



**Clean Air Act:
Case Law, Legislative and
Regulatory Update 2009**

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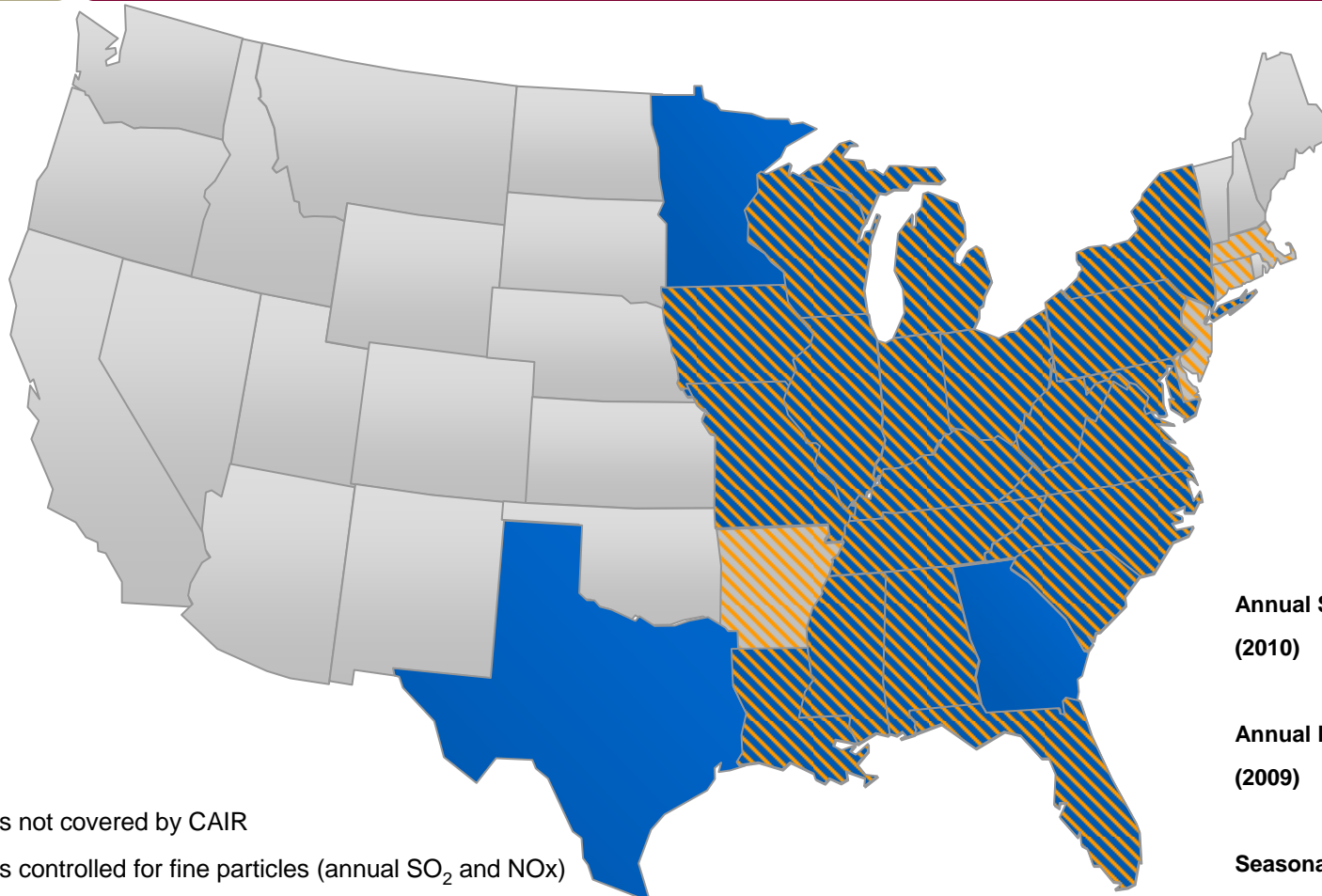
Overview

- **National Ambient Air Quality Standards (NAAQS)**
 - **Clean Air Interstate Rule (CAIR)**
 - **Particulate Matter**
 - **Ozone**
- **Greenhouse Gases (GHG)**
 - **Proposed Endangerment Finding**
 - **Clean Air Act (CAA) Implications, Existing Statute**
 - **Waxman-Markey Discussion Draft, CAA Changes**

Clean Air Interstate Rule Basics

- **Adopted under CAA section 110(a)(2)(D)**
- **States required to have plans that prohibit emissions that “contribute significantly to nonattainment in, or interfere with maintenance by, any other state....”**
- **CAIR would reduce nitrogen oxides (NO_x) and sulfur dioxide (SO₂) emissions from power plants through an emission trading program in two phases (2010 and 2015)**
- **Addresses precursors to ozone (NO_x) and particulate matter (NO_x and SO₂) to assist state efforts to attain the NAAQS**

CAIR: Affected Region and Emission Caps



- States not covered by CAIR
- States controlled for fine particles (annual SO₂ and NO_x)
- States controlled for both fine particles (annual SO₂ and NO_x) and ozone (ozone season NO_x)
- States controlled for ozone (ozone season NO_x)

Emission Caps*
(million tons)

	<u>2009/2010</u>	<u>2015</u>
Annual SO₂ (2010)	3.6	2.5
Annual NO_x (2009)	1.5	1.3
Seasonal NO_x (2009)	.58	.48

*For the affected region.

CAIR: North Carolina v. EPA

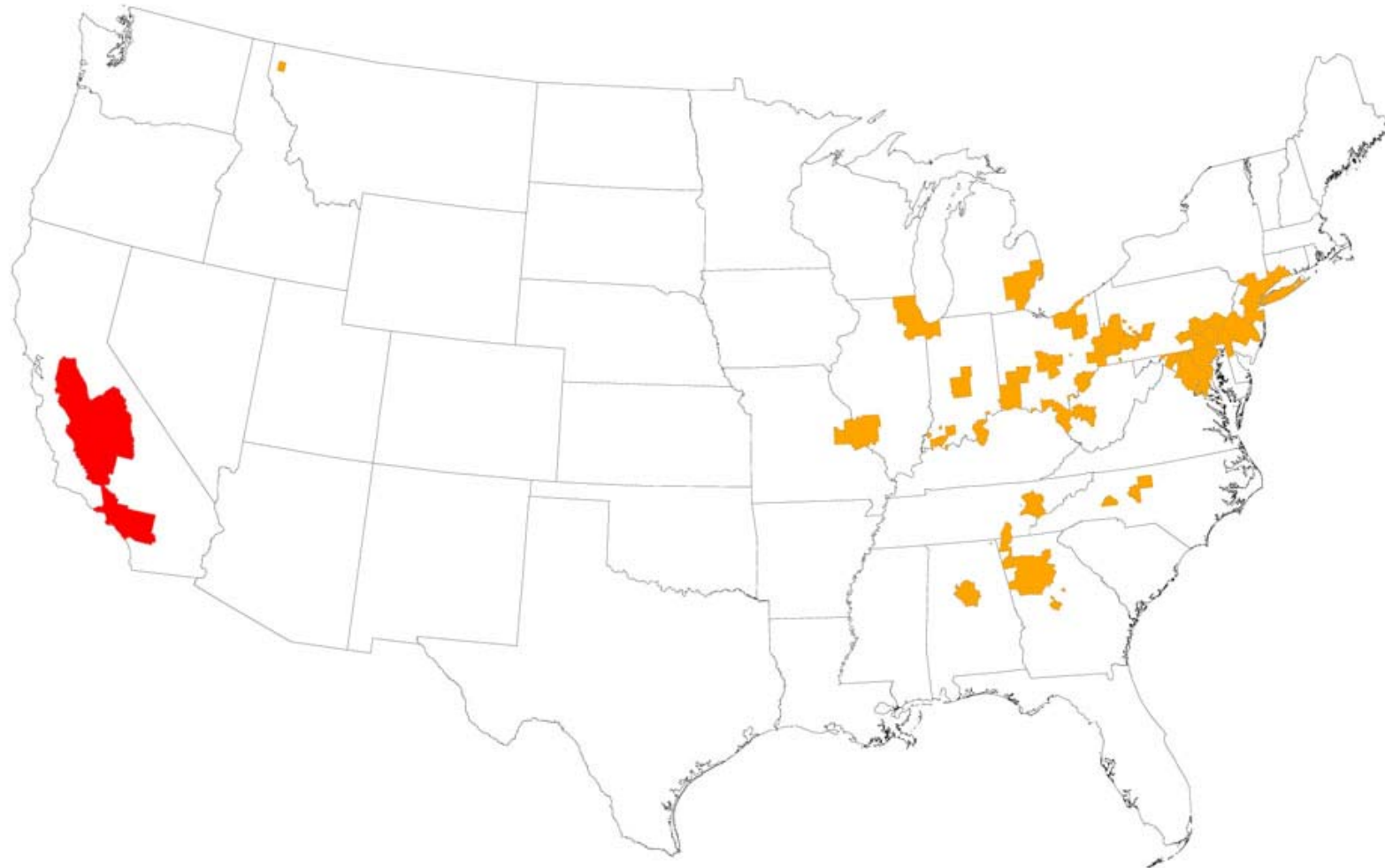
- **Emission trading program “fundamentally flawed;” allows states to emit less than or more than their emission caps**
- **CAIR lacks “upwind-downwind linkage” of a state’s emissions to downwind nonattainment states as required by CAA section 110**
- **CAIR fails to identify upwind states that interfere with maintenance of NAAQS compliance in downwind states**
- **Failure to follow statutory mandate leaves EPA “with no authority” for CAIR**
- **Court vacated CAIR initially, but later agreed to withdraw the vacatur while EPA develops a new program on remand**

Particulate NAAQS

- **PM 2.5 NAAQS: Revised in September 2006**
- **EPA lowered 24 hour Standard for PM 2.5**
- **EPA did not change annual PM 2.5 Standard**
- **EPA revoked annual PM-10 Standard**
- **EPA retained existing PM-10 Standard**
- **Implementation:**
 - **Designation of Nonattainment areas by 2010**
 - **State Implementation Plans due in 2013**
 - **Attainment deadline of 2015**

Currently Designated PM_{2.5} Nonattainment Areas - 1997 Standards

Violated annual and/or 24-hour PM_{2.5} standards with designated data (2001-2003*)



Legend

Nonattainment areas violating:

- both annual (15 $\mu\text{g}/\text{m}^3$) and 24-hour (65 $\mu\text{g}/\text{m}^3$) standards
- ONLY the 24-hour standard (65 $\mu\text{g}/\text{m}^3$)
- ONLY the annual standard (15 $\mu\text{g}/\text{m}^3$)

Number of Areas

2

0

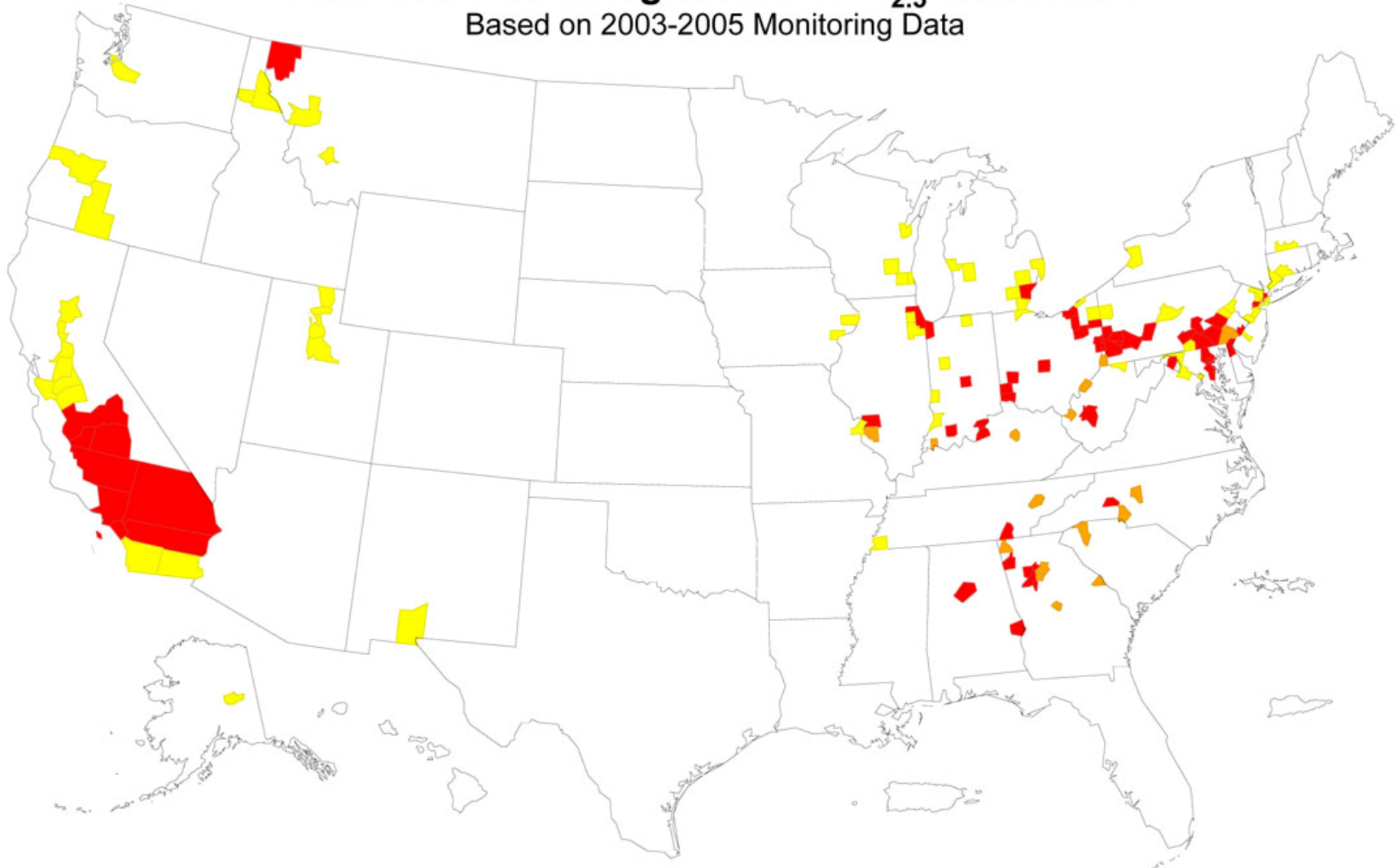
37

Total PM_{2.5} Nonattainment Areas 39

* 2002-2004 data were considered in the designation process but all nonattainment designations were based on 2001-2003 data

Counties Exceeding Revised PM_{2.5} Standards

Based on 2003-2005 Monitoring Data



Legend

County with monitor exceeding:

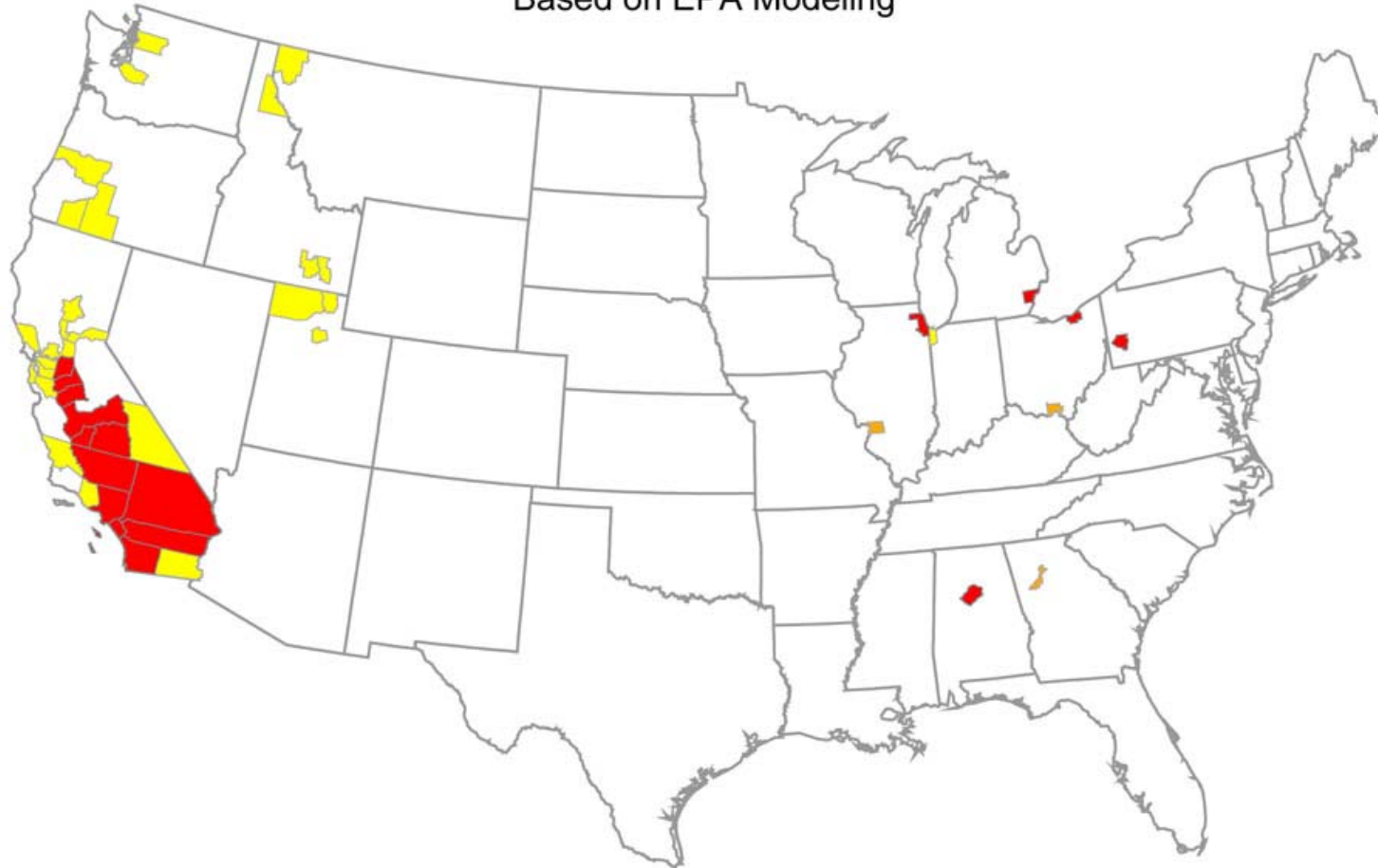
■ both annual (15 µg/m ³) <u>and</u> 24-hour (35 µg/m ³) PM _{2.5} standards	56
■ ONLY the 24-hour PM _{2.5} standard (35 µg/m ³)	70
■ ONLY the annual PM _{2.5} standard (15 µg/m ³)	17
Total Counties Exceeding	143

Number of Counties

- Data from AQS 7/10/2006
- Data completeness computed per CFR 7/10/2006
- EPA will not base designations for the new fine particle standards on these data.

Counties Projected to Exceed the Revised PM_{2.5} Standards in 2020

Based on EPA Modeling*



Legend

County with monitor exceeding:

- both annual ($15 \mu\text{g}/\text{m}^3$) and 24-hour ($35 \mu\text{g}/\text{m}^3$) PM_{2.5} standards
- ONLY the 24-hour PM_{2.5} standard ($35 \mu\text{g}/\text{m}^3$)
- ONLY the annual PM_{2.5} standard ($15 \mu\text{g}/\text{m}^3$)

Number of Counties

17

28

3

Total Counties Projected to Exceed

48

*Projections as of September 2006. EPA models assume implementation of CAIR/CAMR/CAVR, Title IV of the Clean Air Act, the NOx SIP Call, and some existing state programs. This approach does not forecast actions states will take to meet 1997 PM_{2.5} standards.

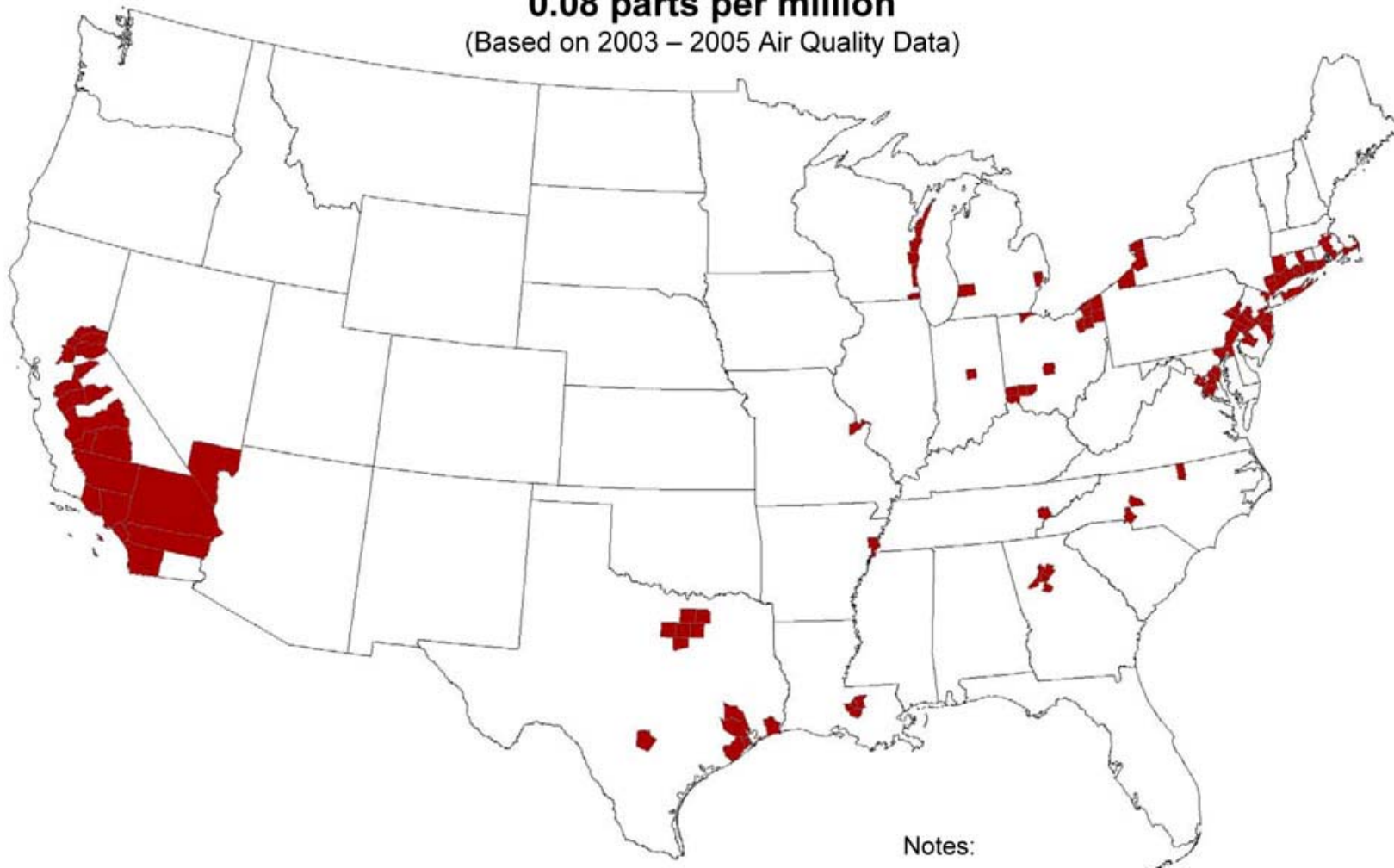
Particulate NAAQS: Am. Farm Bureau v. EPA

- **Court reversed and remanded EPA's revised NAAQS for fine particles (PM_{2.5}), both annual and 24-hour standards**
- **Court upheld EPA's NAAQS for coarse particles (PM₁₀), including repeal of annual standard**
- **Court found that EPA failed to adequately explain its reasoning in setting the standard in a way that did not follow the CASAC's recommendations, particularly regarding protection of vulnerable populations with an adequate margin of safety, under CAA section 109**

Ozone NAAQS Reconsideration

- **Ozone NAAQS: Adopted March 2008**
- **Prior standard was at 0.08 ppm (allowed up to 0.084 ppm due to rounding)**
- **EPA adopted 0.075 ppm**
- **Obama Administration has asked court for 180 days to reconsider the ozone standard**
- **Implementation:**
 - **Designations in 2010**
 - **State Implementation Plans due in 2013**
 - **Attainment deadlines from 2013-2030**

Counties With Monitors Violating the Current Primary 8-hour Ozone Standard 0.08 parts per million (Based on 2003 – 2005 Air Quality Data)



Notes:

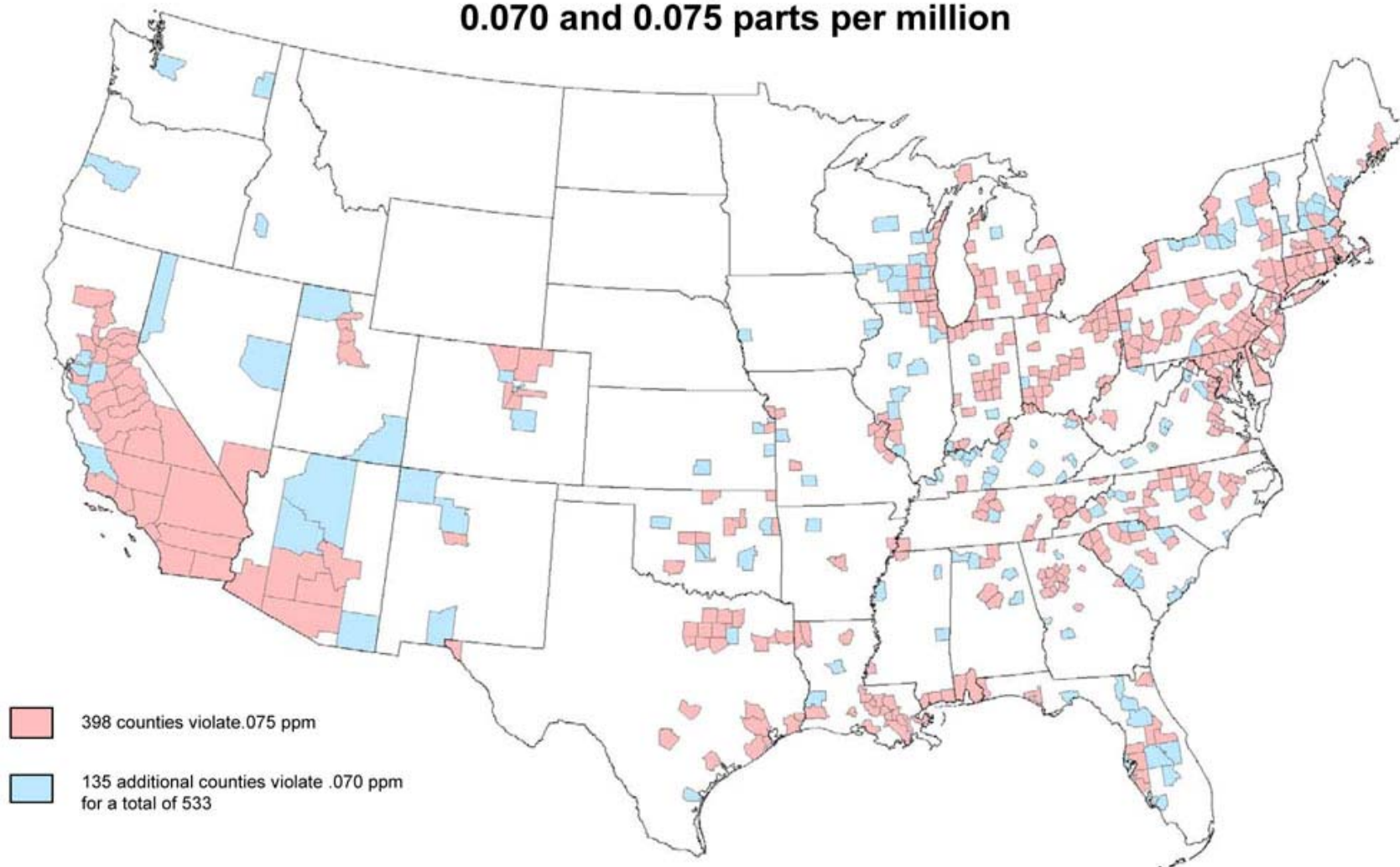
¹ 104 of 639 monitored counties violate.

² No monitored counties outside the continental U.S. violate.

³ Monitored data can be obtained from the AQS system at <http://www.epa.gov/ttn/airs/airsaqs/>

⁴ The current standard of 0.08 ppm is effectively expressed as 0.084 ppm when rounding conventions are applied.

Counties With Monitors Violating Alternate 8-hour Ozone Standards 0.070 and 0.075 parts per million



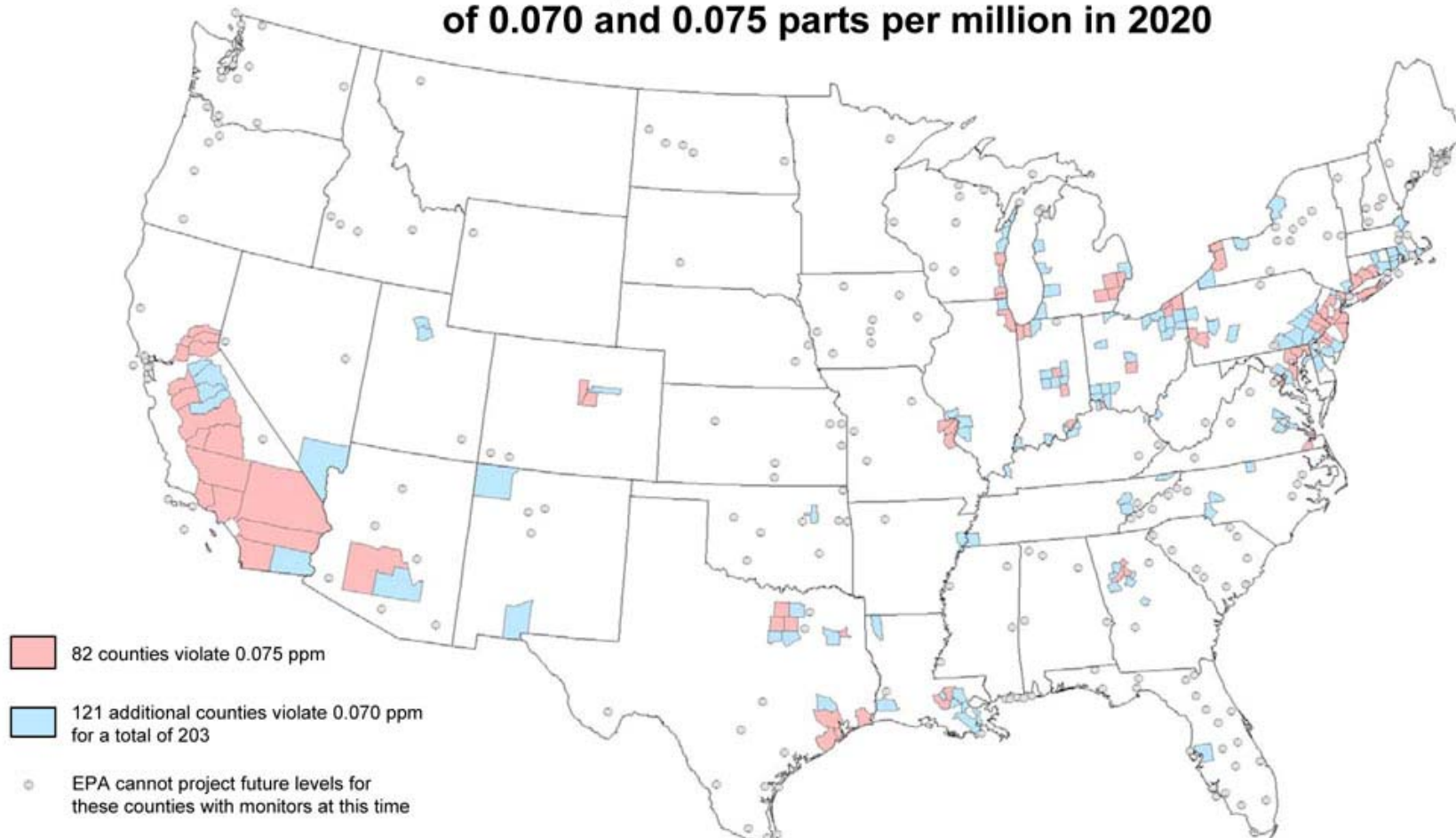
Notes:

¹ 398 of 639 monitored counties violate 0.075,
533 of 639 monitored counties violate 0.070.

² No monitored counties outside the continental U.S. violate.

³ Monitored data can be obtained from the AQS system at
<http://www.epa.gov/ttn/airs/airsaqs/>

Counties With Monitors Projected to Violate Alternate 8-hour Ozone Standards of 0.070 and 0.075 parts per million in 2020



Notes:

¹ Modeled emissions reflect the expected reductions from federal programs including the Clean Air Interstate Rule, the Clean Air Mercury Rule, the Clean Air Visibility Rule, the Clean Air Nonroad Diesel Rule, the Light-Duty Vehicle Tier 2 Rule, the Heavy Duty Diesel Rule, proposed rules for Locomotive and Marine Vessels and for Small Spark-Ignition Engines, and state and local level mobile and stationary source controls identified for additional reductions in emissions for the purpose of attaining the current PM 2.5 and Ozone standards.

² Controls applied are illustrative. States may choose to apply different control strategies for implementation.

³ Modeled design values in ppm are only interpreted up to 3 decimal places.

⁴ Consistent with current modeling guidance, EPA did not project 2020 concentrations for counties where 2001 base year concentrations were less than recommended criterion. Such projections may not represent expected future levels. These counties are shown on the map with a grey dot.

Greenhouse Gases and the Clean Air Act: Endangerment Finding

- **EPA proposed two findings on April 17, 2009:**
 - **Endangerment Finding: GHG are air pollution that can be reasonably anticipated to endanger public health or welfare**
 - **Cause or Contribute Finding: Mobile source emissions (“Section 202(a) sources”) can be reasonably anticipated to cause or contribute to GHG air pollution**
 - **Not accompanied by proposed regulations for Section 202(a) sources, which will follow in a few months**
 - **Response to remand from U.S. Supreme Court in *Massachusetts v. EPA***

Greenhouse Gases and the Clean Air Act: Other Actions Underway at USEPA

- **GHG Reporting Rule (Proposed March 10)**
 - Annual Reporting of GHG emissions from sources that emit over 25,000 tons per year, and from upstream suppliers of fossil fuels
 - Would cover 13,000 facilities and 85% of GHG emissions
- **California Vehicle Waiver Reconsideration**
 - Reconsideration of EPA denial of waiver for California GHG emission standards
 - Focus will likely be on meaning of waiver criterion requiring “compelling and extraordinary conditions”
- **New Source Review/Deseret Reconsideration**
 - Determination of whether GHG “subject to regulation” under the CAA
 - Consequence could be immediate NSR applicability to GHG

Greenhouse Gases and the Clean Air Act: Context

- **Application of Clean Air Act to a wholly different type of pollution issue than it was built to address**
- **Not attempted before without Congressional Amendments to the Act**
- **Lack the funding and phase-in provisions that are always part of a reauthorization**
- **Increased workload on NSPS revisions and SIP development**
- **Under current statutory permit thresholds:**
 - **Over 10 times more NSR permits (2500/year)**
 - **Over 35 times more Title V permits (550,000)**

Greenhouse Gases and the Clean Air Act: Massachusetts v. EPA

- **Court Review of EPA actions conducted under the Chevron standard:**
 - **First Step: Did Congress speak clearly. If so, implement according to plain language, with no deference given to the implementing agency**
 - **Second Step: If statute does not directly address the issue, court will evaluate whether agency’s interpretation of the statute is a “permissible” interpretation**
- **Effect of Chevron on Massachusetts v. EPA:**
 - **First standard applied, led to reversal of EPA determination not to regulate GHG**
 - **Second standard, if it had applied, likely would have led the Court to uphold the EPA decision not to regulate**

Greenhouse Gases and the Clean Air Act: Administrative Law Issues

- **Available Administrative Law Concepts if EPA wants to be excused from following the plain language of the Clean Air Act:**
 - **Action required by “Administrative Necessity”**
 - **Action necessary to avoid “Absurd Results”**
 - **It is unusual to be upheld under these tests**
 - **USEPA’s chances of success depend in part on how often it must resort to this defense**
- **Courts give less deference to agency interpretations of statutes and rules that change or are inconsistent with past practice**
- **If EPA can establish that it is not contradicting the plain language of the Clean Air Act, EPA needs to show that the actions that are not consistent with how it has administered programs in the past, have a rational basis**
- **The factual differences between greenhouse gases and all other air pollutants regulated under the Clean Air Act will help EPA sustain some actions**

Greenhouse Gases and the Clean Air Act: NAAQS

- **EPA Discretion to Not Have a NAAQS?**
 - Section 108 requires endangerment finding, multiple mobile and stationary sources, and pollutants “for which [USEPA] plans to issue air quality criteria”
- **Primary Standard: deadline for attainment**
- **Secondary Standard: no deadline; must meet “as expeditiously as practical”**
- **Pre-Chevron case found EPA had no discretion not to list a pollutant, once first two findings made under section 108 (NRDC v. Train)**

Greenhouse Gases and the Clean Air Act: NSPS

- EPA is limited to adopting achievable standards for sources based on adequately demonstrated technology
- Well-established practice to not address every regulated pollutant in an NSPS, just pollutants of concern from each source category
- There is an issue of the legality of an EPA suggestion that it could adopt phased technology-forcing standards, unless EPA can show them to be achievable
- Phased approach may contradict the plain meaning of the eight year review procedure in the statute
- While D.C. Circuit in New Jersey case did not rule on legality of EPA's mercury trading program, such a trading program under NSPS would be unprecedented.
- Section 111(d), for existing sources, may have more flexibility (but these standards cannot apply to NAAQS pollutants)

Greenhouse Gases and the Clean Air Act: NSR

- **Thresholds for a major source are statutory and recited in section 169 definition of “major emitting facility”**
- **EPA would have a plain meaning issue in interpreting to a more realistic level for greenhouse gases**
- **EPA may have more latitude in defining the significance threshold for modifications to existing facilities**
- **“Phasing in” of NSR permit requirements would contradict plain language of section 165 that prohibits commencing construction of a major facility without an NSR permit**

Greenhouse Gases and the Clean Air Act: Summary

- **The Clean Air Act is detailed, tailored to the issues Congress was addressing when it was enacted, and often provides little or no discretion to the EPA**
- **Air pollution regulation is very expensive, and intricate compromises had to be made to enact the requirements in the first instance**
- **Whether you view a particular innovative approach put forward by EPA as positive or negative, the courts have shown little tolerance for deviations from the plain text when reversing proposed actions**
- **There will likely be some additional court deference, given the remedial nature of the statute, if the courts consider the policy to be more protective of air quality, unless the courts find an action inconsistent with the plain meaning of the Act**

Waxman-Markey Discussion Draft: CAA Amendments

- **Adds two new titles to the CAA:**
 - **Title VII: Global Warming Pollution Reduction Program (economy-wide cap and trade program)**
 - **Title VIII: Additional GHG Standards**
- **Standards of Performance for new and existing uncapped sources with costs limited to projected allowances costs under cap-and-trade program**
- **Mobile Source standards required, must be harmonized with CAFÉ and California standards**
- **Hydrofluorocarbons regulated under CAA Title VI, with phase-out schedule out to 2039**

Waxman-Markey Discussion Draft: CAA Amendments

- **NAAQS: GHG not allowed to be listed as criteria pollutant based on climate change effects**
- **NSR Permit Program: would not apply to a GHG “solely” because of its effect on climate change or its being regulated under new CAA Title VII**
- **Title V Operating Permits: GHG emissions not considered in determining whether a source requires permit**
- **Hazardous Air Pollutant Regulation: GHG could not be listed unless it meets listing criteria apart from its effect on climate change**



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