UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 14 2012

THE ADMINISTRATOR

Mr. Michael K. Stagg
Waller Lansden Dortch & Davis, LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219-8966

Dear Mr. Stagg:

I am pleased to respond to your July 12, 2012, letter in which you filed a petition for reconsideration on behalf of the Shelby County, Tenn., concerning the Environmental Protection Agency's final rule titled, "Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards." *See* 77 *Federal Register* 30,008 (May 21, 2012). The petition requests that the EPA reconsider the nonattainment designation for Shelby County, Tenn., as part of the Memphis, Tennessee-Mississippi-Arkansas ozone nonattainment area.

The EPA has carefully evaluated the issues and information in your petition. For the reasons explained in the EPA's final designation action and information provided in the enclosure, the EPA is denying your petition. The EPA continues to believe that Shelby County, Tenn., is properly designated nonattainment because it violated the 2008 ozone standards with 2008, 2009 and 2010 ozone air monitoring data.

The enclosure provides additional information on the EPA's decision to deny your petition beyond what is already provided in the docket for the May 21, 2012 rulemaking. The EPA considers the designation of nonattainment areas with appropriate boundaries to be an important step in implementing the 2008 ozone standards.

We appreciate the steps you have taken to reduce ozone levels, providing cleaner, healthier air in Tennessee. We look forward to working with you and your staff to ensure achievement of the 2008 ozone standards in the Memphis, Tennessee-Mississippi-Arkansas area.

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

Sincerely,

Lisa P. Jackson

Enclosure

Enclosure

The EPA Response to Petition for Reconsideration from Shelby County, Tennessee

By letter dated July 20, 2012, the firm of Waller, Lansden, Dortch & Davis, LLP, on behalf of Shelby County, Tennessee (TN), petitioned the EPA to reconsider the final area designation for Shelby County in the Memphis, Tennessee-Mississippi-Arkansas (TN-MS-AR) ozone nonattainment area. Also, on September 18, 2012, Waller, Lansden, Dortch & Davis, LLP, on behalf of Shelby County, TN, sent the EPA, via email, a supplement to the July 20, 2012 Petition. 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 20, 2012, petition.

The Petitioner adopts TN's Petition and incorporates it into their Petition by reference. Please see the EPA response to the TN petition for reconsideration in addition to the responses below that are specific to the Petitioner's petition for reconsideration.

I. Consistency with Other EPA Regional Offices

Issue: The Petitioner claims that Regions 4 and 6 acted arbitrarily in their inconsistent decisions to require full certified data sets in the Memphis Area designation while allowing for mixed data sets in the Chicago Area designation. The Petitioner also notes that Region 4 invited TN to submit certified 2011 air monitoring data by February 29, 2012, for its consideration in making final designations and that the "EPA never stated that it would only consider timely submitted and certified 2011 data if all three states in the Memphis, TN-MS-AR area submitted and certified their data from 2011". The Petitioner claims that the EPA, however, failed to consider timely certified 2011 data from TN and MS solely because 'Arkansas did not provide its 2009-2011 monitoring data for EPA to use for designations.'" Petition at 8-9.

Response: The EPA relied on a consistent evaluation principle when presented with mixed years of data in an area, and the agency consistently applied that principle to both the Chicago and Memphis areas. Specifically, the underlying principle is that the EPA cannot designate an area as attainment if the most recent certified data from any of the monitors in the area for a specific 3-year period indicates a violation of the national ambient air quality standards (NAAQS). Importantly, while evidence of one violating monitor is sufficient to demonstrate that the area is violating the NAAQS for a specific 3-year period, to demonstrate attainment of the NAAQS all monitors in the area must be meeting the NAAQS for the same 3-year period. Thus, an area cannot demonstrate attainment of the NAAQS based on air quality data from different 3-year periods for different monitors.[1]

[1] We note that the EPA's reliance on 2008-2010 data for monitors in the Memphis area is consistent with our action in two other multi-state areas where some, but not all, of the states submitted early certified 2011 data. For the Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD area, we relied on air quality data for 2008-2010 for monitors in all of the states where Pennsylvania submitted early certified 2011 data but New Jersey, Delaware and Maryland did not. Similarly, for the Washington DC-MD-VA area, Virginia early certified 2011 data but the District of Columbia and Maryland did not and we based the designation of the area on air quality data from 2008-2010.

In applying that principle to the Chicago combined statistical area (CSA), we note that Illinois submitted certified data for 2011 on December 7, 2011, that showed a violation of the NAAQS for the period of 2009-2011. The EPA was unable to consider that information prior to December 9, 2011, when it sent letters to the three states with counties located in the Chicago CSA notifying them that it intended to designate Chicago as attainment based on air quality data from 2008-2010. However, in light of the certified data demonstrating a violation of the NAAQS in Chicago Area, the EPA believed it was obligated to consider such information and inform the three states that it intended to designate certain counties in those states as nonattainment based on the violation at that monitor. Regardless of whether certified information from Indiana and Wisconsin would show attainment at all monitors within the areas of those states within the Chicago CSA or a violation at one or more such monitors, it was evident that the most recent information demonstrated that the area was violating the 2008 ozone NAAQS.[2] Thus, on January 31, 2012, the EPA notified the three states that it intended to designate certain counties in the Chicago CSA as nonattainment for the 2008 ozone NAAQS.

In applying that principle for the Memphis core-based statistical area (CBSA), we note that the EPA could not designate the Memphis Area as attainment for the 2008 ozone NAAQS because it did not have 3 years of certified data showing that all monitors in the area were attaining the ozone NAAQS for the same 3-year period. The latest 3-year period for which the Area had certified data for all monitors in the CBSA was 2008-2010. Based on that data, the Frayser monitor in Shelby County was violating the standard. While certified data from 2009-2011 demonstrated that the monitors in the TN and MS counties that are part of the Memphis CBSA were attaining the 2008 ozone NAAQS, the EPA did not have certified data from the same period showing that the monitors in Crittenden County were also attaining the NAAQS, which would have been necessary to demonstrate that the Area was attaining the NAAQS. In fact, preliminary data from 2011 showed that the Marion monitor in Crittenden County Arkansas was likely violating the 2008 ozone NAAQS. The approach suggested by the Petitioner of using mismatched sets of data for the three states would result in an attainment designation for an area that includes monitors indicating violations of the standard. Accordingly, the EPA could not rely on certified data from only a portion of the area to designate the entire Memphis area as attainment.

II. Consistency with Regulations and Policies

Issue: The Petitioner cites 40 C.F.R. Part 50, Appendix P, and the EPA's September 22, 2011, memorandum to regional Air Division Directors in support of its claim that the EPA must use the most current air data available in making area designations. The Petitioner claims that TN timely submitted the most recent possible certified data (2009 – 2011) and asserts that had the EPA considered this data, it would have designated Shelby County attainment. The Petitioner claims that the EPA is not required to base designations on "certified data," and as such, the Agency could have relied on the uncertified data from Arkansas in its designations. Alternatively, the Petitioner claims that Region 4 could have delayed its designation in order to consider certified data from Arkansas. The Petitioner notes that the designation for the Chicago Area was delayed for this purpose. Petition at 9-10.

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[2] As noted in the Response to Comments (May 2012 RTC) document issued with the Chicago designation on May 31, 2012, "EPA notes that a designation of nonattainment for the ozone NAAQS can be based on as little as one monitoring site with a quality-assured, state certified violation of the ozone NAAQS. Since such a violation of the Ozone NAAQS has been recorded at the Zion, Illinois monitoring site, EPA must conclude that some portion of the Chicago-Naperville-Michigan City, IL-IN-WI CSA must be designated as nonattainment for the 2008 ozone NAAQS." May 2012 RTC at 36.

Response: As explained in the previous response, the EPA cannot consider mixed year data sets to designate an area as attainment. Rather, data from all monitors in an area for the same 3 year period must demonstrate that the area is meeting the standard before the EPA can determine that the area is attaining the standard. Furthermore, it is the EPA's practice not to use uncertified air quality data for designations. Under 40 CFR 58.15(a), the senior air pollution control officer in a state or, where appropriate, local agency, or designee, is required to certify that the previous year of ambient monitoring data is completely submitted to the EPA's Air Quality System and that the ambient monitoring data are accurate to the best of his or her knowledge, taking into consideration the quality assurance findings. Certification signals that the monitoring agency has loaded all of its data for the year and has completed the monitoring agency's normal validation process. If the May 1 deadline for data certification has not passed and the data have not been certified, it is not clear to the data users whether the responsible agency has completed its normal data review and validation process and/or if the agency believes the data are of adequate quality. The EPA presumes that the monitoring agency may still be reviewing the data, making the data subject to change.

Finally, the EPA could not delay the designation of the Memphis area in order to consider certified data that was not due to be submitted until May 1, 2012. The EPA was obligated to issue final designations by May 31, 2012 pursuant to a Consent Decree. *WildEarth Guardians v. Jackson*, D. Ariz. No. 2:11-CV-1661. The EPA could not meet the procedural requirements of section 107(d)(1)(B), most notably providing states with 120-day notice of any intended modifications to the State's recommendation, in the 30-day window between May 1, 2012 and the Consent Decree deadline of May 31, 2012. The EPA was able to meet the Consent Decree deadline for the Chicago area because Illinois submitted certified air quality data in December 2012 and the EPA provided 120 days of notice to Illinois, Indiana and Wisconsin of modifications to the State's recommendations in January 2012, based on that certified air quality data.

III. Whether Shelby County Meaningfully Contributes to the Violating Monitor in Crittenden County, Arkansas.

Issue: The Petitioner claims that the use of 2009-2011 data likely would change the outcome of the Final Rule because the EPA would need to analyze the contribution of Shelby County on the non-attaining Arkansas monitor. The Petitioner then cites a February 16, 2012, Nine Factor Analysis included with TN's February 27, 2012, response to the EPA's 120-day letter and claims that TN demonstrated that Shelby County did not contribute meaningfully to the violations in Crittenden County, Arkansas. The Petitioner claims that because the EPA erroneously used Shelby County 2008-2010 data, it failed to consider TN's arguments that Shelby County did not meaningfully contribute to the violating monitor in Crittenden County, Arkansas. Petition at 11-13.

Response: For the reasons provided previously, the EPA did not consider air quality monitoring data from 2009-2011 for purposes of designating the Memphis area. Based on air quality monitoring data from 2008-2010, the monitor in Crittenden County was not violating the 2008 ozone NAAQS and thus the EPA did not evaluate whether to include counties based on their contribution to violations at that monitor. Furthermore, the data from 2008-2010 show a violation of the 2008 ozone NAAQS at the Frayser monitor in Shelby County and the EPA included Shelby County as part of the nonattainment area because of this violation within the county and not based on whether the County contributed to a violation in another county.

IV. Consideration of Economic Growth, Job Creation, Predictability, and Regulatory Burden in Issuing the Final Rule

Issue: The Petitioner claims that inconsistently choosing which 3-year data period to use in making designations and in determining whether to delay a designation conflicts with Executive Order 13563, which requires regulatory agencies to promote predictability reduce uncertainty and use the least burdensome tools for achieving regulatory ends. Petitioner also notes that EPA's CSAPR modeling indicates that the Memphis CBSA is likely to be in attainment with 2008 Ozone NAAQS by 2014 even without additional local emissions reductions, and as such, a nonattainment designation is particularly burdensome. Petition at 13-14.

Response: The EPA's designation approach was not inconsistent with Executive Order 13563 regarding regulatory flexibility and reducing burdens. For the reasons provided above, the EPA does not believe that it could rely on mismatched years of data to designate the Memphis area as attainment for the 2008 ozone NAAQS. Nor could the EPA delay designating areas beyond the required deadline in order to consider ambient air quality data that was available only at the very end of the designation process. We further note, as explained in the Response to Comments Document, the "EPA did not consider economic impacts because that is not relevant for determining whether an included area is violating the NAAQS or is a nearby area that is contributing to a violation as provided under CAA section 107(d)." Response to Comments at 14.

EPA Response to Supplemental Petition for Reconsideration from Shelby County, TN

Issue: In addition to the July 20, 2012, Petition described above, the EPA received a "Supplemental Petition" on September 18, 2012, from the Petitioner, related to the EPA's final designation for the Memphis CBSA. In its introduction, the Supplemental Petition raises the general issue that nitrogen oxides (NOx) and volatile organic compounds (VOC) emissions are projected to be reduced by 2015 due to regional and national emission-reducing rules currently in place and that these reductions alone will result in all monitors in the Metropolitan Statistical Area (MSA)[3] attaining the 2008 ozone NAAQS by 2014. As support for this claim the Petitioner analyzed the following ozone modeling:

I. CSAPR and 2008 Standard Modeling
II. Crittenden County Ozone Study (CCOS) Modeling

The Supplemental Petition includes a technical analysis of these two models.

Response: In response to the NOx and VOC projected emission reduction issues, and the Supplemental Petition's analysis of the CSAPR and 2008 Standard Modeling, the EPA notes that much of this technical information regarding the Memphis nonattainment designation was available prior to April 30, 2012, the date the Administrator signed the final designation; thus, this information is not an appropriate basis for reconsideration. The Petition presents conclusions regarding the EPA modeling and claims that the EPA's designation for the Memphis TN-MS-AR area is burdensome by the fact that the EPA

[3] The Petitioner references the Memphis MSA in their petition. However, as noted in the "Area Designations for the 2008 Revised Ozone National Ambient Air Quality Standards," memorandum from Robert J. Meyers, to Regional Administrators, Regions I-X, December 4, 2008, for the purpose of evaluating appropriate boundaries for nonattainment areas for the 2008 ozone National Ambient Air Quality Standard, the EPA evaluated information relevant to the CBSA or the CSA, as a starting point. The Memphis area is a CBSA so the EPA evaluated information relevant to the area covering the entire Memphis CBSA to determine an appropriate nonattainment area boundary.

modeling shows that the entire MSA, will be in attainment with the 2008 standard in 2015 without local controls. Similarly this information was available prior to the EPA's issuance of the designations and the Petitioner had the opportunity during the public comment period, and through the state, the opportunity prior to the EPA's final designation, to provide such information. The Petitioner did not raise this issue to the EPA prior to the EPA's final designations and thus this information does not provide an appropriate basis for reconsideration. The EPA notes that, as a general matter, the issue of attainment without the need for additional local controls was raised in written comments for other intended nonattainment areas and addressed by the EPA in its Response to Comments at 14, 15, 39 and 40. Moreover, information about the future impact of emissions controls is not relevant to the task in the designations process to determine whether there is a violation of the standard or whether emissions in an area are contributing to a violation of the NAAQS. The Clean Air Act's (CAA or Act) area designation authority does not provide a waiver of a properly defined nonattainment designation for an area that may at some future date attain the NAAQS.

In addition to the information described above which could have been presented to the EPA prior to the final designation, Petitioner also references an August 23, 2012, letter from the Greater Memphis Chamber to the Memphis and Shelby County Health Department. This letter is new information which was not available prior to the EPA's final designation. New technical information is not an appropriate basis for reconsideration. As noted by the Court in *Catawba v. EPA*, 571 F.3d 20 at 23, "Congress imposed deadlines on EPA and thus clearly envisioned an end to the designation process." Information that was not available in time for the EPA to consider while complying with the procedural requirements of the Act does not provides an appropriate basis for reconsidering the designations. It is important that states are able to rely on the completed designations and to move forward with the planning now required for the Area.

The remainder of Section I includes additional information which was available prior to April 30, 2012, the date the Administrator signed the final designations but issues concerning this information were not raised to the Agency. For example, paragraphs 4 includes a list of Shelby County, TN local actions to reduce emissions from mobile and other sources, includes data tables from an analysis done by the Petitioner using CSAPR modeling data and data regarding the Allen Power Plant. The EPA notes that the Petitioner had the opportunity during the public comment period, and through the state, the opportunity prior to the EPA's final designation, to provide such information and explain how they believed it should affect the EPA's designation decision. The Petitioner, however, did not provide this information prior to the EPA's final designations and it does not provide an appropriate basis for reconsideration.

With respect to the Supplemental Petition's analysis of the CCOS Modeling, the EPA notes that Petitioner provides an argument against Shelby county's sufficient contribution to a violating monitor in Crittenden County based apparently on the presumption that 2009-2011 monitoring data should have been used for designations instead of 2008-2010 monitoring data relied upon by the EPA. However, for the reasons stated above in the response to the original petition at Petition Section I, in the absence of certified data from all monitors in the area for the most recent 3 years showing that the area as a whole is attaining the standard, the EPA could not rely on certified data from only a portion of the area to designate the Memphis area as attainment. As such, the EPA does not view the CCOS Modeling analysis provided by Petitioner to support its contribution argument for the 2009-2011 period as an appropriate basis for reconsideration.

To the extent that the Petitioner is suggesting that the EPA grant reconsideration and now consider 2009-2011 data for all three states, the EPA notes that air quality monitoring data that was not certified in sufficient time to be considered during the designation process is not a basis for re-opening the designation process. Furthermore, we do not believe that air quality monitoring data that could not be considered during the designation process supports re-opening the designations through reconsideration. New technical data becomes available on a regular basis and granting petitions for reconsideration to consider such new information would result in a never-ending process in which designations are never finalized and thus do not provide certainty. As noted by the Court in *Catawba County, North Carolina v. EPA*, 571 F.3d, 20, 52, "Congress imposed deadlines on EPA and thus clearly envisioned an end to the designation process." New monitoring information that was not available in time for the EPA to fully comply with the procedural requirements of the CAA does not provide an appropriate basis for reconsidering the designations. It is important that states are able to rely on the completed designations and to move forward with the planning now required.