Comments to the Tennessee Department of Environment and Conservation
On the Draft Early Action Compact
Submitted by Undersigned Organizations
December 20, 2002

## I. INTRODUCTION

The undersigned organizations strongly urge the Tennessee Department of Environmental Conservation (TDEC) to reconsider its interest in entering into an Early Action Compact with the United States Environmental Protection Agency (EPA) and local areas struggling to meet the new 8-hour ozone standard. The Draft Early Action Compact is plagued by several basic problems.[1] First, it is doubtful that the approach will reduce pollution levels enough to comply with the 8-hour ozone standard. Second, it is clear from materials presented by the EPA and the TDEC that the Draft Early Action Compact seeks to impermissibly override the Clean Air Act and ignore the requirements of federal law. Third, the Draft Early Action Compact is unworkable in that it fails to provide a mechanism by which participating areas can come back into compliance with the Act in the event they succeed in achieving air quality reductions.

The Early Action Compact is a fundamentally flawed concept that sinks under the weight of its own illegality: it would lead participating areas so far astray that they would be incapable of reconciling themselves with the law even if they succeed in sufficiently reducing pollution levels. Tennessee and its communities should reject the Early Action Compact and the legal and procedural morass it promises.

## II. OVERVIEW OF THE EARLY ACTION COMPACT

The Draft Early Action Compact (EAC) is an awkward attempt to avoid several of the stringent pollution control measures selected by Congress to address the significant air quality problems that affect our communities. Rather than insist on compliance with the Clean Air Act, the EPA has invited areas that will likely fail to attain the new 8-hour National Ambient Air Quality Standard for ozone, but have managed to attain the older 1-hour standard, to participate in an alternative EAC. Tennessee has several areas that would be eligible under the scheme, and the state has prepared a draft compact to be submitted to EPA.

[1] This analysis of the Early Action Compact is based on the "Draft Early Action Compact for the State of Tennessee and Local Program Areas" (December 2002) (hereinafter "Draft EAC"), as well as the "Protocol for Early Action Compacts Designed to Achieve and Maintain the 8-Hour Ozone Standard" developed by the US EPA and the Texas Commission on Environmental Quality (formerly the "Texas Natural Resources Conservation Commission").

An EAC would allow participating areas to develop and implement control measures designed to bring about attainment of the 8-hour ozone standard. The EPA asserts that as long as a participating area meets several milestones, the Agency would defer the effectiveness of the area's nonattainment designation, thereby allowing the area to circumvent the Clean Air Act's specific programmatic requirements for nonattainment areas. In return, the area would have to submit its state implementation plan (SIP) for controlling ozone by the end of 2004, implement control measures in 2005, and demonstrate attainment with the 8-hour standard by the end of 2007.[2]

## III. THE EAC APPROACH IS UNLIKELY TO RESULT IN SUFFICIENT POLLUTION REDUCTIONS.

Part of the Draft EAC's appeal to areas struggling to meet the 8-hour standard is that the Compact would allow them to avoid nonattainment new source review and transportation conformity. However, new source review and conformity are typically the most effective means of reducing emissions in nonattainment areas. Required nonattainment measures were effective in bringing Nashville, Knoxville, and Memphis into attainment of the 1-hour ozone standard.[3]

The extent of Tennessee's nonattainment problem will not be solved without the proven measures required by the Clean Air Act. We believe that the lack of tools like transportation conformity and new source review would significantly reduce the ability of the larger metro areas in Tennessee to come into compliance with the 8-hour ozone standard. We feel very strongly that the state needs to remove Knoxville, Nashville, and Memphis from the Compact and only consider smaller metro areas that were not previously in non-attainment for the 1-hour standard in the EAC. These larger areas will require serious measures for mobile sector emission reductions only available through full implementation of the transportation conformity measures. While there are a multitude of voluntary measures available to local officials for emission reductions, we believe it is unlikely that local program areas will be able to jump the political hurdle of choosing the strongest, most effective measures such as inspection and maintenance programs due to the expense of such programs. Without required programs like transportation conformity and inspection and maintenance, we will not get the large reductions necessary for Tennesseans to truly see clean air early. Moreover, without the new source review programs, new power plants and industrial sources of air pollution will not be reviewed appropriately for their contribution to air quality problems.

## IV. THE EARLY ACTION COMPACT APPROACH IS EXTRA-LEGAL AND WOULD RESULT IN MULTIPLE VIOLATIONS OF THE CLEAN AIR ACT

[2] *See* Draft EAC; *see also* US EPA and the Texas Commission on Environmental Quality, "Protocol for Early Action Compacts Designed to Achieve and Maintain the 8-Hour Ozone Standard."
[3] Janice Nolen, American Lung Association.

The Draft Early Action Compact would substitute its terms for the requirements of the Clean Air Act. Such a step should not be taken lightly. The Clean Air Act is the product of several decades' worth of intense legislative effort and political compromise. It is an exceedingly broad, complex, and sophisticated legal document aimed not only at improving local air quality but also at addressing national issues such as the interstate transport of pollution. As such, it cannot be undone through a series of contracts executed by a subordinate federal agency.

The Draft EAC conflicts with several provisions of the Clean Air Act, particularly those sections of the Act that pertain to the state implementation plans (SIPs) and the maintenance plans required of nonattainment areas. Under the approach outlined in the Draft EAC, areas that violate the 8-hour NAAQS will still be designated as nonattainment. Although the Compact contemplates that the EPA will defer the effective date of those designations as long as the participating areas are meeting the Compact's milestones, the deferral is a contrivance that lacks any legal basis. There is nothing in the Clean Air Act that ratifies – or even conceives of – such an action. A nonattainment designation triggers a schedule under which SIPs are due, control measures must be implemented, and air quality standards must be attained. That schedule is at the center of the Act's strategy for bringing nonattainment areas into attainment. Deferring the effectiveness of a nonattainment designation would wreak havoc on that schedule and render it virtually meaningless. The deferral would directly conflict with the Act and is therefore illegal.[4]

The Clean Air Act requires that certain measures be implemented in areas designated nonattainment for ozone, including new source review and conformity analysis. New and modified major stationary sources within the nonattainment area are required to obtain emissions permits and submit to new source review.[5] Depending on an area's classification, these sources are also required to secure offsets of varying sizes in emissions of nitrogen oxides and volatile organic compounds.[6] Nonattainment areas are required to conduct conformity analyses to ensure that transportation plans and highway projects conform to the nonattainment provisions and that federal funds are not used in such a way as would adversely impact air quality.[7]

Despite the mandatory language of the Clean Air Act, the Draft EAC attempts to avoid these measures.[8] The Compact would not require participating areas to adopt any of the

[4] EPA's attempt to craft an exemption to the nonattainment requirements of the Clean Air Act is comparable to its botched efforts to grant extensions to areas that have failed to attain the 1-hour ozone standard. In a recent decision, the U.S. Court of Appeals for the 7th Circuit struck down the extension policy and reminded the Agency that "[i]t is not EPA's prerogative to disregard statutory limits on its discretion because it concludes that other remedies it has created out of whole cloth are better." *Sierra Club v. EPA*, 2002 U.S. App. LEXIS 24068, at *22-23 (7th Cir. November 25, 2002).
[5] CAA § 175(c)(5), 42 U.S.C. § 7502(c)(5); CAA § 182(a)(2)(C)(i), 42 U.S.C. § 7511(a)(2)(C)(i).
[6] CAA § 182(a)(4), 42 U.S.C. § 7511(a)(4).
[7] CAA § 176(c), 42 U.S.C. § 7506(c).
[8] *See* Draft EAC at 7 (specifically mentioning transportation conformity and new source review in a list of measures that could be avoided).

measures, but would rather let them rely on alternative methods such as enhanced vehicle inspection and maintenance in an attempt to come into compliance.[9] Such a plan would clearly contradict the specific programmatic requirements of the Clean Air Act outlined above.

The Draft EAC also runs afoul of the law with respect to maintenance plans. Tennessee's Draft Early Action Compact suggests that if a participating area demonstrates attainment by the end of 2007, the twenty-year maintenance plan required under Section 175A of the Clean Air Act would be inapplicable.[10] The Draft EAC would replace the Act's twenty-year maintenance period with a plan to check emissions growth for ten years after the attainment deadline.[11] These provisions treat the terms of the Clean Air Act as suggestive rather than obligatory. In order to redesignate an area as attainment, binding federal law requires EPA to make several determinations that are described in more detail below. One of those required determinations relates to the issue of whether "the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A."[12] To comply with Section 175A of the Clean Air Act, a maintenance plan must "provide for the maintenance of the national primary ambient air quality standard for [ozone] in the area concerned for at least 10 years after the redesignation."[13] The Act further requires that the applicable SIP be revised to ensure the maintenance of the standard for an additional ten years thereafter.[14] Therefore, unless an area commits to a twenty-year maintenance plan, it will not comply with the law.

The approach outlined in the Draft EAC would clearly result in multiple violations of the Clean Air Act. The EPA's decision to condone these violations would do little to shield them from citizens suits brought under Section 304 of the Act, 42 U.S.C. §7604. Should it proceed with an Early Action Compact, the Agency's failure to effectively designate nonattainment areas, its failure to require the nonattainment SIP measures specified in the Act, and its failure to require approvable maintenance plans would all be actionable. Lacking any legal justification, the framework developed under the Draft EAC would crumble and the participating areas would find themselves back in the statutory nonattainment SIP process, albeit well behind schedule.

## V. THE EARLY ACTION COMPACT APPROACH IS UNWORKABLE

A central facet of the EAC approach is that the EPA would defer the date on which a participating area's nonattainment designation becomes effective as long as the area complies with the terms of the Compact. We will ignore for now that such a deferment would be illegal

[9] *See* Draft EAC at 5, 7; *see also* US EPA and the Texas Commission on Environmental Quality, "Protocol for Early Action Compacts Designed to Achieve and Maintain the 8-Hour Ozone Standard."
[10] Draft EAC at 9,11 (although the compact suggests that the Air Quality Improvement Plan will address emissions growth through 2017, monitoring provisions are provided for only until 2012).
[11] Id.
[12] CAA § 107(d)(3)(E)(iv), 42 U.S.C. § 7407(d)(3)(E)(iv).
[13] CAA § 175(a), 42 U.S.C. § 7505a(a).
[14] CAA § 175(b), 42 U.S.C. § 7505a(b).

and assume that the participating areas will succeed in reducing ozone to attainment levels by December 31, 2007. The next step – the process by which EPA recognizes that the areas have achieved attainment – is problematic, to say the least.

According to the Draft EAC, "Provided that the area has progressed from nonattainment to attainment status by December 31, 2007, EPA will move expeditiously to designate the area as attainment and impose no additional requirements."[15] The overly simplified approach described in the draft Compact fails to appreciate that the area would have already been designated as nonattainment several years earlier. There is nothing in the Clean Air Act that allows the EPA to simply designate an area into attainment, particularly one that has previously been designated as nonattainment. Areas that have already been designated can only be redesignated according to the process outlined in Section 107(d)(3)(E) of the Clean Air Act, 42 U.S.C. § 7407(d)(3)(E). That process, however, is particularly incompatible with the EAC approach.

Section 107(d)(3)(E) states that the EPA "may *not* promulgate a redesignation of a nonattainment area (or portion thereof) *unless*—

> (i) the Administrator determines that the area has attained the national ambient air quality standard;
>
> (ii) the Administrator has fully approved the applicable implementation plan for the area under section 110(k) [pertaining to whether the plan is complete];
>
> (iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;
>
> (iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A [pertaining to maintenance plans]; and
>
> (v) the State containing such area has met all requirements applicable to the area under section 110 and part D [pertaining to state implementation plan requirements and requirements for nonattainment areas].[16]"

The EPA would be incapable of making the determinations required under Section 107(d)(3)(E). For example, the EPA would not be able to determine that the improvement in air quality is due to permanent and enforceable reductions due to the implementation of applicable Federal air pollutant control regulations, as required under Section 107(d)(3)(E)(iii). Areas that participate in an EAC will have intentionally avoided Federal air pollution controls such as nonattainment NSR and transportation conformity. Whether or not the EPA endorses an EAC at the outset, it cannot thereafter misrepresent the nature of the Compact. The EPA cannot legally determine that an area has complied with the federal pollution controls applicable to

[15] Draft EAC.
[16] 42 U.S.C. § 7407(d)(3)(E) (emphasis added).

nonattainment areas when the Agency itself has signed an agreement that purports to excuse the area from those very requirements.

Similarly, the EPA will be unable to "fully approve[] a maintenance plan" for an area that participated in an EAC "as meeting the requirements of Section 175A."[17] As discussed above, Section 175A(a) of the Clean Air Act necessitates that a state include in its state implementation plan provisions to ensure that the air quality will be maintained for twenty years after redesignation.[18] The Draft EAC, however, commits participating areas to address post-compliance emissions for only ten years. Without such a plan in place, the EPA would be unable to legally certify that the area has met the requirement of Section 175A.

Finally, Section 107(d)(3)(E)(v) requires a determination that the "area has met all requirements applicable to the area under section 110 and part D," which pertain to state implementation plan requirements and requirements for nonattainment areas, respectively. It has already been demonstrated that participation in an EAC is incompatible with the various nonattainment SIP-based requirements applicable to nonattainment areas under the Clean Air Act.

The Draft EAC would encourage communities to abandon the structure of the Clean Air Act without a providing a workable method of bringing them back into compliance once they have sufficiently reduced their pollution levels. Because participating areas will be incapable of making the requisite demonstrations to be redesignated as attainment, the will be at risk of remaining in nonattainment irrespective of their air quality.

## VI. CONCLUSION

The poor air quality in the Tennessee requires aggressive action by local, state, and federal governments using the strongest of enforcement measures available. The Southern Alliance for Clean Energy (SACE) and the undersigned organizations are extremely supportive of early and voluntary measures that reduce our air pollution and bring areas into attainment with the NAAQS. However, those measures should augment the enforceable requirements of the Clean Air Act, not supplant them. We are interested in working with TDEC to form early action plans to achieve cleaner air sooner, but we feel that measures must include the tested implementation programs of the Clean Air Act.

As mentioned earlier, we feel that the EAC is a fundamentally flawed concept that sinks under the weight of its own illegality: it would lead participating areas so far astray that they would be incapable of reconciling themselves with the law even if they succeed in sufficiently

[17] 42 U.S.C. § 7407(d)(3)(E)(iv).
[18] CAA § 175 (a)-(b), 42 U.S.C. § 7505a(a)-(b).

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