UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, et. al.,

Plaintiffs,

v.

CHRISTINE TODD WHITMAN, Administrator, United States Environmental Protection Agency,

Defendant.

Civil Action No. 00-2206 (CKK)/(JMF)

MEMORANDUM OPINION

This case arises out of an action brought by Plaintiffs Sierra Club and Group Against Smog and Pollution (collectively "Sierra Club" or "Plaintiffs") under the citizen-suit provision of the Clean Air Act, 42 U.S.C. § 7604(a)(2) (1995) ("CAA"), alleging that Defendant United States Environmental Protection Agency ("EPA" or "Agency") failed to meet its statutory obligations to perform certain nondiscretionary duties required by the CAA. Sierra Club alleges, *inter alia*, that the Defendant failed to comply with the nonattainment determination and reclassification process required by the CAA with respect to the Birmingham Area in Alabama and Kent and Queen Anne's Counties in Maryland. Pursuant to Local Civil Rule 72.3, the Court referred Plaintiffs' Motion for Partial Summary Judgment and Defendant's Cross-Motion to Dismiss Certain Claims for Lack of Jurisdiction to Magistrate Judge John Facciola for report and recommendation. On March 11, 2002, Magistrate Judge Facciola recommended that this Court order EPA to publish formal attainment determinations for both the Birmingham Area and Kent and Queen Anne's Counties. After carefully reviewing the Magistrate Judge's recommendations, EPA's objections, Plaintiffs' response thereto, the entire record, and the relevant law, the Court

(N)

70

adopts in part and rejects in part the Magistrate Judge's Report and Recommendation.

I. BACKGROUND

A thorough summary of the relevant facts of this case and the details of the relevant federal statutes are set forth in Part II of Magistrate Judge Facciola's Report and Recommendation and that discussion is incorporated herein by reference. A brief recitation of the facts of this case is discussed below.

A. *Statutory Background*

The CAA sets forth a comprehensive scheme for regulating air pollutant levels throughout the country. 42 U.S.C. §§ 7401, *et seq.* Under the CAA, the United States is divided into distinct "air quality control regions" which are designated by EPA as attainment or nonattainment areas for each regulated pollutant based on the measurement of that particular pollutant in the area. The 1990 Amendments to the CAA established a system of penalties and incentives for an area to achieve attainment status. An area is classified as a nonattainment area on a sliding scale from "marginal" to "extreme" depending on the number and severity of exceedances over the National Ambient Air Quality Standards ("NAAQS").[1] 42 U.S.C. § 7511(a)(1). An area will be "bumped up" or reclassified to a more severe classification if EPA determines that the area has not attained the NAAQS standard by the required attainment date. *See* 42 U.S.C. § 7511(b)(2)(A). An area must meet more exacting emissions standards if it is reclassified at a higher nonattainment status. 42 U.S.C. § 7511(a). If an area fails to achieve

[1]The EPA is required to set primary National Ambient Air Quality Standards ("NAAQS") for pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" 42 U.S.C. §§ 7408(a)(1)(A); 7409(b). Areas that fail to meet the NAAQS are designated as "nonattainment areas" and are required to reach attainment by certain 'attainment dates' set forth in the CAA. *See* 42 U.S.C. § 7407(d)(1)(A).

attainment by the required attainment date, the CAA imposes a nondiscretionary duty on EPA to publish a notice in the Federal Register six months after the attainment date identifying the areas that have failed to achieve attainment and reclassifying those areas to a higher non-attainment status. 42 U.S.C. § 7511(b)(2).

B. *Birmingham Area*

EPA concedes that pursuant to § 7511 (a)(1), it "should have made a determination on Birmingham's attainment status by May 15, 1994, but did not." Defendant's Cross Motion to Dismiss Certain Claims for Lack of Jurisdiction ("Def. Cross Mot.") at 11. EPA contends that it satisfied this statutory obligation, albeit late, when it published proposed and final actions in April and September of 1997, in response to and denying the State of Alabama's request for redesignation of the Birmingham area from nonattainment to attainment status. This denial, EPA argues, also served as the formal determination of attainment required by § 7511 (a)(1).[2] *See* 62 Fed. Reg. 23,421 (Apr. 30, 1997); 62 Fed Reg. 49,154 (Sept. 19, 1997) ("the 1997 Rules").

C. *Kent and Queen Anne's Counties*

EPA also concedes that it failed to make an attainment determination required by § 7511(b)(2) for the Kent and Queen Anne's Counties by the statutory deadline of November 15, 1993. However, EPA claims it satisfied its obligations with an attainment determination made on January 17, 1995, when EPA published a "Direct Final Rule" entitled "Clean Air Act Promulgation of Reclassification of Ozone Nonattainment Areas in Virginia, and Attainment Determinations." 60 Fed. Reg. 3,349 (1995) ("January 1995 Rule"). This Rule contained formal attainment determinations for several areas outside of Virginia, including Kent and Queen

[2] The State of Alabama's request for redesignation of the Birmingham area and the EPA's response were made pursuant to § 7407(d)(3).

Anne's Counties in Maryland. The January 1995 Rule concluded that the Maryland counties would remain at a marginal nonattainment status. *Id.* at 3,351.

On March 13, 1995, EPA published another rule entitled "Designation of Areas for Air Quality Planning Purposes; Virginia; Withdrawal of Final Rule Pertaining to the Clean Air Act Promulgation of Reclassification of the Hampton Roads Ozone Nonattainment Areas in Virginia and Attainment Determinations." 60 Fed. Reg. 13,368 (1995) ("March 1995 Rule"). This rule withdrew the portions of the January 1995 Rule that applied to the Virginia area, but explained that the rule had no effect on the attainment determinations in the January 1995 Rule relating to areas outside of Virginia, and listed all of those areas, except Maryland. *Id.*

D. *The Parties's Arguments*

The essence of Sierra Club's motion for partial summary judgment is that Defendant failed to comply with the nonattainment determination and reclassification process set forth in the CAA for ozone with respect to the Birmingham Area and Kent and Queen Anne's Counties. Specifically, Plaintiff contends that EPA failed to meet the six-month deadline imposed by 42 U.S.C. § 7511(b)(2) for EPA attainment determinations. Plaintiffs ask the Court to grant relief by requiring EPA to issue such determinations pursuant to this Court's power to "order the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2).

Defendant, in its cross-motion to dismiss, argues that this Court lacks jurisdiction to determine whether EPA's Federal Register notices with respect to the areas at issue satisfy its obligations under § 7511 of the CAA. EPA claims that this Court's jurisdiction is limited to cases involving EPA's failure to perform a nondiscretionary act, and that because EPA has undertaken a final action, jurisdiction properly lies with the appropriate United States Court of

Appeals. *See* 42 U.S.C. § 7607(b)(1) (granting exclusive jurisdiction to the United States Court of Appeals for the appropriate Circuit to review the Agency's final actions).[3]

II. DISCUSSION

A. *Jurisdiction over EPA's Nondiscretionary Duties.*

At the threshold this Court must determine whether it has jurisdiction to determine the present controversy. Magistrate Judge Facciola concluded that this Court did indeed have jurisdiction to determine whether the Federal Register notices issued by EPA with respect to the Birmingham area and Kent and Queen Anne's Counties meet the non-discretionary obligations imposed by § 7511 of the CAA. He noted that "the statute's grant of jurisdiction to the District Courts to order EPA to perform a nondiscretionary duty must presuppose the District Court's jurisdiction to determine whether such duties have been performed in the first place." Report and Recommendation at 7.

The CAA clearly delineates the responsibilities of the Court of Appeals for the appropriate Circuit and the United States District Courts in reviewing decisions made by the EPA under the Act. In citizen-suits brought pursuant to 42 U.S.C. § 7604(a), District Courts are empowered to order EPA to perform non-discretionary obligations required by Act. *See* 42 U.S.C. § 7604(a); *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 89 (D.D.C. 2001) ("The Court's power to grant relief in such suits is limited to 'ordering the Administrator to perform such act or duty [or] compelling . . . agency action unreasonably delayed.' 42 U.S.C. § 7604(a).").

---

[3] Section 307(b) of the CAA provides that all challenges to nationally applicable regulations under the Clean Air Act must be brought in the United States Court of Appeals for the District of Columbia Circuit. 42 U.S.C. § 7607(b)(1). Challenges to locally or regionally applicable rules and final actions must be brought in the appropriate Court of Appeals for that locality. *Id.*

However, once the Agency takes a final action and performs a non-discretionary act, the Court of Appeals for the appropriate Circuit has exclusive jurisdiction to review the substance and validity of the Agency's final action. *See* 42 U.S.C. § 7607(b)(1). In the instant case, EPA characterizes its actions related to the promulgation of the 1997 and 1995 Rules as "final actions," and thus argues that the Court of Appeals has exclusive jurisdiction over the present controversy. EPA maintains that Magistrate Judge Facciola, in determining that jurisdiction properly lay with this Court, failed to distinguish between "(1) determining whether EPA has taken the mandated action and (2) determining whether EPA's actions complied with the substantive and procedural requirements of the APA, [Administrative Procedures Act, 5 U.S.C. § 553(b)(1996) ("APA")] and the CAA." EPA's Objections to Report and Recommendations of Magistrate Judge ("EPA's Objections") at 9. EPA asserts that although this Court has jurisdiction over the first, the Court of Appeals has the jurisdiction exclusively over the second. *Id.* In summary, EPA argues that any review of whether the 1995 and 1997 Rules are in fact "final actions" would require this Court to review the substantive merits of the Rules in direct contravention of 42 U.S.C. § 7604(a) of the CAA.

It is clear that this Court does not have jurisdiction to determine whether final actions undertaken by EPA are valid or lawful. However, the Court retains jurisdiction to determine whether the actions taken by EPA are in fact final actions. The Court agrees with the Magistrate Judge that to conclude otherwise would "render meaningless any grant of jurisdiction under § 7604(a) empowering a District Court to order EPA to perform a nondiscretionary duty." Report and Recommendation at 7. In this instance Plaintiffs contest that the actions taken by EPA in 1995 and 1997 in relation to the disputed areas are final actions satisfying the non-discretionary obligations set forth in § 7511 of the CAA. The relief requested by Plaintiff is

limited to requiring EPA to undertake those non-discretionary obligations by publishing a final attainment determination. Plaintiff does not request that this Court make a determination regarding the validity or substance of those determinations; but merely that the Court order EPA to undertake its non-discretionary duty to make a determination. In order for the Court to determine whether EPA failed to perform a mandatory action under § 7511 of the CAA, it must examine EPA's actions to determine whether they meet the required non-discretionary standards of the CAA and the APA. Thus, because § 7604(a) grants the District Court the jurisdiction to hear suits which allege that EPA has failed to meet its nondiscretionary duties, the Court necessarily must determine whether EPA has met such duties and if the action taken is sufficient to constitute a final action.

This conclusion is supported by this Court's findings in *Sierra Club v. Browner*, 130 F. Supp.2d 78 (D.D.C. 2001), recently affirmed by the Court of Appeals for the District of Columbia in *Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002). *Browner* declared that the limits of this Court's power "precludes [it] from assessing the substance of the agency's decision" and that "[s]ince the Court's power is limited to ordering EPA to take nondiscretionary action, *and since EPA has taken that action* . . . the Court is without power to grant meaningful relief. . . ." *Id.* at 82 (emphasis added). Nothing in the *Browner* opinion precludes the Court from determining whether EPA has in fact taken the required action. Moreover, the *Browner* court considered, at EPA's request, whether informal communications fulfilled its nondiscretionary duties under § 7511. The Court determined that it did have the jurisdiction to make such a determination stating that "the Court has jurisdiction to require that EPA make a determination. Quite plainly, the Court's jurisdiction does not extend to telling EPA what the determination should be. That limitation does not, however, eliminate the Court's jurisdiction

altogether. Under the CAA, the Court unquestionably has the authority to require EPA to take nondiscretionary actions, such as reaching a determination." *Id.* at 89 n.16 (citations omitted).[4] Accordingly, the Court adopts the Magistrate Judge's recommendation and concludes that this Court has jurisdiction to review EPA's actions in order to determine whether those actions fulfill the non-discretionary requirements imposed by § 7511(b).

B. *Adequacy of EPA's Actions to Constitute Final Actions*

EPA does not dispute that attainment determinations must be made through notice and comment rulemaking prescribed by 5 U.S.C. § 553(b).[5] *See* EPA Objections at 9 n.6. Consistent with its position in *Browner*, EPA acknowledges that the CAA requires formal rulemaking procedures such that public notice must include publication and an opportunity for comment before a determination is final. *Browner*, 130 F. Supp. at 90; *see also Whitman*, 285 F.3d at 66

---

[4]EPA further asserts that the jurisdictional conclusion reached in *Browner* does not apply in this case because EPA has not conceded that the formal rulemaking procedures had not been followed, as it admitted in *Browner*. However, this Court's jurisdiction is not contingent upon EPA's interpretations of its own actions. Rather, "[i]t is for the District Court, and not EPA, to decide whether EPA has actually taken final action." Report and Recommendation at 8. It is an established practice of this Court to determine whether an agency action constitutes final action for purposes of jurisdiction. *See Sierra Club v. Whitman*, 285 F.3d 63, 66-67 (D.C. Cir. 2002) (affirming the District Court's finding that EPA's informal attainment determinations were not final actions under the CAA); *Independent Petroleum Ass'n of America v. Babbit*, 971 F. Supp. 19, 27 (D.D.C. 1997) (noting that, under the APA, finality of agency action is a jurisdictional requirement that must be determined prior to any decision on the merits).

[5]EPA's interpretation of the CAA is reviewed under the standards set out in *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council Inc.*, 467 U.S. 837 (1984). *See Sierra Club v. EPA*, 2002 U.S. App. LEXIS 13141 (D.C. Cir. July 2, 2002). When Congress "has directly spoken to the precise question at issue" the Court is required to "give effect to [the] unambiguously expressed intent." *Chevron*, 467 U.S. at 843. However, when a statute is ambiguous, the Court is required to defer to an agency's reasonable interpretations. *Id.* Section 7511(b)(2) of the CAA clearly requires EPA to reach an attainment determination. However, the statute is silent regarding what qualifies as such a determination, and thus, the Court will defer to the Agency's reasonable interpretation that formal notice and comment rulemaking is required for an attainment determination.

("EPA's established practice for making a final decision concerning nonattainment and reclassification is to conduct a rulemaking under the APA.") (quoting Brief of Appellee at 28). Accordingly, any attainment determination made pursuant to § 7511 of the CAA must conform to the formal notice and comment rulemaking standards set forth in the APA. *See Whitman*, 285 F.3d at 66 (explaining that "if there has not been a rulemaking there has not been an attainment determination.").

The APA has three elements for the notice requirement: "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b) (1995). The Court of Appeals for the District of Columbia has explained that "[t]he principal purpose of section 553 was to provide that the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice. . ." *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (internal citations omitted). Under the APA, notice must "afford interested parties a reasonable opportunity to participate in the rulemaking process." *MCI Telecomm. Corp. v. FCC*, 274 F.3d 1136, 1140 (D.C. Cir. 1995) (quoting *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)). In addition, the *Browner* Court stressed the importance of "a notice and comment period during which potentially affected parties can scrutinize the EPA's [actions]" because of the "weighty . . . consequence[s]" of the determinations. *Browner*, 130 F. Supp. at 91. Therefore, this Court will review the 1995 and 1997 Rules at issue to determine whether they adequately provide the public notice and opportunity for comment required by the APA, and by extension, the CAA.

1. Birmingham Area

EPA argues that consideration of a redesignation request cannot be done without also making an attainment determination, and therefore, not only was the attainment determination made, but the 1997 Rules also constitute notice to the public that EPA made such a determination. EPA's argument fails for several reasons. First, the titles and summaries of the 1997 Rules make no mention of an attainment determination and discuss only Alabama's redesignation request. *See McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988) (finding that an agency's published notice inadequate where the title and the summary of the notice "would not have alerted a reader to the stakes"). Although the 1997 Rules make a passing reference to the area's attainment data from 1990 through 1994, no conclusion as to attainment is drawn from this data. *See* 62 Fed. Reg. at 23,421; 62 Fed. Reg. at 49,154. Additionally, the 1997 Rules fail to make "reference to the legal authority under which the rule is proposed" as is required by § 553(b)(2) of the APA. EPA does not reference § 7511(b) of the CAA and does not indicate that the 1997 Rules are proposed pursuant to that authority.

Moreover, EPA did not promulgate the 1997 Rules for the specific purpose of making an attainment determination for the Birmingham area. In *Whitman*, Sierra Club claimed that an attainment determination had been made for the St. Louis area in a 1998 EPA rule which listed areas that had attained ozone standards, yet omitted the St. Louis area. *Whitman*, 285 F.3d at 66 (citing 63 Fed. Reg. 31,014, 31,059 (June 5, 1998)). The court held that the "focus of the rule was not the St. Louis area's attainment status," and thus, the rule did not create an attainment determination. *Id.* Similarly in the present case, a passing reference to attainment data in an otherwise unrelated rule denying a redesignation request does not constitute an attainment determination. A rule must not only be made through formal rulemaking procedures, but must

also focus specifically on the relevant determination, and therefore, EPA's 1997 Rule failed to make a formal attainment determination for the Birmingham area.

Finally, the 1997 Rules do not conform to the purposes of the APA by supplying the requisite notice to the public because as the Magistrate Judge noted, "[i]t would take no one less than a mindreader to interpret the 1997 Rules as an attainment determination for the Birmingham Area." Report and Recommendation at 12. Accordingly, this Court finds that the 1997 Rules do not constitute final attainment determinations for the Birmingham area because they failed to provide the necessary notice to the public and did not conform to the requirements of the APA, and by extension, the CAA.

2. Kent and Queen Anne's Counties

The Magistrate Judge also found that EPA's 1995 Rules do not constitute an attainment determination for Kent and Queen Anne's Counties because these rules do not provide proper notice to the public. Specifically, the Magistrate Judge believes the title of the 1995 Rules were misleading because a person searching for information pertaining to Kent and Queen Anne's Counties would not scrutinize a rule that only referenced Virginia in its title. The January 1995 Rule, however, does more than solely reference Virginia in its title. Rather, it adds a comma and an additional term "and Attainment Determinations," to delineate that this rule will discuss this subject as well. 60 Fed. Reg. at 3,349. Therefore, although the title did not specifically mention Maryland, it gave sufficient notice that the reader should have looked further to determine the attainment determinations made by the EPA.

Even assuming that this unspecific title alone is insufficient to constitute notice, the summary of the rule, located just below the title, specifically mentions the Maryland areas and that "this action determines that the Kent and Queen Anne's Counties, MD marginal ozone

nonattainment area attained the ozone standard by November 1994." 60 Fed. Reg. at 3,349. In the analysis of this issue, the Magistrate Judge relied on *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988) which held that the agency's published notice was inadequate where both the title *and the summary* "would not have alerted a reader to the stakes." *Id.* at 1323. However, when an agency includes outlines at the beginning of its proposed rule which contain headings and subheadings which "clearly indicate[] the Notices would discuss" the relevant issues, "the outlines, and the Notices, [are] sufficiently informative to satisfy the requirements of the APA." *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1535 (D.C. Cir. 1989). Similarly here, where the summary at the beginning of the proposed rule specifically indicated that an attainment determination was made for Kent and Queen Anne's Counties in Maryland, the January 1995 Rule satisfies the notice requirements of the APA.

Accordingly, this Court concludes that the 1995 Rules relating Kent and Queen Anne's Counties in Maryland are final attainment determinations and thus rejects the Magistrate Judge's recommendation related to this issue.

3. Timing of Remedy

EPA requests that this Court grant it 164 days to comply with any order requiring it to make an attainment determination for the Birmingham area. EPA Objections at 14. In the alternative, if the Court adopts the recommendation of the Magistrate Judge that EPA be granted only 120 days, EPA requests that the Court set only the dates for signature of the final action and publication in the Federal Register. *Id.* The Court will not adopt the 164 day schedule requested by EPA. The attainment determination for Birmingham should have been made by May 15, 1994, and EPA has had ample time to make such a determination. The Court notes that the

statutory duty to make an attainment determination is a non-discretionary mandate "to determine and publish by a date certain" *Browner*, 130 F. Supp. at 95. Therefore, the Court will accept the "reasonable middle ground," Report and Recommendation at 15, recommended by the Magistrate Judge and order EPA to publish the proposed determinations 45 days from the order accompanying this opinion. EPA will then have 30 days for public comment and forty-five days following the comment period in which to publish the final action in the Federal Register.

Accordingly, this Court will adopt the schedule proposed by Magistrate Judge Facciola.

CONCLUSION

After carefully reviewing Magistrate Judge Facciola's Report and Recommendation, Defendant's objections, Plaintiff's response thereto, and the relevant law, the Court concludes that the Report and Recommendation will be adopted in part and rejected in part. The Court concludes that the present case is properly before it and that EPA has failed to make a final attainment determination for the Birmingham, Alabama area as required by 42 U.S.C. § 7511(b). Therefore, the Court will require EPA to make a formal attainment determination for the Birmingham area within 120 days from the date of this opinion. This Court further finds that EPA has performed its non-discretionary duty to promulgate a formal attainment determination with respect to Kent and Queen Anne's Counties in Maryland. Accordingly, Plaintiffs' Motion for Partial Summary Judgment shall be granted in part and denied in part, and Defendant's Cross-Motion to Dismiss Certain Claims for Lack of Jurisdiction shall be granted in part and denied in part. An appropriate Order accompanies this Memorandum Opinion

July 9, 2002

COLLEEN KOLLAR-KOTELLY
United States District Judge