THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DEC 14 2012

Ms. Robin Cooley
Earth Justice
1400 Glenarm Place, Suite 300
Denver, Colorado 80202

Dear Ms. Cooley:

I am pleased to respond to your July 19, 2012, letter in which you filed a petition for reconsideration on behalf of WildEarth Guardians, Southern Utah Wilderness Alliance and Utah Physicians for a Healthy Environment, concerning the U.S. Environmental Protection Agency's final rule, "Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards." *See* 77 *Federal Register* 30008 (May 21, 2012). The petition requests that the EPA reconsider its decision to classify Uintah and Duchesne Counties in the Uinta Basin as unclassifiable and to issue a new final rule designating the area as nonattainment.

The EPA has carefully evaluated the issues and information in your petition. For the reasons provided in the enclosure, the EPA is denying your petition. The EPA continues to believe that Uintah and Duchesne Counties in the Uinta Basin were properly designated unclassifiable because of the lack of regulatory monitoring data to support a defensible designation of either attainment or nonattainment.

The enclosure addresses the specific issues raised in your petition and provides the basis for this denial. The EPA hopes that the responses will help to explain the agency's conclusions so that you will better understand our final decision. The EPA considers the quality assurance of data used to support designation decisions an essential consideration in implementing the 2008 ozone standards.

In the meantime, I thank you for your interest in protecting the quality of our environment.

Sincerely,

Lisa P. Jackson

Enclosure

Enclosure

EPA Response to Petition for Reconsideration from Earthjustice

By letter dated July 19, 2012, Earthjustice petitioned the EPA to reconsider the final 2012 ozone area designation for Uintah and Duchesne Counties in the Uinta Basin Unclassifiable Area. For the reasons discussed below, the EPA is denying the petition. For the sake of clarity, we have organized this response according to the structure of the July 19, 2012 petition.

Background

In a letter from the EPA Region 8 Regional Administrator James B. Martin to Utah Governor Gary R. Herbert dated December 8, 2011, the EPA notified the State of Utah how it intended to modify the state's recommendation regarding designation of areas within the state for the 2008 ozone National Ambient Air Quality Standards (NAAQS). Among other things, the EPA stated that it intended to designate the Uinta Basin of Utah as an unclassifiable ozone area because, while existing monitors in the basin showed ozone concentrations above the level of the standard, the monitors were classified as non-regulatory.

On December 20, 2011, the EPA published a notice in the *Federal Register* providing the public with an opportunity to comment on the EPA's letters to the states setting forth whether and, if so, how it intended to modify state designation recommendations. The EPA received one public comment, from WildEarth Guardians, (one of the parties to this petition) regarding its intended designation of the Uinta Basin. The comment asserted that the term non-regulatory is not defined in either the Clean Air Act (hereinafter the Act) nor in the EPA regulations, and thus the EPA should designate the Uinta Basin as a nonattainment area based on the non-regulatory data in the EPA AQS air quality database.

In response to this comment, the EPA prepared a detailed response [EPA Response to Comments (RTC), pp. 72-74] summarizing our concerns about using the data from the available monitors in the Uinta Basin for regulatory decisions, and specifically for designation purposes. The available data in the basin, from the first efforts to survey air quality in this remote area, was a combination of data collected by industry under enforcement consent decrees which could not comply completely with regulations intended for government monitoring operations, and research monitoring by the National Park Service using monitors which were not federal reference or equivalent methods.

Petitioner's Arguments

I. The EPA did not provide an opportunity for comment on the EPA's response to comments.

Issue: The petitioner asserts that the EPA must reconsider the Uinta Basin unclassifiable designation because the EPA's rationale for considering the Uinta Basin data non-regulatory appeared for the first time only in the EPA's RTC document so that it was impracticable for petitioners to comment on that rationale. Petitioners also assert that publication of the RTC occurred after the date of the final rule.

Response: The EPA submitted the RTC to the electronic docket on April 30, 2012, the date the Administrator issued the designations. The docket staff uploaded the RTC for public viewing on May 16, 2012. As a general matter, agencies are not required to provide an additional opportunity for public comment on RTCs or on information supporting an RTC. Such an approach would result in an unworkable, endless rulemaking process.

With regard to the designation process, there is another reason that an additional opportunity for public comment is not warranted. Section 107(d)(2)(B) of the Act specifically waives the notice and public comment process of the Administrative Procedure Act for initial area designations for new or revised NAAQS. Although no public comment period is required, the EPA opted to provide such a comment period for the 2012 ozone designations.

Moreover, we do not believe that any information provided in the RTC document establishes grounds for re-opening the designation pursuant to a petition for reconsideration. The information in the RTC merely provides further explanation of the EPA's rationale for not relying on the non-regulatory monitors for purposes of establishing a nonattainment designations category for the area and does not create a new justification for the EPA's decision.

II. The EPA cannot disregard sound reliable data.

Issue: The petitioner asserts that Congress intended in the Act that the EPA make attainment decisions based on "available data." Since the Uinta Basin data are available and show a violation, the EPA must find the area to be in nonattainment, rather than unclassifiable.

Response: The Petitioner could have raised this issue during the comment period and failed to do so; thus, this issue is not a proper basis for reconsideration. We disagree that Congress evidenced any specific intent regarding what data should be considered for designations. Most NAAQS, as defined by 40 CFR Part 50, explicitly require that data used for comparison to the NAAQS come from ambient monitors operating in accordance with 40 CFR Part 58. For ozone, this requirement is not explicit in Part 50, but the EPA made clear in the rulemaking establishing the 2008 8-hour ozone NAAQS that such compliance was needed to allow monitored data to be used for NAAQS compliance. For example, *see* 73 FR 16502 regarding upgrading the EPA CASTNET ozone monitors to compliance with 40 CFR Part 58, Appendix A: "EPA notes that the resulting O_3 ambient data from the upgraded sites will meet Appendix A requirements as is presently the case for O_3 data from State operated monitors and NPS monitors. These data will be ***deemed acceptable for NAAQS comparison objectives*** and available in the AQS database beginning in 2008" (emphasis added).

The requirement that monitors used for NAAQS compliance be operated in accordance with Part 58 derives from the Act, where Section 319 (42 USC § 7619) states that "the Administrator shall promulgate regulations establishing an air quality monitoring system throughout the United States which — (1) utilizes uniform air quality monitoring criteria and methodology" and further states that "Any air quality monitoring system required under any applicable implementation plan under section 7410 of this title shall, as soon as practicable following promulgation of regulations under this section, utilize the standard criteria and methodology . . . established under such regulations." On May 10, 1979, the EPA published a final rule promulgating 40 CFR Part 58, stating (44 FR 27558) "Criteria to be followed when measuring air quality and provisions for daily air pollution index reporting are established in Part 58 as required by Section 319 of the Act." Thus Part 58 of the Code of Federal Regulations defines the regulatory methodology for ambient air monitoring required by the Act.

Although we disagree that Congress required the EPA to rely on the non-regulatory monitors for purposes of determining whether these areas are violating the 2008 ozone NAAQS, the EPA did not disregard the non-regulatory data from the Uinta Basin; in fact, the data are the reason the EPA designated the Uinta Basin of Utah as unclassifiable for the 2008 ozone NAAQS.

III. The EPA's failure to approve the monitoring Quality Assurance Project Plan (QAPP) does not call into question the data validity.

Issue: The petitioner asserts that the EPA does not identify any regulation requiring the EPA approval of QAPPs for the specific circumstances surrounding the operation of the monitors in question (that is, monitors run by industry under enforcement settlement agreements), and further that the EPA's failure to approve the plan is merely a technicality and does not provide adequate justification for not using the data.

Response: The EPA's regulations for ambient air monitoring at 40 CFR Part 58 deal exclusively with regulatory monitoring by state and local governments or monitoring under governmental oversight for Prevention of Signification Deterioration purposes. For governmental agencies collecting regulatory data, the regulations specify how to gather and quality assure the data; the regulations include aspects difficult if not impossible to achieve without governmental involvement, and so cannot be implemented completely by private entities. A Quality Assurance Project Plan (QAPP) is a specific tool required by the EPA for governmental monitoring which documents the standard procedures, actions, personnel and methods used in a specific monitoring operation to ensure the day-to-day operations of the monitoring program result in data of quality sufficient to meet 40 CFR Part 58 requirements and withstand court challenge. The QAPP prepared for the non-regulatory Uinta Basin monitors (which neither the EPA nor the State of Utah approved) and the quality assurance data available at the time of designations (collected under the requirements of that QAPP) are not complete enough to allow the EPA to determine that the data are appropriate for determining that a violation of the NAAQS has occurred for designations purposes.

IV. The EPA had the authority under the controlling consent decrees to oversee the Uinta Basin monitoring.

Issue: The petitioner cites the data reporting requirements of the consent decrees pursuant to which the monitoring was established, and EPA's ability to bring contempt proceedings in federal court should the EPA need to direct corrective action for monitoring errors or deficiencies, as evidence that the EPA had sufficient oversight of the monitors to ensure regulatory monitoring was conducted.

Response: The EPA considered the monitoring required by the consent decrees to be non-regulatory from the outset. *See* page 320 of the appendix to the Earthjustice petition, consisting of page 22 of the Memorandum in Support of Motion to Enter Consent Decree, Attachment 1, United States v. Miller, Dyer & Co., LLC, Case 2:09-cv-00332-DAK (D. Utah) (filed Sept. 1, 2009): "The air monitoring under these consent decrees was not designed for a specific regulatory purpose such as determining compliance with the NAAQS. However, the data collected will be extremely useful to determine trends in emissions in the area. The EPA would have to re-negotiate this settlement and the Colorado Interstate Gas settlement to make the necessary changes to allow data collected to be used to determine NAAQS compliance." Regulatory monitoring requires a higher level of oversight than was conducted for the non-regulatory monitoring required by consent decree. No after-the-fact activities can substitute for oversight which did not occur at the time.

V. Quality Assurance of Monitoring Data

Issue: The petitioner asserts that because raw data from August, 2009 through September, 2011, and quality assurance data from August 2009 through January 2010 are in the EPA's air quality database, the data from the monitors are quality assured, even if the EPA has not approved the quality assurance project plan. The petitioner assumes that the EPA's issue with considering the data quality assured is based on the date in 40 CFR Section 58.15(a) when state or local monitoring agencies are to certify data (May 1 of the year following data collection).

Response: The petitioner's statement that the presence of some limited quality assurance data indicates all the data are quality assured is contrary to monitoring quality assurance regulations. Quality assurance data consist, primarily, of biweekly single point quality control (QC) checks, used to assess the precision and bias a given instrument is displaying in its day-to-day measurements, and annual independent performance evaluations (audits) of equipment, which rely on independent staff and measuring systems to confirm that the monitors are operating as expected and required (*see* 40 CFR Part 58, Appendix A, cited in the RTC at pp. 72-73). For the Uinta Basin monitors, biweekly QC check data and daily span check data are available in AQS only for August 2009 through January 2010, and no independent multi-point audit data are available. Without complete records of both types of quality assurance data, the data cannot be considered quality assured. The petitioners' assumption that the EPA did not use the data for designations because of a lack of certification of the 2011 data is incorrect; rather, the EPA does not consider the data appropriate for designation purposes because it does not meet the criteria for quality assurance.

VI. The EPA's refusal to rely on information other than "regulatory monitoring" is inconsistent with EPA's own policies and past practice.

Issue: The petitioner asserts that the EPA's insistence that monitoring data be "regulatory" is inconsistent with 1) the EPA's suggestion that it would use modeling for SO_2 designations; 2) the EPA's prior use of modeling data in designating Billings, Montana nonattainment for SO_2; and 3) the EPA's use of data other than from regulatory air quality monitors in establishing boundaries for nonattainment areas.

Response: The Petitioner could have raised this issue during the comment period and failed to do so; thus, this issue is not a proper basis for reconsideration. Nevertheless, we disagree that the EPA's proposed use of modeling for purposes of designations for the SO_2 NAAQS is inconsistent with or relevant for the EPA's decision to rely on air quality monitoring consistent with the EPA's regulations for purposes of designations for the 2008 ozone NAAQS. The EPA has never relied on modeling data, or anything other than quality assured data from monitors that are part of an approved monitoring system for ozone designations.[1]

---

[1] *See* 77 FR 30091: "The final ozone designations are based primarily on certified air quality monitoring data from calendar years 2008–2010, which was the most recent certified data available to the EPA at the time the EPA notified the states of its intended modifications to their recommendations"; 69 FR 23860: "Therefore, today's designations and classifications are generally based on monitoring data collected in 2001–2003 although other relevant years of data may have been used in certain circumstances"; 56 FR 56697: "The primary years the EPA used for purposes of designations and classifications pursuant to this notice were 1987-1989 (3-year period for ozone and 1988-1989 (2-year

In contrast to ozone, which is a regional secondary pollutant, elevated short-term SO_2 data often results from direct impingement of plumes. Direct impingement is highly variable spatially, and thus can be difficult to detect only through monitoring. EPA has therefore historically relied on both monitoring and modeling to determine whether an area is violating the SO_2 NAAQS. *See* 75 FR 35554: "For a short-term 1-hour standard, dispersion modeling of stationary sources will generally be more technically appropriate, efficient, and effective because it takes into account fairly infrequent combinations of meteorological and source operating conditions that can contribute to peak ground-level concentrations of SO_2. Even an expansive monitoring network could fail to identify all such locations." Moreover, the EPA's review of a wider variety of data to determine whether an area is contributing to a NAAQS violation (that is, in setting boundaries) is not inconsistent with its historic approach of relying solely on monitoring data to determine whether an area is violating a NAAQS. Setting boundaries around areas contributing emissions to a violating monitor must inherently use methods other than air quality monitoring, as the scientific questions involved are different.

VII. New information demonstrates the need for a nonattainment designation.

Issue: The petitioner points to continued leasing of lands within the Uinta Basin for oil and gas development as a sign that the emissions leading to elevated ozone in the basin are likely to continue to increase in the absence of a nonattainment designation.

Response: We disagree that these future and ongoing activities support reconsideration of the designation. The CAA provides for redesignation of areas as an appropriate mechanism to address changes that arise after the EPA has issued the initial designations. However, until the area has sufficient regulatory monitoring data, the EPA would not be able to consider redesignating the area from unclassifiable to either attainment or nonattainment. The EPA is working with the Ute Indian Tribe of the Uintah and Ouray Reservation, the Utah Department of Environmental Quality and with local industry to collect sufficient regulatory data in the basin to allow redesignation.

---

period) for CO. In some cases, the EPA used complete 1988-1990 (ozone) or 1989-1990 (CO) data if they were quality assured and publicly available in the AIRS [Aerometric Information Retrieval System (EPA's National Air Quality Database)] by February 13, 1991, and the state requested that EPA use it."