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

DEC 14 2012

THE ADMINISTRATOR

Mr. Robert J. Martineau, Jr.
Commissioner
State of Tennessee
Department of Environment and Conservation
Nashville, Tennessee 37243-0435

Dear Mr. Martineau:

I am pleased to respond to your July 19, 2012, letter in which you filed a petition for reconsideration on behalf of the state of Tennessee 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 Commissioner Robert J. Martineau, Jr., on Behalf of the State of Tennessee

By letter dated July 19, 2012, Robert J. Martineau, Jr., Commissioner of the State of Tennessee Department of Environment and Conservation, on behalf of the State of Tennessee, petitioned the EPA to reconsider the final area designation for Shelby County in the Memphis, Tennessee-Mississippi-Arkansas (TN-MS-AR) 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.

I. Consistency with Other EPA Regional Offices

Issue: The Petitioner claims that the EPA failed to treat certified air quality monitoring data consistently among its Regional Offices. The EPA informed the states that it would consider 2009-2011 data if the states submitted certified air quality data by February 29, 2012. The EPA relied on 2008-2010 certified data from Tennessee and Mississippi to make its area designations instead of timely submitted 2009-2011 certified data from Tennessee and Mississippi in conjunction with 2008-2010 data from Arkansas. Arkansas notified the EPA of certified air quality data in a letter dated April 17, 2012. If the EPA had relied on these "mixed years" of certified data for purposes of the Memphis core-based statistical area (CSA) designations, Shelby County would have been designated attainment. The EPA's approach to require a uniform data set for the entire Memphis Area is inconsistent with the approach used for the Chicago combined statistical area (CSA) where the EPA relied on 2009-2011 data for Illinois and 2008-2010 data for Indiana and Wisconsin. Petition at 4-7; 10-14.

Response: The EPA relied on a consistent evaluation principle when presented with mixed years of data in an area, and the EPA 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 for the Chicago CSA, the EPA notes 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 area 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 from the violating monitor in Illinois 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 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 Tennessee and Mississippi 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.[3] 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.[4] 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. Consideration of 2009-2011 Data for All Three States

Issue: The Petitioner claims the EPA erroneously determined that it cannot used "mixed years" of data for the Memphis Area, instead the EPA should have designated Shelby County, TN as attainment or partial non-attainment based on air quality data from 2009-2011 for all three states. Further, the Petitioner asserts that Arkansas submitted certified data on or about April 17, 2012, and thus, even if the

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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.

[3] This violation was confirmed by an April 17, 2012 letter from Arkansas to the EPA certifying the 2011 air quality data for the State.

EPA could not consider the 2009-2011 data from Arkansas during the designation process, it should grant the Petition for reconsideration and consider such information now. The Petitioner also states that based on monitoring data from 2009-2011, the violating monitor is located in Crittenden County, yet the EPA ignored Tennessee's analysis of contribution from Shelby County to Crittenden County because the EPA relied on the 2008-2010 air monitoring data which included a violating monitor in Shelby County, TN. The Petitioner claims that the Tennessee analysis demonstrates that through a partial nonattainment designation for Shelby County, it is possible to capture nearly all of the contributing sources of pollution from Shelby County. Moreover, the Petitioner asserts that designating the whole of Shelby County as nonattainment is inconsistent with Executive Order 13563, which requires regulatory agencies to "consider regulatory approaches that reduce burdens and maintain flexibility because "EPA's [CSAPR] modeling indicates that approximately half of the 52 areas would attain the 0.075 ppm standard by 2015… as a result of the emission-reducing rules already in place." Petition at 7-9; 14-20.

Response: The EPA could not rely on data from 2009-2011 for Arkansas for purposes of the designations issued on April 30, 2012 because those data were not certified in sufficient time for the EPA to consider it during the designation process. 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.

The Clean Air Act (CAA) specifies specific procedural obligations for designations, including a requirement that the EPA notify states 120 days before issuing a designation that modifies the state's recommendation. CAA section 107(d)(1)(B)(ii). The EPA did not have sufficient time to determine how and whether to revise the states' recommendations based on certified monitoring data submitted in mid- to late-April 2012 and still meet procedural requirements to provide states with 120-day notice of any modification to the state recommendation. As noted by the Petitioner, if the EPA had considered air quality monitoring data from 2009-2011 from all three states for the designation process, the EPA would have considered the violating monitor in Crittenden County for purposes of evaluating whether other counties in the CBSA, including Shelby County, TN and DeSoto County, MS contributed to violations at that monitor. Instead, based on the most current certified information the EPA had before it at the time it issued its intended designations to the states in December 2011, the EPA based its contribution analysis on the violating monitor in Shelby County, TN. Because the EPA considered air quality data from 2008-2010 for purposes of designating the Memphis CSA, the Agency did not consider the contribution from Shelby County (either in full or in part) to the Marion monitor in Crittenden County because the Marion monitor was meeting the NAAQS based 2008-2010 data.

Furthermore, the EPA does 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 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 the EPA granted this Petition and considered air quality

data from 2009-2011 to designate the Memphis CBSA, we anticipate that certified data from 2012 would become available about the time we were finalizing the reconsideration process and we could receive one or more petitions for reconsideration of that final action to then consider air quality data from 2010-2012. As noted by the Court in *Catawba County, North Carolina v. EPA*, 571 F.3d, 20, 52, "Congress imposed deadlines on the 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.

Finally, the EPA designation approach was not inconsistent with Executive Order 13563 regarding regulatory flexibility and reducing burdens. For the reasons provided, the EPA does not believe that it could rely on mismatched years of data in order to designate the 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 were not available, at best, until the end of the designation process. We further note, as explained in the Response to Comments Document, "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.