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EPN Comments on the Proposed Error Correction of the Area Designations for the 2010 1-Hour Sulfur Dioxide Primary NAAQS in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas

September 23, 2019

Re: **Docket ID No. EPA–HQ– OAR–2014–0464**

The Environmental Protection Network (EPN) is an organization comprised of over 450 EPA alumni volunteering their time to protect the integrity of the U.S. Environmental Protection Agency (EPA), human health and the environment. We harness the expertise of former EPA career staff and confirmation-level appointees to provide an informed and rigorous defense against current Administration efforts to undermine public health and environmental protections.

On August 22, 2019, EPA issued a proposed rule indicating that it is intending to alter the sulfur dioxide (SO2) designations for several areas in Texas on the basis of error correction, changing the existing non-attainment designations to designations of unclassifiable. 84 Federal Register 43757 (Aug. 22, 2019). The attempt to alter these designations through error correction allows these areas to be removed from the planning and implementation obligations for areas that do not attain an air quality standard without demonstrating that the areas do in fact attain the relevant standard, or developing the maintenance plan necessary to insure the areas remain in attainment of the SO2 standard.

EPN is providing this comment because of our concerns that this proposed action:

- Uses an error correction theory to make a designation change based not on an actual error at the time of designation, but rather on a change in agency opinion concerning the desired designation status of the areas;
- Allows a change in designation status without any additional technical support identifying the actual air quality status of the areas;
- Is not transparent about if and/or how potential issues of impartiality on the part of the EPA official signing the proposed notice have been addressed.

EPA proposes to alter the SO2 designations for these three Texas areas based on alleged errors in the initial designations. However, EPA does not present adequate reasoned explanations for the alleged errors, but rather relies on comments submitted by Texas in the initial designation rulemaking—comments that EPA considered and rejected in that rulemaking. Further, EPA does not present any additional information relevant to the air quality status of these areas to support revised designations. EPA wants to go back in time and alter designations based on its current opinion about data the agency determined was properly used at the time the designations were made. Finally, this proposed notice was signed by a current EPA employee who worked for the state of Texas at the time of the initial designations rulemaking. This at least raises concern about potential lack of impartiality, or the appearance of such, and should be addressed to determine whether the employee should be recused from acting on rulemakings relating to the designations recommended by Texas if the employee worked on these matters for the state of Texas in her prior employment with the Texas Commission on Environmental Quality (TCEQ). EPN therefore urges EPA not to finalize approval of these proposed changes to the SO2 designations for these three Texas areas.

Background

The history of the current SO2 designations is long and complicated. As noted in the proposed rule, after first invoking a statutory 1-year extension of the deadlines to designate areas, EPA published an initial round of SO2 designations for certain areas of the country on August 5, 2013 (referred to as "Round 1") (78 FR 47191). Following the initial designations, three lawsuits were filed against EPA in different U.S. District Courts, alleging the agency had failed to perform a nondiscretionary duty under the Clean Air Act (CAA) by not designating all portions of the country by the June 2, 2013, statutory deadline. The state of Texas was a plaintiff or plaintiff-intervenor in two of those cases. In one of those cases (Sierra Club and NRDC v. McCarthy, No. 13–cv–3953), the U.S. District Court for the Northern District of California on March 2, 2015, entered an enforceable order for EPA to complete the area designations by three specific deadlines according to the court-ordered schedule. The court order required EPA to designate areas containing sources meeting certain criteria—basically, certain very large sources, such as power plants—no later than July 2, 2016. The three Texas areas EPA designated that are the subject of this proposed action contained sources meeting those criteria. To meet the first court-ordered deadline for the next set of SO2 designations, EPA signed a final action including the designations for portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County, on November 29, 2016. 81 FR 89870 (December 13, 2016).

The court order allowed EPA to establish later dates for designations in areas that elected to establish new air quality monitoring networks or submit additional air quality modeling; however, the areas with large sources, including all three of the Texas areas covered by this proposed rulemaking, were required to be designated in 2016 based on the best data available to the agency at that time without regard to state desires concerning future modeling or monitoring. As further noted in the proposal, in 2016 EPA did not have any monitoring data concerning the three Texas areas. EPA did, however, have two sets of modeling data characterizing the Texas areas, one submitted by the state of Texas showing attainment and one submitted by Sierra Club showing nonattainment. 84 FR 43759. In the 2016 rulemaking, EPA determined that the modeling submitted by Texas was not acceptable as it did not follow EPA modeling guidelines. However, EPA concluded at that time that the modeling submitted by Sierra Club was in compliance with EPA modeling guidance and thus appropriate for use in the SO2 designations. See the SO2 NAAQS Designations Modeling Technical Assistance Document at https://www.epa.gov/sites/production/files/2016-06/documents/so2modelingtad.pdf. EPA also clarified at the time that even for states that planned to establish future monitoring networks and believed that all designations should be based on monitoring data, designations would be done based on whatever monitoring or modeling data were available to EPA in 2016 for the areas with large sources, such as the three Texas areas, as required by the consent decree. 84 FR 43761.

The State of Texas and other parties filed petitions for judicial review of these final designations and also filed a petition with EPA asking the agency to reconsider its decisions. On September 21, 2017, EPA responded that it intended to undertake an administrative action to revisit the nonattainment designations.

Discussion

1. Improper use of error correction to reverse designations:
EPA provides two bases for claiming that there was an error back in 2016 when these designations were finalized; neither one amounts to an error.

Error correction can be a viable ground for EPA action and has been used occasionally with respect to designations in the past. However, error correction requires that there be an actual error at the time of the initial EPA action and that the error continues to the present time. Error correction should not be used in cases where current EPA officials simply disagree with a past EPA action and would have acted differently if they had been in charge at an earlier date. EPA is of course free to change its mind about matters, but would need to provide adequate technical support for any changed action rather than merely asserting that an error had been made in the past.

In this case, EPA concluded in 2016 that the Sierra Club modeling was consistent with EPA modeling requirements and was sufficiently reliable to support these designations. It responded, at that time, to concerns raised by other parties about the reliability of that modeling. In its proposed error correction, EPA did not do any additional modeling or analysis to rebut the 2016 modeling, but now belatedly highlights potential inadequacies in the modeling, which it alleges are now sufficient to retroactively reject that modeling as a basis for designation. However, similar comments submitted by the state of Texas and certain Texas utilities at the time of initial designation were rejected by EPA at that time as not undermining the validity of the 2016 modeling. 81 FR 89873. This is not an error correction; this is wanting the substantive analysis to come out another way.

EPA claims as a further basis for the error correction that it should have relied more heavily on the state of Texas' desire to rely on future monitoring data. However, under the applicable court ordered deadline, EPA did not have the discretion to delay designations for these areas containing large SO2 emitting sources but was required to designate based on the best available data. The fact that Texas might like to monitor in the future does not undermine the fact that available modeling data meeting EPA modeling guidance clearly demonstrated that the three Texas areas were violating the SO2 standards.

EPA might argue that for two of the areas, the power plants that were the main sources of SO2 emissions have permanently suspended operations and their operating permits voided, or soon will be voided, and thus the emissions that would have been responsible for potential SO2 violations can no longer do so. While that may be factually correct, there is an appropriate route to return those areas to attainment status: redesignate them using the CAA provided process (which would be straightforward if the main source of emissions is no longer legally permitted to operate). To use the error correction process may seem a quicker way to get to the same result, but it is an inappropriate use of that process and can lead to future abuses. And, we note, in the third area—Rusk County—the power plant continues to operate.

2. Lack of technical information regarding attainment status:
EPA relies on an error correction theory to change the designation of these areas merely by raising potential concerns about the modeling relied on in 2016, concerns similar to those that were raised to EPA and rejected in the designation rulemaking. EPA has not provided any additional modeling or monitoring data relating to the attainment status of the three Texas areas to support changing the designations. In assigning a designation of unclassifiable to these areas, EPA is asserting that it has no available data to characterize the air quality status of these areas. However, the fact that the current EPA Administration does not like the results of the 2016 modeling does not mean that the modeling no longer shows that the areas do not attain the SO2 standard. The potential shortcomings in the data identified in the proposal do not change the bottom line that the modeling followed EPA's modeling guidance, and no other modeling data reaching any other result have been presented.[1]

[1] We note that TCEQ has located an SO2 monitor in Rusk County, near the Martin Lake facility. That monitor has been operating since 2017, so does not yet have three full years of data by which to assess the area's compliance with the SO2 NAAQS.

The CAA, in sections 107 and 175A, requires that areas seeking redesignation from nonattainment provide a technical demonstration that the area has attained the relevant NAAQS and the state has in place an approved maintenance plan designed to keep the area in attainment. Using an error correction theory to change an area's designation to unclassifiable avoids demonstrating that the air quality is now healthy and that plans are in place to ensure that it stays that way. This practice could dangerously undercut the redesignation and maintenance provisions of the statute. In fact, it appears that EPA has already changed the designation of an area in Illinois on a similar error correction theory. See 84 FR 48286 (September 13, 2019).

3. Lack of transparency about potential impartiality:
The error correction proposal was signed by a current EPA employee who previously worked for the state of Texas at the time the state made the recommendation to EPA that these three areas be designated unclassifiable because Texas wished to use monitoring data to characterize air quality. To the extent the employee did work on this issue when employed by the state, there is an appearance of lack of impartiality that undermines the credibility of the agency's action. We understand the employee did recuse themselves from certain matters when working at EPA's Region 6 office, but those matters did not include SO2 designations. Transparency about the employee's involvement, or not, in this specific matter while working at TCEQ is important to assure integrity of EPA's decision-making process.

Conclusion

This rule, if finalized, would set a very dangerous precedent on the use by EPA of error correction rather than redesignation to change an area's air quality designation; would be contrary to clear direction in the CAA that areas should not be redesignated without a technical demonstration that the area has attained the relevant NAAQS and an approved maintenance plan designed to keep the area in attainment; and would put residents at risk, at least in the county where the power plant continues to operate, for continued exposure to significant amounts of pollution, which the areas would have no obligation to control. We respectfully urge EPA not to finalize this approval.

Information available on the TCEQ website, however, indicates that there have been a number of days where the SO2 levels exceeded 75 parts per billion, and it is unlikely that data from 2020, when combined with existing data from 2018 and 2019 will support a showing of attainment over three years based on the Calculation Procedures for the 1-Hour Primary SO2 NAAQS in Rusk County. 75 FR 35596 https://www.tceq.texas.gov/airquality/monops/hourly_data.html.