

US EPA ARCHIVE DOCUMENT



THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DEC 14 2012

Mr. Robert Ukeiley
Attorney
Law Office of Robert Ukeiley
435R Chestnut Street, Suite 1
Berea, Kentucky 40403

Dear Mr. Ukeiley:

I am pleased to respond to your July 20, 2012, letter in which you filed a petition for reconsideration on behalf of Sierra Club 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 asks that the EPA reconsider its April 30, 2012, decisions for 15 unclassifiable/attainment areas and designate those areas as nonattainment based on now-certified 2009-11 air-quality data.

The EPA has carefully evaluated the issue and information in your petition. For the reasons provided in the enclosure, the EPA is denying your petition. The EPA continues to believe that the 15 areas are properly designated as unclassifiable/attainment based on 2008-10 air-quality data that were the most recent certified data available to the EPA during the designation process.

The enclosure addresses the specific issue raised in your petition and provides the basis for this denial. The EPA hopes that the response will help to explain the agency's conclusions so that you will better understand our final decision. The EPA considers the designation of areas with appropriate boundaries to be an important step in implementing the 2008 ozone standards.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa P. Jackson".

Lisa P. Jackson

Enclosure

Enclosure

EPA Response to Petition for Reconsideration from Sierra Club

By Petition dated July 20, 2012, Sierra Club requested that the EPA reconsider the final designations for certain identified areas. For the reasons discussed below, the EPA is denying the Petition.

Issue: Petitioner asserts that the EPA should reconsider the final ozone designations rule (signed on April 30, 2012) and designate 15 counties and parishes identified in the Petition as nonattainment based on certified air quality monitoring data for 2009-2011, which became available shortly after signature of the final rule. Petitioner also asserts that the EPA should designate as nonattainment the combined statistical areas or at least the metropolitan or micropolitan statistical areas in which the listed counties or parishes are located.

Response: The designation process laid out in the Clean Air Act (CAA) involves an interactive process between states and the EPA. States provide initial designation recommendations based on current air quality data and other factors. The EPA notifies the states of any modifications it believes are appropriate to the state recommendations at least 120-days prior to promulgating the final designations. The states then have an opportunity to respond to the EPA's intended modifications before the EPA finalizes the designations. In the EPA's designation guidance for the 2008 ozone National Ambient Air Quality Standards (NAAQS), the EPA recommended that "states and tribes identify violating areas using the most recent three consecutive years of quality-assured, certified air quality data." In addition, the EPA stated, "We expect to base the final designations in March 2010 on the most recent quality-assured data which would be from 2006-2008 or 2007-2009." (*See* memorandum from Robert J. Meyers, Principal Deputy Assistant Administrator, to Region Administrators, Regions I-X, titled, "Area Designations for the 2008 Revised Ozone National Ambient Air Quality Standards.") In September 2009, the EPA announced it was reconsidering the 2008 ozone NAAQS and later announced it was deferring designations by an additional year, until March 12, 2011, as provided under the statute due to insufficient information. (*See* 75 FR 2936; January 19, 2010.) Because the EPA had not completed the designation process by March 12, 2011, WildEarth Guardians filed suit claiming that the EPA had an outstanding mandatory duty to issue the designations. (*WildEarth Guardians v. Jackson, D. Ariz. No. 2:11-CV-1661.*) The EPA and WildEarth Guardians entered into a Consent Decree requiring the EPA to complete the designations for the 2008 ozone NAAQS by May 31, 2012.)

On September 22, 2011, the EPA issued a memorandum to clarify for state and local agencies the status of the 2008 ozone NAAQS and to outline plans for moving forward to implement them. (*See* memorandum from Gina McCarthy, Assistant Administrator, to Air Division Directors, Regions 1-10, titled, "Implementation of the Ozone National Ambient Air Quality Standard.") For purposes of issuing the designations, the EPA indicated that it would use the recommendations states made in 2009 as updated by the most current, certified air quality monitoring data from 2008-2010. While the EPA did not request that states submit updated designation recommendations, the EPA provided the opportunity for states to do so. In certain cases, states that chose to submit updated designation recommendations also included as part of their recommendation a request that the EPA consider monitoring data from 2009-2011 in making final designation decisions. In their updated recommendations they indicated to the EPA what they anticipated new certified data would show regarding whether an area was attaining

the standard, and for designation purposes they committed to certifying their 2011 data earlier than required.¹

In section VII of the Preamble for the April 30, 2012, designations rule and section 3.1.1 of the Response to Comments (RTC) document, the EPA explains which years of certified air quality data it considered in making designations decisions. (*See* 77 FR 30088; May 21, 2012, page 30,091 and RTC document in the docket at HQ-OAR-2008-0476-0675, pages 7-8.) For most areas of the country, including the 15 counties and parishes identified in the Petition, the final designations for the 2008 ozone NAAQS were based on air quality monitoring data for the 2008-2010 time period because these were the most recent certified data available in the timeframe consistent with the EPA's ability to comply with the procedural requirements of CAA section 107(d) and to issue the designations by the May 31, 2012 Consent Decree deadline. Under 40 CFR part 58.15(a)(2) regarding the deadline for annual air monitoring certification, states were required to certify 2011 air quality monitoring data by May 1, 2012, and states generally did not certify such data until that date. Data certified on or about May 1, 2012, were not certified in sufficient time for the EPA to evaluate the data and to meet the procedural requirements of the CAA for purposes of meeting the required May 31, 2012 designations deadline.² Specifically, EPA needs sufficient time to determine how and whether to revise the states' designation recommendations based on such data and to provide states with 120-day notice if the EPA intends to revise the state's recommendations. For areas where states notified the EPA of the preliminary 2011 monitoring results and committed to submit and certify the data early, the EPA considered the information submitted by the state in determining whether to notify the state in the December 2011 letters that it intended to modify the state's recommendation. Additionally, in the notification letters, the EPA further indicated to states that in order for the EPA to be able to consider 2011 air quality monitoring data for purposes of the final designations, the state must submit the certified 2011 data for an area by February 29, 2012. The EPA established this deadline for states to submit any additional information to ensure sufficient time for the EPA and the state to complete the interactive process considering the air quality data on which the designation would be based, and to provide the EPA with sufficient time to develop the final rule and related technical support documents. For states that met the February 29, 2012 deadline for certifying the 2011 monitoring data, the EPA was able to consider the data for final designations.

The EPA notes that once the EPA has promulgated initial designations for a new or revised NAAQS, section 107(d)(3) of the CAA provides a separate process for redesignating areas based upon subsequent air quality-related considerations. We believe the redesignation process is an appropriate process for addressing monitoring information that was not available in sufficient time to be considered during the initial area designation process. New technical data become 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. Moreover, if we granted this Petition and considered air quality data from 2009-2011 to designate the identified 15 counties and

¹ 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 by May 1 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. Therefore, it is the EPA's practice not to use uncertified air quality data for designations.

² The Petitioner notes in a footnote, that the EPA issued the designations a month before the date required by the Consent Decree. However, given the timing constraints, this did not affect which data were available to the EPA for use in making the designation decisions.

parishes, we anticipate that certified data from 2012 would become available about the time we were finalizing the reconsideration process and we could receive a further petition to then consider air quality data from 2010-12. As noted by the Court in *Catawba v. EPA*, 571 F.3d, page 52, “Congress imposed deadlines on EPA and thus clearly envisioned an end to the designation process.” We do not agree that new monitoring information that was not available in time for the EPA to fully comply with the procedural requirements of the CAA provides an appropriate basis for reconsidering the designations.