restricting the effective date that the EPA might select for its action. First, the Court cannot issue what in essence would be an advisory ruling regarding an effective date decision that the EPA has not yet made. Second, the Court in any event does not have jurisdiction under Section 7604 to dictate the particulars of the EPA's action.[3]

LEAN argues that a determination without timely effect would subvert the intent of Congress under the Clean Air Act by disregarding timetables established for the express purpose of avoiding "gaming by the States, industry, and others." LEAN argues that the EPA should be required to issue a determination with a restricted effective date.

The EPA responds that the selection by the EPA of an effective date for its determination is part of its substance.

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[3]Magistrate Judge's Report, doc. 88.

The statute in question, 42 U.S.C. §7604, grants the court jurisdiction to compel agency action unreasonably delayed.[4] Given this limited authority, the court agrees with the recommendation by the magistrate judge. The court lacks the authority to issue an order restricting the effective date that the EPA selects for its action.

**Objection by intervenors LDEQ, City-Parish, Entergy, LCA, and LMOGA**

Intervenors object to the deadlines recommended by the magistrate judge in her report, and maintain that the court should use its equitable discretion to allow the EPA additional time to issue its determination. Intervenors argue that immediate compliance will divert resources and possibly delay the actions necessary to achieve significant improvements in air quality. Intervenors argue that, by limiting the time for EPA action to 45 days, the court is dictating that the EPA reclassify Baton Rouge to a "severe" classification, which will require Baton Rouge residents to use a more expensive reformulated gasoline and regulate small businesses which are not currently regulated.

LEAN responds that the harm inflicted by continued delay of EPA determination is prolonged exposure to unhealthy levels of ozone.

The proposal by the LDEQ to delay such an order to EPA until EPA completes action upon the State's recently filed program has practical and surface appeal. It is certainly possible that the State could achieve attainment soon, particularly if the

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[4] 42 U.S.C. §7604(a).

Baton Rouge area is the victim of "ozone transport" from Texas. The court is convinced, however, that the narrow range of discretion bestowed upon it does not authorize such an approach. The time for making a determination by EPA is long past.

As the magistrate judge observed, "...continued delay frustrates clear congressional directives that a determination as to attainment be made now and, if that determination is one of nonattainment, that specific mandatory measures be initiated now to reduce ozone causing emissions."[5] The magistrate judge recommended that the court order the EPA to comply with the statutory directive within the same 45 day period ordered in the matter of **Sierra Club v. Browner**.[6]

The court agrees that continued delay frustrates the clear direction of the Congress. However, the court finds that a 90-day deadline for EPA compliance with the statutory directive is more appropriate in this matter. The **Sierra Club** case, although informative, is neither binding precedent upon this court nor did it involve the same set of circumstances as this case. The court hereby adopts the report of the magistrate judge as its ruling, with the exception that the compliance deadline is hereby set at 90 days and only prompt publication will be required.

For the foregoing reasons, the motion by plaintiff, Louisiana Environmental Action Network (LEAN) for summary judgment (doc. 10), is hereby **GRANTED IN**

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[5]Magistrate Judge's Report, page 21, doc. 88.

[6]130 F.Supp.2d 78 (D.D.C. 2001).

**PART** and **DENIED IN PART**. There will be declaratory judgment in favor of plaintiff which shall order EPA to: 1) issue, no later than ninety (90) days after the date of the judgment, a determination pursuant to 42 U.S.C. §7511(b)(2) as to whether the Baton Rouge Ozone Nonattainment Area attained the applicable ozone standard by November 15, 1999; and 2) promptly after the determination publish in the Federal Register notice of a final action reflecting both the determination and any reclassification of the area required as a result of the determination.

Baton Rouge, Louisiana, February 27, 2002.

JOHN V. PARKER,
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

**UNITED STATES DISTRICT COURT**

**MIDDLE DISTRICT OF LOUISIANA**

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|---|---|
| **LOUISIANA ENVIRONMENTAL ACTION NETWORK** | **CIVIL ACTION** |
| **VERSUS** | |
| **CHRISTINE TODD WHITMAN, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY** | **NO. 00-879-A-M3** |

**NOTICE**

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U.S. District Court.

In accordance with 28 U.S.C. §636(b)(1), you have ten days from date of receipt of this notice to file written objections to the proposed findings of fact and conclusions of law set forth in the Magistrate Judge's Report. A failure to object will constitute a waiver of your right to attack the factual findings on appeal.

**ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.**

Baton Rouge, Louisiana, this 29th day of August, 2001.

MAGISTRATE JUDGE DOCIA L. DALBY

DKT. & ENTERED
DATE 8/29/01
NOTICE MAILED TO:
DATE ____ BY BS

DLD
JS
P. Hunter
Babuch
Thornton
Wye
McCowan
Percy
Trahan
Levine

INITIALS DOCKET#
BS 88

**UNITED STATES DISTRICT COURT**

**MIDDLE DISTRICT OF LOUISIANA**

**LOUISIANA ENVIRONMENTAL ACTION NETWORK** — **CIVIL ACTION**

**VERSUS**

**CHRISTINE TODD WHITMAN, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY** — **NO. 00-879-A-M3**

## MAGISTRATE JUDGE'S REPORT

This citizen suit under the Clean Air Act comes before the Court on the district judge's referral of a motion for summary judgment (rec.doc.no.10). Plaintiff Louisiana Environmental Action Network (LEAN) claims that Christine Todd Whitman, Administrator of the Environmental Protection Agency, has failed to perform her statutorily mandated duty of determining whether or not the Baton Rogue area attained a federal ozone reduction standard by its mandatory deadline of November 15, 1999, as required under the Clean Air Act. LEAN claims that the Baton Rouge area has failed to reduce ozone to the required level, and as a result of its failure to attain that reduction, it must be reclassified from an area of "serious" nonattainment to one of "severe" nonattainment, which would have the effect of automatically imposing enhanced restrictions on further precursor emissions that contribute to ozone formation.[1]

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[1]Ozone is a molecular form of oxygen containing three atoms of oxygen, rather than the two atom oxygen molecules that are more prevalent in the earth's atmosphere. The formation of ozone is the result of chemical reactions of other pollutants emitted into the air called ozone "precursors," which are volatile organic compounds (VOCs) and Nitrogen Oxides (NOx). The right mix of precursors and temperature form ozone. There is no dispute that ozone is harmful to the public's health.

The EPA does not contest that it is required by statute to make a determination, nor does it contest that the determination was not made within six months of November 15, 1999, as required by the Act. The EPA instead argues that it needs more time, and explains that it ultimately will make a determination either that the Baton Rouge area failed to attain the ozone standard by November 15, 1999, or that the Baton Rouge area is entitled to additional time within which to reduce pollutants to the required standard by virtue of what the EPA describes as its "transport extension policy." Under that policy, Louisiana must show that its failure to attain the ozone standard by November 15, 1999, is the result of significant transport of pollutants (ozone precursors) from an upwind source, in this case, from Houston, Texas. The EPA maintains that it needs at least until December 31, 2002, to consider whether or not to extend the November 15, 1999, deadline for the Baton Rouge area to meet the required ozone standard.

The EPA has been joined by a number of intervenors who, with limited exception, essentially adopt the EPA's position.[2]

LEAN responds that the EPA's "transport policy" carries no legal force, is an unauthorized creation by the EPA, is directly in conflict with the Act, and allows further harm to the public health by delaying the implementation of regulations designed to reduce pollutants emitted in the air. The EPA, LEAN concludes, must perform its non-discretionary statutory duty -- which is to make the determination that Congress mandated be made on May 15, 2000; that is, whether, by November 15, 1999, the Baton Rouge area had reduced ozone concentrations to the level required by Congress.

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[2]The Court granted requests to intervene by: the Louisiana Chemical Association (LCA) and the Louisiana Mid-Continent Oil & Gas Association (LMOGA)(referred to collectively as the "industry intervenors"), the City of Baton Rouge/Parish of East Baton Rouge (the City-Parish), the Louisiana Department of Environmental Quality (DEQ), and Entergy Louisiana, Inc. and Entergy GulfStates, Inc. (referred to collectively as "Entergy").

### *Statutory and Regulatory Background*

The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, establishes a comprehensive program for controlling and improving air quality through federal and state regulations. As part of that program, the Act requires the EPA to set certain air quality standards, "the attainment and maintenance of which...are requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1). The EPA, using scientific data concerning health effects, "is to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an 'adequate' margin of safety, and set the standard at that level." *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 121 S.Ct. 903, 908, 149 L.Ed.2d 1 (2001). The EPA set such a standard for ozone levels.

For purposes of ozone attainment (acceptable levels of ozone in the air), an area is characterized or "classified" based on how often ozone concentrations in the ambient air *exceed* the applicable acceptable standard. In the 1990 amendments to the Clean Air Act, Congress provided that those areas in 1990 which exceeded the Act's ozone standards were to be classified by operation of law as either *marginal, moderate, serious, severe* or *extreme* nonattainment areas according to the level of nonattainment then existing. Congress allowed an area classified as one of serious nonattainment (the classification into which Baton Rouge fell) almost ten years to reduce its level of ozone pollutants in order to meet the legally-mandated ozone standard by November 15, 1999.[3]

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[3]42 U.S.C. § 7511(a)(1).

The only express provision in the Act which allows an extension of this mandatory deadline reads as follows:

> (5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the date specified...if-
>
> (A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and
> (B) no more than 1 exceedance of the national ambient standard level for ozone has occurred in the area in the year preceding the Extension Year.
>
> No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

42 U.S.C. § 7511(a)(5).

Congress also provided that "[w]ithin 6 months following the applicable attainment date (including any extension thereof) for an ozone attainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date." Congress instructed that a *serious* nonattainment area which failed to reduce ozone levels to the applicable standard by November 15, 1999, is to be reclassified by operation of law to the next higher classification, *i.e.*, a *severe* area. Congress then specifically directed that the EPA must publish a notice of the determination and resulting reclassification in the Federal Register within six months of the attainment date, *i.e.*, by May 15, 2000.[4]

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[4]See 42 U.S.C. § 7511(b)(2)(A) & (B). Reclassification to a severe area under subparagraph 42 U.S.C. § 7511(b)(2)(A)(i) is the only statutory possibility for a serious area that fails to attain.

When an area is reclassified from serious to severe, Congress mandated that specific measures are to be taken to reduce ozone levels. These measures include an automatic reduction of the threshold at which new sources and major modifications to existing sources must undergo detailed review of new permits which seek approval for increased emissions of pollutants.[5] Further, new sources and modifications must satisfy a more stringent emission reductions standard to offset emissions from already existing sources. Congress additionally required that the state revise its state implementation plan (SIP) to take a number of steps, such as measures to reduce vehicle emissions. See 42 U.S.C. §§ 7511(a)(c) & (d); *see also* 42 U.S.C. §§ 7503 & 7661a.

Congress also specifically addressed the issue of upwind contribution to downwind nonattainment in the Clean Air Act. Under the "good neighbor provision" of Section 110 of the Act, each state's implementation plan must prohibit any source or activity within that state from emitting air pollutants in amounts that will contribute significantly to nonattainment in any other state. Under Section 126 of the Act, any state or political subdivision may petition the EPA for a finding that any major source or group of stationary sources emit air pollutants in violation of this good neighbor provision. Within 60 days after receipt of a Section 126 petition, the EPA either must make such a finding or deny the petition. If the EPA makes a finding of significant upwind contribution, then no new sources subject to the finding may be permitted, and existing major sources subject to the finding may operate for no more than three months. Congress authorized the EPA to permit continued operation of the upwind sources beyond this three month period only

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[5]The threshold triggering the requirement for detailed review of permits is reduced from 50 tons per year of volatile organic compound (VOC) emissions to 25 tons per year.

upon source compliance with emission limitations and compliance schedules designed to bring about compliance with the good neighbor provision "as expeditiously as practicable, but in no case later than three years after the date of such finding."[6]

Although Congress expressly provided relief to downwind areas affected by upwind transport in certain circumstances, none of those circumstance are applicable to this case.[7] No express provisions of the Clean Air Act grant the EPA authority to exempt a nonattainment area from the consequences of reclassification based upon ozone transport from upwind sources or to extend the attainment date based upon interstate ozone transport.

In July 1998, the EPA announced a policy of extending attainment dates for ozone nonattainment areas affected by transport from upwind sources.[8] The EPA stated that it believes a fair reading of the Act permits it to harmonize an earlier attainment demonstration date requirement for a downwind area affected by transport with a later

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[6]*See* 42 U.S.C. §§ 7410(2)(D)(i) and 7426(b) & (c). *See also Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1036-39 & 1040-46 (D.C. Cir. 2001)(the court of appeals harmonizes that cross-reference in Section 7426(b) & (c) with the provisions of Section 7410(2)(D); the court also discusses the unique nature of § 126).

[7]First, Congress provided that the EPA could adjust the initial (*i.e.*, circa 1991) classification of the area within 90 days of the classification base upon, *inter alia*, the "level of pollution transport between the area and other affected areas, including both intrastate and interstate transport," if the area was within five percent of the level required for another classification. Second, Congress provided for certain exemptions for nonattainment areas that would have attained the ozone standard "but for emissions emanating from outside the United States" (which, of course, would be beyond the reach of the good neighbor provision and a Section 126 petition). Third, Congress provided that a state in a multi-state ozone nonattainment area, *i.e.*, a single nonattainment area spanning more than one state, could be exempted from sanctions if its portion of the area would have attained but for the failure of the other state(s) to commit to implementation. And, fourth, Congress exempted areas with total populations under 200,000 from statutory sanctions if the area could demonstrate that attainment in the area was "prevented because of ozone or ozone precursors transported from other areas." *See* 42 U.S.C. §§ 7509a(b), 7511(a)(4) & 7511d(e). None of these provisions benefit the Baton Rouge area, which is up for reclassification rather than the initial classification, is not a border area claiming that it would have attained but for international transport, is not part of a multi-state ozone nonattainment area, and has a population well in excess of 200,000.

[8]*See generally* 64 F.R. 14441 (March 25, 1999)(discussing the July 1998 policy at length).

attainment schedule created by the Act for the upwind source by granting an attainment date extension to the downwind area.[9] The EPA stated that it would finalize this interpretation only in the context of individual attainment date extension requests, and judicial review would become available only "[a]t that time and in that context." Petitions challenging the ozone transport extension policy recently have been filed in other courts, following upon EPA grants of extensions in specific cases.[10]

***Factual and Procedural Background***

In 1991, the EPA designated the Baton Rouge Ozone Nonattainment Area as a serious ozone nonattainment area.

Neither the State of Louisiana nor the City of Baton Rouge-Parish of East Baton Rouge (the "City-Parish") submitted a Section 126 petition to the EPA at any time after 1991 requesting a finding that air pollutants emitted in Texas were significantly contributing to nonattainment of ozone standard in the Baton Rouge area. There is no evidence that the EPA made such a finding under Section 126(c) to enforce the good neighbor provision to address transport from Houston downwind to the Baton Rouge area.

The deadline for attainment for the Baton Rouge area fell on November 15, 1999. The State made no request for an extension of the deadline prior to that date.

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[9] *See* 64 F.R. 14441, 14443 (March 25, 1999). Ultimately, the merit of the EPA's statutory position is not a matter that will be resolved in this proceeding; and the Court therefore states only the gist of the agency's position here to frame the overall background. Extensive statements of the EPA's position can be found in 64 F.R. at 14442-44, and 66 F.R. 26914, at 26916-26 (May 15, 2001)(Beaumont extension grant).

[10] On July 13, 2001, a petition was filed in the Fifth Circuit challenging a Beaumont extension and another was filed in the Seventh Circuit challenging a St. Louis extension. In the D.C. Circuit, oral argument is set for February 4, 2002, on a challenge to a D.C. extension.

By letter dated May 10, 2000, the Louisiana Governor requested an extension of the attainment deadline pursuant to the EPA's July 1998 ozone transport extension policy. The Governor referred to a study performed for the Louisiana Department of Environmental Quality (DEQ) which reportedly indicated that transport of ozone and ozone precursors from Houston significantly contributed to nonattainment in Baton Rouge. The letter committed to submission of the state implementation plan elements required under the policy no later than August 31, 2001.

The deadline for the EPA to make and publish its determination as to attainment fell on May 15, 2000. The EPA did not make a determination by this date.

On November 22, 2000, LEAN filed this action for declaratory and injunctive relief, seeking to compel a determination by the EPA.

On May 9, 2001, LEAN filed the present motion for summary judgment.

On the same day, May 9, 2001, the EPA published a notice in the Federal Register setting forth proposed alternative action regarding the Baton Rouge area. The EPA proposed, first, to find that the Baton Rouge area failed to attain the ozone standard by November 15, 1999. The EPA cited test results reflecting that the area had not in fact attained the required standard. The notice stated that if the EPA took final action on this proposed finding, the area would be reclassified by operation of law as a severe nonattainment area. The EPA proposed, second, to consider the Baton Rouge area's potential eligibility for an attainment date extension pursuant to its July 1998 ozone transport extension policy, provided that Louisiana submit materials satisfying the extension policy criteria by August 31, 2001. According to the notice, the EPA does not intend to take final action on reclassification of the Baton Rouge area prior to allowing

Louisiana an opportunity to qualify for an attainment date extension under the extension policy. The notice further states that if the Louisiana submission fails to meet the criteria for the extension policy, the EPA will finalize the proposed finding of failure to attain; and the Baton Rouge area will be reclassified as an area of severe nonattainment. The comment period on both proposed actions ended June 8, 2001. See 66 F.R. 23646 (May 9, 2001).

On July 25, 2001, the EPA published a notice proposing a further extension of the State's submission deadline from August 31, 2001, to December 31, 2001, in response to a June 7, 2001, request for more time by the Louisiana Governor. According to the notice, the State originally assumed that only a small additional reduction in ozone precursors in the five-parish non-attainment area would be necessary. The State instead found, *inter alia*, that emission reductions needed to be made in a larger twelve-parish area and, further, that the necessary reductions of nitrogen oxide (NOx) emissions were "significantly greater than expected." The notice further reflected that the prior submittal date did not take into account a proliferation of proposed merchant power plants, which, according to DEQ modeling and then-pending permit applications, would represent over 14,000 tons per year of additional NOx emissions. See 66 F.R. 829424 (July 25, 2001).

According to the EPA, if Louisiana submits the necessary information for consideration of its extension request by December 31, 2001, the EPA will need nearly another full year, until December 15, 2002, to take final action on the extension request. The period includes six-and-one-half months to review Louisiana's submission and to

publish a notice of proposed rulemaking, and it further includes an additional five months to receive and analyze public comment and to prepare a notice of final rulemaking.[11]

Against the foregoing factual and procedural backdrop, only the following undisputed facts are necessary and material to the Court's ultimate recommendation:

(a) the Congressional deadline for an EPA attainment determination passed on May 15, 2000;

(b) the EPA has not made a determination as to whether the Baton Rouge area attained the required ozone standard by November 15, 1999;

(c) the EPA has not extended the November 15, 1999, attainment deadline under the express statutory provision in 42 U.S.C. § 7511(a)(5); and

(d) the EPA at this time has not extended the November 15, 1999, deadline pursuant to the EPA ozone transport extension policy.

***Principal Contentions of the Parties***

LEAN requests that the Court enter a judgment ordering the EPA to publish notice of a final attainment determination and any consequent reclassification within thirty days of the Court's order. Plaintiff contends that the EPA has a nondiscretionary duty to make the attainment determination under Section 7511(b)(2) and that this Court has authority to order the EPA to comply with this duty under 24 U.S.C. § 7604.

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[11]Interestingly, EPA counsel stated at oral argument that the EPA conducts ongoing review of the matter throughout, such that "its's not that a total package is presented to the EPA for the first time when the State makes its formal submission." EPA counsel further made factual representations to the Court regarding the extent to which Houston allegedly contributed to Baton Rouge ozone, which she stated were based upon "substantial information and computer modeling" provided by the State. Counsel maintained, however, that the process was "extremely complicated" and that the EPA still needed additional substantive information and modeling prior to taking final action.

The EPA admits that it has not made the determination required by the statute by the required statutory date. The EPA likewise does not contest the Court's authority under Section 7604 to order it to comply with this nondiscretionary duty. The EPA instead focuses its argument upon the nature and timing of the relief to be ordered as a result of its failure to comply with its statutory duty. The EPA contends that under the decision in *Weinberger v. Romero-Barcelo,*[12] the Court has the equitable discretion to order that the EPA may delay compliance with the statutory directive until it completes consideration of the still-to-be-perfected Louisiana request for an extension under the EPA's ozone transport extension policy. The EPA maintains that *Romero-Barcelo* authorizes the Court to balance the harms which would result by granting its request for more time versus ordering immediate compliance with the Act. The EPA contends that an order giving it time to consider the Baton Rouge extension request would provide "a more equitable and appropriate means of accomplishing the goals of the [Clean Air Act]" than would the order sought by LEAN, which triggers the remedial measures required by Congress upon a finding of nonattainment. Should the court not be persuaded by this argument, the EPA requests in the alternative that it be granted 90 days to analyze the comments received on its recent (May 9, 2001) proposed determination that the Baton Rouge area failed to attain the ozone standard by November 15, 1999.

LEAN replies, *inter alia*, that *Romero-Barcelo* does not authorize a district court (nor the EPA, for that matter) to use equitable discretion to nullify a Congressional directive, such as Section 7511(b)(2), which specifically limits the EPA's discretion. Plaintiff also

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[12]456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982).

notes that *Romero-Barcelo* turned upon a finding that the activities in that case posed no appreciable risk of harm. In contrast, LEAN continues, there is no dispute in this case that ozone poses a threat to public health, and there is no contention by any party that the Baton Rouge area presently is in compliance with the required ozone standard. LEAN points out that the EPA's continued delay in making the attainment determination simultaneously delays implementation of the mandatory safeguards established by Congress, which automatically change permitting standards and thereby reduce emissions of ozone precursors. LEAN argues that continued delay allows permits to "come in under the wire" and to be issued at an emission level that would not be allowed were the mandatory safeguards triggered and in place. Plaintiff concludes, therefore, that clearly this is not a situation where the delay poses no appreciable risk or harm, inasmuch as the delay allows harmful emissions to continue at a higher rate -- not only during the current delay but during the full term of the permits granted "under the wire" -- than otherwise would be allowed if mandatory safeguards were triggered according to the Congressional timetable.

LEAN further notes that a Louisiana extension request has not been perfected, much less granted; and an extension request that may be granted some day does not provide a basis for not complying with a nondiscretionary statutory duty today. LEAN also argues that the EPA's ozone transport policy constitutes an *ultra vires* act - the extension is not supported by the Act, and the policy not only contradicts the text of the Act, but also constitutes an attempt to create discretion where Congress specifically intended to negate agency discretion. In further support of its position on legislative intent, LEAN points out that not only does Section 126 clearly and specifically set out the remedy Congress

provided to downwind states for upwind ozone transport, but also Congress has always failed to adopt various legislative proposals which would have allowed downwind attainment date extensions on account of ozone transport.

In addition to its request for an order compelling the EPA to make a determination, LEAN requests that the Court make a finding of fact that the Baton Rouge area failed to attain the ozone standard by the required date. LEAN contends that the Court has authority to make such a finding under the Declaratory Judgment Act, 28 U.S.C. § 2201. The EPA argues in response that the Court's declaratory authority is circumscribed by Section 7604 and the limited waiver of sovereign immunity contained therein. It maintains that Section 7604 does not give the Court jurisdiction to make such a declaration.

And last, LEAN requested at oral argument that the Court not allow the EPA to delay the effective date for any determination it makes. Plaintiff contends that the Court has the authority to exercise its equitable discretion to ensure that the EPA does not circumvent the congressional mandate by delaying the effective date, which would, for all practical purposes, serve as a stay of the mandatory safeguards which would otherwise be in place as the result of a determination of nonattainment. The EPA contends in response that Section 7604 does not give the Court jurisdiction to limit the agency's exercise of its discretion in selecting an effective date after it makes its determination.

***Governing Law***

On LEAN'S motion for summary judgment, the question before the Court is whether the evidentiary materials on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When a summary judgment motion is properly made and supported under Rule

56(c), the nonmoving party must come forward with specific facts showing that there is a genuine issue of material fact for trial. *E.g., Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Of equally pertinent concern in this case, however, is jurisdiction. Lower federal courts may exercise only such jurisdiction as has been conferred by Congress, and federal district courts enjoy only a limited jurisdiction under 42 U.S.C. § 7604(a)(2) to hear citizen suits "against the Administrator [of the EPA] where there is alleged a failure . . . to perform any act of duty under this chapter which is not discretionary . . . ." Section 7604(a) specifically grants district courts "jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed."

Courts of appeals, on the other hand, have been designated by Congress as the only courts with authority to hear disputes concerning the interpretation and application of the Act. These issues come before the courts of appeals via a petition for review of final agency action under 42 U.S.C. § 7607(b)(1).

As a consequence of this bifurcation of jurisdiction, the Clean Air Act does not permit a district court to make substantive determinations of its own or to grant other forms of relief that, in essence, entail the making of a substantive determination. *See, e.g., Sierra Club v. Browner*, 130 F.Supp.2d 78, 82-83 & 90 (D.D.C.2001). Review of substantive issues is reserved to the court of appeals having jurisdiction over the petition for judicial review of the agency's final action. *Id.*, at 83. While there is a conceptual possibility of overlap between the two jurisdictional provisions, it appears that Congress intended that there be no overlapping or concurrent jurisdiction between a district court and

a court of appeals under Sections 7604 and 7607.[13] The district court therefore may compel nondiscretionary agency action that has been unreasonably delayed, but it must leave the resolution of subsequent substantive issues to the court of appeals.

***Prior Case Law***

The aforementioned *Sierra Club v. Browner* constitutes the only published decision to date in which a party sought to compel a Section 7511(b)(2) attainment determination. In that case, the EPA requested that the district court allow the EPA to delay compliance with the statute until after the agency received and reviewed state computer modeling on St. Louis' request for an extension under its ozone transport extension policy. The District of Columbia district court rejected this timetable, concluding that delaying compliance in this fashion "would effectively amount to condoning a fully discretionary approach to a nondiscretionary duty" and would "completely neutralize the mandatory nature of the statutory directive." 130 F.Supp.2d at 95. The court's January 29, 2001, order instead directed the EPA to make the required determination within 45 days of its order, *i.e.*, by March 12, 2001; and, as modified, the order directed the EPA to publish the required notice six working days later, by March 20, 2001.

The EPA made the required determination within the 45 day period, and it published a final notice of its determination that the St. Louis area failed to attain the standard, followed by publication of the resulting reclassification, on March 20, 2001. At the same time, however, the agency proposed to extend the effective date of the determination until June 29, 2001, which was the earlier of the two dates that the EPA had previously given

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[13] *See generally* Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 Ind. L.J. 65, 111-18 & 125-27 (1996)(outlining legislative history).

to the court as a possible date for completion of its proceedings on the St. Louis extension request. The agency ultimately, all between March 20, 2001, and June 29, 2001: (a) extended the effective date for the nonattainment determination, (b) granted St. Louis an extension of the attainment date under the ozone transport policy, and (c) withdrew the nonattainment determination and reclassification prior to the effective date for same. The EPA proposals and actions generated a flurry of post-judgment motions in the district court, which concluded, however, that it did not have jurisdiction under Section 7604 to address the content of the agency action taken. *See* rec.doc.nos. 78 & 87 (D.C. record excerpts.)

***Discussion***

The few facts material to the Court's decision are undisputed. The date established by Congress for attainment of ozone standards by the Baton Rouge area has passed. The date established by Congress for the EPA to make a formal and final determination with regard to attainment of the ozone standard likewise has passed. The EPA has not made the determination required by Congress; and, as the matter stands now, the Baton Rouge area attainment deadline has not been extended.[14]

There further is no substantial legal dispute that the plaintiff is entitled to an order directing the EPA to comply with its undisputed mandatory nondiscretionary duty to make

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[14]The other factual issues debated by the parties in the briefing are not material to the Court's decision, which turns simply upon enforcement of a nondiscretionary Congressional command. The question of how much time the Court should give the EPA to comply as a matter of its equitable discretion is not a "factual issue." *E.g., Sierra Club v. Ruckelshaus*, 602 F.Supp. 892, 898 n.9 (D.D.C. 1984). Otherwise, no party seeking to compel an agency action under Section 7604 would ever be able to compel the action without the additional delay of an unnecessary trial to determine whether the court should order compliance within one time frame rather than another. Section 7604 citizen suits routinely are resolved on a motion for summary judgment. *See, e.g., Natural Resources Defense Council, Inc. v. EPA*, 797 F.Supp. 194 (E.D.N.Y. 1992); *Sierra Club v. Ruckelshaus, supra; Natural Resources Defenses Council, Inc. v. Ruckelshaus*, 1984 WL 6092, at *3 (D.D.C. 1984).

a determination. The only legal disputes concern the amount of time that the Court should give the EPA to comply with the Congressional directive and whether the district court has the jurisdiction to grant LEAN's additional requests for relief.[15]

With regard to time for compliance, the Court is not persuaded that the *Romero-Barcelo* decision counsels in favor of delaying EPA compliance until such time as the agency completes proceedings on the still-to-be-perfected Louisiana request for an extension. In *Romero-Barcelo*, Puerto Rico filed an action for injunctive relief seeking to enjoin the Navy from continuing to bomb Vieques Island as part of its air-to-ground weapons training without first obtaining an EPA permit for discharge of ordnance into the water as required by federal clean water legislation. The district court specifically found there that the Navy's activities in discharging the ordnance into the water were not harming the environment under the Federal Water Pollution Control Act and that the lack of a permit thus constituted only a technical violation of federal law. The district court thus allowed the Navy to continue bombing Vieques while it went through the formalities of obtaining a permit that, once issued, would entail no change in the Navy's activities. The Supreme Court held that the district court had the equitable discretion to decline to order the Navy to stop bombing the island while it was securing the permit.

*Romero-Barcelo* is far, far afield from this case. First, *Romero-Barcelo* was a suit for injunctive relief against a violator rather than a Section 7604 suit to compel the agency's

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[15]The Court is unpersuaded by the industry intervenors' legal argument that the EPA has no enforceable duty to make an attainment determination until after the EPA completes proceedings on Louisiana's still-to-be-perfected ozone transport extension policy request. A mere unperfected extension request that may never be granted cannot suspend a clear Congressional command, a point which the EPA at least does not challenge.

performance of a nondiscretionary duty. Although prior Section 7604 cases cite *Romero-Barcelo* as additional support for the broad proposition that the district courts have equitable discretion to delay compliance, these cases also hold that this equitable discretion is limited in this context to delaying compliance only where the EPA shows that it is impossible or infeasible to meet the Congressionally imposed deadline. The courts consistently reject EPA requests that they second-guess Congress; and they studiously avoid getting involved in a determination of whether Congress' mandatory timetable is urgent, necessary, reasonable or important.[16]

Second, the environmental statute involved in *Romero-Barcelo* arguably afforded far more discretion as to timing than does the Clean Air Act. As the Supreme Court recently reaffirmed in another context, the Clean Air Act operates to limit rather than to expand discretion with regard to Congressional timetables. *See Whitman v. American Trucking Associations, Inc., supra.*

The Court need not rely on these two distinctions, however, because *Romero-Barcelo* is, on its face, distinguishable in substance from the present case.[17]

For, unlike the situation described in *Romero-Barcelo*, compliance with the Congressional directive makes a difference in this case. If the EPA determines that the area failed to attain the applicable ozone standard, the Act mandates that more stringent permitting and emission reduction standards then apply. The Court thus cannot conclude

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[16] *See, e.g., Sierra Club v. Thomas*, 658 F.Supp. 165, 171 & 174 (N.D. Cal. 1987); *Sierra Club v. Ruckelshaus*, 602 F.Supp. at 897 & 898.

[17] The Court accordingly assumes, *arguendo* that: (1) *Romero-Barcelo* permits a district court to delay compliance in a Section 7604 suit without an agency showing of impossibility of compliance; and (2) that *Romero-Barcelo* is not distinguished in substance due to a marked difference in the level of discretion permitted under the Clean Air Act.

that the failure to make the determination is merely a matter of technical noncompliance with the statute that makes no difference. Congress has determined both that ozone is harmful and that the specific steps that it ordered be taken following a nonattainment determination will reduce that harm. If the Court delayed compliance on the premise that the EPA's continuing failure to make a determination constitutes only a "technical matter" that can make no difference, it would have either to ignore or to override these Congressional judgments. Neither *Romero-Barcelo* nor the concept of equitable discretion contemplate such judicial activism.

The Court similarly is not persuaded by the remaining arguments of the EPA and intervenors that tend to suggest that making a determination in compliance with the statute makes no difference.

First, the EPA and intervenors suggest that compliance with the Congressional timetable makes no difference in this case because the area's ozone quality allegedly has improved. This argument begs the question. Congress has directed quite clearly that areas *attain* the federal ozone standard, not that they "show improvement." No suggestion has been made that the Baton Rouge area has *attained* the standard at the time of the Court's decision such that further action no longer is needed to meet the Congressionally established ozone standard.

Second, the EPA and intervenors suggest that making a determination in compliance with the Congressional timetable makes no difference because the plan being prepared by DEQ[18] allegedly would satisfy the federal ozone standard by the same

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[18]The plan, of course, still is a work-in-progress.

extended attainment date[19] through different means. This argument is a red herring. The proper question is whether the required determination *has* consequences under the Act, not whether some other proposal might be as good as or better than the consequences directed by Congress. A determination that results in reclassification indisputably has consequences under the Clean Air Act.[20] It is one thing to delay compliance with a Congressional directive on the premise that compliance constitutes only a technical matter. It is quite another to delay compliance with a determination deadline that triggers a specific remedial regime mandated by Congress on the premise that some remedial plan other than the one selected by Congress perhaps might achieve the same end on the same schedule.[21]

As the matter stands now, the Louisiana extension request has not been perfected, considered, or granted; and the EPA does not contemplate completion of its proceedings pursuant to its transport extension policy prior to December 2002. Indeed, the possibility remains that the extension may never come to pass. Whether this alternative contingent extension proposal, should it ever come to fruition, might constitute a valid and "more

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[19]Reclassification moves the area's attainment date back.

[20]Indeed, the intervenors premised their requests to intervene in this case on the extensive consequences that they maintained would follow from a determination and reclassification.

[21]The Court only assumes, *arguendo*, that the Congressional and EPA-DEQ timetables are substantially equivalent. The plaintiff maintains that compliance with the Congressional timetable will result in the 25 ton per year and offset reduction permit standard changes becoming effective immediately. In contrast, under the EPA-DEQ timetable, no actual emission reduction measures are contemplated prior to the EPA's completion of its review of the proposed revised SIP at the end of December 2002. While both alternatives have the same last-ditch date by which compliance with the federal ozone standard must be achieved, *i.e.*, the attainment date, the point at which air reduction measures *start* and begin improving air quality perhaps may be different under the two alternatives. The Court simply assumes, *arguendo*, that the alternatives are equivalent. For the reasons outlined in the text, the alleged equivalence of the Congressional and EPA-DEQ remedial schemes begs the question of whether compliance with the determination deadline is a matter having consequences rather than being simply a matter of mere technical statutory compliance.

equitable and appropriate means" of accomplishing the goals of the Clean Air Act than the measures specified by Congress in the Act is a matter that remains to be resolved on another day in another court. Meanwhile, continued delay frustrates clear Congressional directives that a determination as to attainment be made *now* and, if that determination is one of nonattainment, that specific mandatory measures be initiated *now* to reduce ozone causing emissions. Sound principles of judicial restraint counsel that the Court not use its equitable discretion to essentially negate what Congress has directed must happen and when.

The Court, in the exercise of its discretion, therefore should not delay the EPA's compliance with Section 7511(b)(2) for an additional year or more while it pursues the yet-to-be-perfected Louisiana extension request. The Court instead should order the EPA to comply with the statutory directive within the same 45 day period ordered in the *Sierra Club v. Browner* litigation.

The EPA advances no substantial reason why it cannot move with the same dispatch that it exhibited in the District of Columbia case, both when it made the determination in compliance with the district court's order and when it then moved to withdraw the determination before it became effective. The agency demonstrated the ability to move rapidly through any necessary technical review and procedural requirements, and it can do the same here. The district court is not required either to unquestionably accept or to conduct only deferential review of the agency's representations regarding the length of time required to complete administrative proceedings. Instead, the EPA has an "especially heavy" burden to show that it would be impossible or infeasible for the agency, acting in good faith, to proceed more expeditiously.

Claims of impossibility by the EPA are to be "carefully scrutinized;" and the primary recourse for the agency to obtain relief from mandatory statutory deadlines is Congress, not the courts. *See,e.g., Natural Resources Defense Council, Inc. v. EPA*, 797 F.Supp. 194, 196-98 (E.D.N.Y. 1992); *Sierra Club v. Thomas*, 658 F.Supp. 165, 169-75 (N.D. Cal. 1987); *Sierra Club v. Ruckelshaus*, 602 F.Supp.892, 898-99 (D.D.C. 1984). In this case, the EPA has not claimed, much less established, that it would be impossible for the agency to complete all necessary proceedings within 45 days.

The Court, however, does not reach the content of the determination ultimately made. Consistent with principles of judicial restraint and the limited jurisdictional grant in Section 7604, the Court should deny the plaintiff's request for a factual finding that the Baton Rouge area failed to attain the ozone standard by November 15, 1999. The Declaratory Judgment Act does not expand the Court's jurisdiction under Section 7604, and the Court has no jurisdiction to make such a finding or declaration in this proceeding.

The Court further should deny plaintiff's request for an order restricting the effective date that the EPA might select for its action. First, the Court cannot issue what in essence would be an advisory ruling regarding an effective date decision that the EPA has not yet made. Second, the Court in any event does not have jurisdiction under Section 7604 to dictate the particulars of the EPA's action.

Congress has granted to this court only that limited authority necessary for prodding the agency into taking final action. Any other issues regarding the validity or propriety of either the EPA's ozone transport extension policy or possible future agency proceedings or actions are for another day and another court. This Court's recommendation is simply

that the EPA be ordered to make the required determination and any resulting reclassification within the time period specified.

**RECOMMENDATION**

For the foregoing reasons, the Magistrate Judge recommends that the motion (rec.doc.no. 10) for summary judgment be **GRANTED IN PART** and **DENIED IN PART**, with the Court entering a final judgment ordering the defendant EPA to: (a) make, no later than 45 days after the date of the Court's order, a determination pursuant to 42 U.S.C. § 7511(b)(2) as to whether the Baton Rouge Ozone Nonattainment Area attained the applicable ozone standard by November 15, 1999; and (b) publish in the Federal Register no later than six working days after said determination notice of a final action reflecting both the determination and any reclassification of the area required as a result of the determination.

Baton Rouge, Louisiana, this 29th day of August, 2001.

MAGISTRATE JUDGE DOCIA L. DALBY