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July 20, 2012

Lisa P. Jackson, Administrator  
United States Environmental Protection Agency Headquarters  
Ariel Rios Building  
1200 Pennsylvania Avenue NW  
Mail Code 1101A  
Washington, DC 20460

Re: SC Petition for Reconsideration: 2008 Ozone NAAQS Designations

Dear Administrator Jackson:

The South Carolina Department of Health and Environmental Control (DHEC) respectfully requests that the Environmental Protection Agency (EPA) reconsider its designation decision to include the current boundaries of the Rock Hill-Fort Mill Area Transportation Study (RFATS) Metropolitan Planning Organization (MPO), the municipal planning organization for the eastern side of York County, South Carolina, within the Charlotte, North Carolina nonattainment designation for the 2008 ozone National Ambient Air Quality Standards (NAAQS).

Since states are charged with carrying out the requirements of the Clean Air Act (CAA), EPA should give great deference to state recommendations for designating areas for the NAAQS. In a letter to EPA on February 29, 2012, DHEC requested that York County, in its entirety, be designated attainment for the 2008 8-hour ozone NAAQS. DHEC cited many facts for its attainment recommendation including improved air quality in the area, significant reductions in emissions since the ozone designations in 2004 (with the closest air quality monitor indicating levels well below the standard at 64 ppb), a back trajectory analysis, and extensive local voluntary programs that have contributed to overall improvement of air quality in the region.

As such, we are writing to request that EPA reconsider this decision based on these major concerns: (1) the appearance that the determination was rushed and made without adequate time to fully consider DHEC's submissions, (2) EPA has provided insufficient consultation and detail in its Technical Support Documentation (TSD) to give us a clear understanding of the rationale used in making the designation decision, and (3) the inconsistent application of scientific rationale. It is our hope that this request and subsequent conversations will ultimately lead to an improved consultation process and a better understanding of the scientific rationale for these and future designation decisions.

***Justification for Request for Reconsideration:***

**Rushed Decision**

We believe EPA made a final designation decision in a manner that did not adequately consider all the evidence – primarily based on inadequate time to review South Carolina's recommendation. The EPA published its decision nearly a month before the deadline to issue the 2008 8-hour ozone NAAQS

designations which resulted in very little time to consider critically important back trajectory and other scientific data submitted by DHEC. We feel that this fact alone provides a basis for reconsideration of the designations, as published.

By its own admission EPA states, “In those cases where timing constraints and the lack of additional information prevented a more detailed assessment, EPA believes that the default wind rose analyses, in conjunction with the remainder of the multi-factor analysis, can provide an adequate assessment of appropriate boundaries.”<sup>1</sup> DHEC did provide wind rose and back trajectory analysis in its February 29, 2012, recommendation to EPA. However, during the February 9, 2012, consultation meeting, EPA referred to and referenced a back trajectory analysis that EPA had performed. Despite a request by DHEC during the February 9<sup>th</sup> meeting, this referenced back trajectory analysis was never shared with DHEC (either within the 120-day consultation period or later in the EPA TSD). This, taken in conjunction with EPA’s response to DHEC’s kreiging analysis,<sup>2</sup> wherein EPA objects based on the fact that DHEC did not provide any “uncertainty analysis” for its methodology, further supports this request for reconsideration.

To date, EPA has not disclosed any current data or evidence to DHEC that questions the South Carolina methodology or supports any EPA alternative analysis. Absent such analysis or data to the contrary, we believe there should be a strong presumption that the DHEC analysis should stand. Furthermore, if EPA applied its own alternative rationale as part of its consideration on designations, it should have been a part of the TSD and/or, at a minimum, have been presented and discussed during the comment response period. The fact this did not happen, coupled with virtually no specific rebuttal of materials submitted by DHEC, strongly implies that EPA did not spend adequate time to undertake a thorough analysis of all the factors in developing their final boundary determinations.

### **Insufficient Consultation and TSD**

As previously mentioned, during the 120-day consultation period, DHEC and EPA Region 4 staff met to discuss South Carolina’s proposed attainment recommendation. This meeting was productive in that we were able to lay out DHEC’s rationale and gather initial EPA feedback in crafting South Carolina’s 120-day response to EPA’s initial recommendation. However, based on the understanding that at least two other affected entities would also be submitting separate recommendations, we left this meeting expecting there to be additional opportunities for consultation after all the recommendations were received and prior to a final designation being made. Further, in its February 29, 2012, 120-day response letter to EPA, DHEC expressly requested “continued discussions regarding these matters, especially if EPA receives boundary recommendations for this area that may be different from our submittal.” We contend that both during and after the required 120-day process for consultation set out by CAA Section 107(d), EPA did not adequately address requests for meetings, conference calls with headquarters, and discussions aimed at a meaningful understanding of the rationale used in its decision making, particularly the back trajectory/kreiging analyses.

We expected EPA to fulfill its obligation and continue its commitment to transparency<sup>3</sup> by providing us (as well as the public) with the scientific analyses, supporting documentation, and data, should they not

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<sup>1</sup> EPA’s *Responses to Significant Comments 2008 Ozone NAAQS, April 30, 2012*, 3.1.3 Meteorology, page 13, Docket Number EPA-HQ-OAR-2008-0476.

<sup>2</sup> Id at page 43.

<sup>3</sup> See Section 2 on Public Participation of the President’s January 18, 2011, Executive Order 13563 – *Improving Regulation and Regulatory Review*, last accessed February 17, 2012: <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>.

concur with South Carolina's recommendation. While we and EPA were able to discuss some issues in conference calls, insufficient feedback on the rationale used in EPA's decision was supplied to DHEC. In fact, EPA stated that much of the decision regarding the designation was 'deliberative'<sup>4</sup> and could not be shared. While we understand the purpose behind shielding some deliberative processes from public disclosure, this policy should not permit EPA to reject a state's submission of scientific data and technical analysis without disclosing any countervailing EPA data, information, or analysis relied upon to question the state's submitted facts and/or analysis.

We have yet to be made aware of any deficiencies in the DHEC recommendation. The 16-page TSD and 4-page comment/response document<sup>5</sup> does not provide enough detail to give us a clear understanding of the rationale used in making the designation decision. We acknowledge the failure of EPA to undertake more thorough and detailed discussions aimed at reconciling their assessment with that of DHEC may simply be due to overwhelming demands on EPA staff and does not reflect an unwillingness to ultimately release the information requested. Nonetheless, this possibility only reinforces, rather than mitigates the need to complete a meaningful consultation between the two agencies and a reconsideration of EPA's decision.

### **Inconsistent Application of Factors**

The "EPA acknowledges that the ozone monitor in York County is attaining the 2008 8-hour ozone NAAQS with 2009-2011 data at 0.064 parts per million (ppm). The presence of an attaining monitor in York County does not establish whether emissions activity in York County is contributing to violations in nearby counties."<sup>6</sup>

We do not agree with the notion, implied by this statement, that any area containing a source of emissions should forever be considered as contributing to far removed violations unless and until it can be conclusively proved otherwise. We strongly believe DHEC has adequately demonstrated, through scientific analysis that York County does not contribute (significantly or otherwise) to violations elsewhere. Still, we are keenly aware that we may be faced with a difficult burden of proof.

The word "contribute" in CAA Section 107(d)(1)(A)(i) is ambiguous.<sup>7</sup> The EPA has never defined nor established a bright line test for what is considered to contribute to a nonattainment area and courts have shown great deference to EPA's judgment in this regard. It therefore stands to reason and is entirely conceivable that despite whatever scientific argument is presented, EPA (and any subsequent court ruling) could find that any single source of emission could contribute to remote violations and, thereby, justify virtually any nonattainment area. Yet, such a position would not seem prudent or productive for EPA. If a nonattainment area can never definitively demonstrate compliance and subsequently achieve attainment status, there is little incentive for states and local jurisdictions to take remedial actions.

The EPA, as outlined in the TSD, designated the Catawba Indian Nation Reservation as a separate "unclassifiable/attainment" area. The EPA's decision regarding this designation was correct. However, the

<sup>4</sup> See Exemption 5 of the Department of Justice's *Freedom of Information Act Guide*, May 2004, last accessed June 22, 2012: <http://www.justice.gov/oip/exemption5.htm>.

<sup>5</sup> *Responses to Significant Comments 2008 Ozone NAAQS*, April 30, 2012, and Final Area Technical Support Documents, Charlotte-Rock Hill, NC-SC, last access July 16, 2012: [http://www.epa.gov/ozonedesignations/2008standards/documents/R4\\_Charlotte\\_TSD\\_Final.pdf](http://www.epa.gov/ozonedesignations/2008standards/documents/R4_Charlotte_TSD_Final.pdf).

<sup>6</sup> See Page 43, *Responses to Significant Comments 2008 Ozone NAAQS*, April 30, 2012.

<sup>7</sup> David Flannery, DC Circuit Upholds US EPA's PM 2.5 Nonattainment Designations, July 17, 2009.

two tracts of land constituting the Catawba Indian Reservation are nearly in the middle of and wholly surrounded by the current RFATS MPO boundaries that were used to define a nonattainment area in York County. There is no actual air quality data pertaining to the Indian lands; as there are no monitors within the Reservation. However, using the same data as that submitted by DHEC, EPA determined that “there is no indication that activities on the Catawba Indian Nation Reservation are contributing to the violations at the monitors in the Charlotte-Gastonia-Salisbury CSA.”

It would only seem logical that the same or similar reasoning would apply to most or all of the RFATS MPO as it also lacks an internal monitor and, more to the point, “EPA acknowledges that the ozone monitor in York County [immediately to the west of the RFATS area] is attaining the 2008 8-hour ozone NAAQS with 2009-2011 data at 0.064 parts per million (ppm).”<sup>8</sup> However, in stark contrast to its determination regarding the tracks of land in the Catawba Reservation, EPA notes in the TSD, “York County cannot be ruled out as a potential contributor to ozone violations at monitors in the Charlotte-Gastonia-Salisbury CSA.” According to the EPA findings, this is because nothing provided by South Carolina *conclusively* excludes transport of emissions from York County.

We contend these diametrically opposed findings, creating an attainment area inside a surrounding nonattainment zone, are both inconsistent and irreconcilable. The two rationales contradict one another and indicate that EPA did not consistently apply the 5 relevant factors in making its decision. We believe EPA should not have based decisions of this significance on such vague and conclusory assertions that there is either “no indication” of contribution or that a “potential” for contribution exists.

#### **Alternative Jurisdiction Boundaries**

Had the 120-day consultation period been more meaningful, the outcome in this decision might also have been materially different. The EPA defines consultation in Step 4 of its *Guidance to Regions for Working with Tribes during the National Ambient Air Quality Standards (NAAQS) Designations Process*;<sup>9</sup> “Consultation is generally defined as a process of meaningful communication and coordination between an EPA representative who is considered a decision-maker for the Agency (the Associate Division Director or above) and tribal officials or their designees.” The EPA further explains this as an opportunity “to engage in a *technical dialogue* [emphasis added] regarding the recommendations.” Step 10 of the same memo goes on to state, “When requested, consultation should be conducted after the 120-day letter is sent. This is especially important where a tribe disagrees with EPA’s intended designation.”<sup>10</sup>

While we realize that this Guidance is directed at the tribal designation process, we contend that South Carolina has yet to understand the scientific rationale used in this decision, despite its many requests. Ultimately we look forward to continued discussion aimed at understanding not only the true nature of air quality in this area, but also the designation process.

Because we have yet to be made aware of any specific claimed deficiencies in DHEC’s back trajectory analysis or in other materials submitted by DHEC and because, we did not anticipate different findings related to Indian lands and the area immediately surrounding them, South Carolina had no real reason to offer alternatives for a more compact nonattainment zone. The findings and recommendations we submitted were focused on York County as a whole because the data and analysis supported such a focus.

<sup>8</sup> See Page 43, *Responses to Significant Comments 2008 Ozone NAAQS*, April 30, 2012.

<sup>9</sup> Page 4, of the EPA Memo, *Guidance to Regions for Working with Tribes during the National Ambient Air Quality Standards (NAAQS) Designations Process*, December 20, 2011.

<sup>10</sup> *Id.* Page 5.



The EPA has clearly disagreed. However, had the consultation process afforded a greater opportunity for understanding the scientific basis for our disagreements, it is highly likely a better choice could have been made for a nonattainment area boundary.

By way of example, changes embodied in the recently released 2010 census require modifications to be made in the RFATS MPO boundaries. The process of MPO boundary change is actually already underway and must be completed early next year. Consequently, the very boundary designated by EPA will be changing in a matter of months. Smaller jurisdictional units, like townships, were used as nonattainment boundaries in neighboring North Carolina and the same and similar boundaries exist and could also be used in South Carolina. Alternative and more compact boundaries based on other jurisdictional boundaries could totally eliminate the inconsistent treatment of the Catawba Indian Nation lands as compared to adjacent properties and other included areas even farther away from the monitors showing violations in North Carolina. None of these factors have yet been considered because they have yet to be discussed.

We welcome continued discussions with EPA Region 4 staff and headquarters and invite each to participate in follow up talks aimed at addressing the concerns as outlined today. We look forward to the opportunity to discuss the technical aspects of EPA's decision in hopes that we can examine potentially smaller boundaries that may be more appropriate based on the 5 factors. Designating uncertain boundaries due to impending changes or drawing the boundaries larger than they need to be, based on an incomplete examination of all available data would place York County and the rest of South Carolina at an unfair economic disadvantage. Instead we'd like to discuss potential boundaries that might rely on more appropriate jurisdictional boundaries.

Furthermore, we also look forward to the opportunity to understand the designation process, to inform the consultation process such that it becomes more meaningful, and to give real credence to South Carolina and EPA's commitment to transparency in decision making. We understand that EPA Region 4 has been named the lead Air Agency for the next two years, starting in October 2012. As such we are committed to supporting this opportunity in any way we can; with the ultimate goal of evaluating needed improvements in the current process and proposing meaningful and practical solutions that reinforces South Carolina and EPA as co-regulators. This is especially important given the fact that EPA is expected to release a revised ozone NAAQS in 2013.

### **Conclusion**

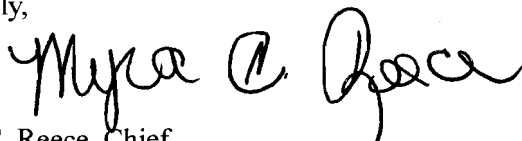
South Carolina's commitment to ensuring clean air for our citizens has been clearly demonstrated by DHEC's achievement of compliance with all NAAQS before or within statutorily mandated timeframes, but meeting the new standards will be extremely difficult. Statutory, regulatory, scientific, and technical limitations continue to hinder progress toward efficient and effective ways to reduce air pollution, improve air quality, protect public health and meet all of the NAAQS. Substantial progress has been made in improving air quality by implementation of the CAA, but significant changes are needed to meet the challenges that lie ahead. Since 1990, science related to air quality management has evolved and many requirements from 20 years ago are not appropriate today. A paradigm shift is needed, a shift away from a process that favors paperwork and procrastination toward a process that favors pollution reduction and public health.

*It is for the reasons outlined in this document, that we request EPA reconsider its designation decision. At a minimum, EPA should grant DHEC's request to have additional conversations aimed at appropriately*

*explaining its rationale and consider alternative recommendations. We believe it questionable that any portion of York County be included in the EPA designation; however if some designation is necessary, we believe it should only include a potentially smaller nonattainment boundary that would be the result of consistent application of the 5 factors.*

We look forward to the commitment of continued discussions aimed at establishing not only an understanding of this process, but also of a potential designation that makes sense for all the parties involved that is based on sound scientific rationale and a consistent approach.

Sincerely,



Myra C. Reece, Chief  
Bureau of Air Quality

ec: Ms. Gwendolyn Keyes Fleming, Esq., Regional Administrator, US EPA Region 4  
Ms. Beverly Banister, Deputy Regional Administrator, US EPA Region 4  
Chief Bill Harris, Catawba Indian Nation  
Mr. Randy Imler, Executive Director, Catawba Council of Governments  
Mr. James Baker, Manager, York County  
Mr. Funderburk, Mayor, Fort Mill, South Carolina  
Mr. Echols, Mayor, Rock Hill, South Carolina  
Ms. Catharine B. Templeton, Director, DHEC  
Mr. Robert W. King, Jr., P.E., Deputy Director, DHEC-EQC  
Mr. Harry Mathis, Director, DHEC-EQC Region 3

cc: Governor Nikki Haley  
Congressman James E. Clyburn  
Congressman Mick Mulvaney  
Congressman Trey Gowdy  
Congressman Joe Wilson  
Congressman Jeff Duncan  
Congressman Tim Scott  
Senator Lindsey O. Graham  
Senator Jim W. DeMint