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August 13, 2021

Michael S. Regan
Administrator
U.S. Environmental Protection Agency
Mail code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Subject: Petition for Reconsideration of EPA's Revised Nonattainment Area Designations in Wisconsin for the 2015 Ozone National Ambient Air Quality Standards, 86 Fed. Reg. 31345 (June 14, 2021) – EPA-HQ-OAR-2017-0548

Dear Administrator Regan:

Enclosed is a petition for reconsideration under section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B). The Wisconsin Department of Natural Resource respectfully requests that EPA reconsiders aspects of the final rule, *Revised Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards*, 86 Fed. Reg. 31345 (June 14, 2021). The Department also requests a stay of the rule under § 307(b)(7)(B).

Reconsideration is warranted under the Clean Air Act when concerns over a final rule were unable to be raised during the period for public comment, or where those concerns arose after the public comment period. Here, it was impossible for the Department or other affected parties to raise objections to EPA's revised area designations during the public comment period because—by EPA's own admission—the agency failed to provide one. Alternatively, EPA's original public comment period held on the intended area designations—which ended on February 5, 2018—was a wholly insufficient opportunity to provide feedback on EPA's response to the 2020 remand ordered in *Clean Wisconsin v. EPA*, 964 F.3d 1145 (D.C. Cir.), 83 Fed. Reg. 651 (Jan. 5, 2018). In either case, and as described in the petition, the Department's grounds for concern were not apparent until the final rule had been published on June 14, 2021.

In addition, this objection is “of central relevance to the outcome of the rule.” 42 U.S.C. § 7607(d)(7)(B). By failing to solicit public input on area designations for the most densely populated areas in Wisconsin, EPA created uncertainty both for the Department and for regulated entities. Addressing ozone nonattainment in Wisconsin is a long-term project requiring a sustained and properly directed commitment at both the state and federal level. EPA must work with the Department in the future so that the root causes of nonattainment in Wisconsin can be cooperatively addressed. Granting this petition would be an appropriate first step.

Sincerely,

Todd L. Ambs
Deputy Secretary
Wisconsin Department of Natural Resources

cc: Preston D. Cole, Secretary
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attainment status for each area in Wisconsin. 42 U.S.C. § 7407(d)(1)(A). The Governor's timely recommendation letter was submitted to EPA in September 21, 2016 and supplemented by a comprehensive technical support document (TSD) submitted to EPA on April 20, 2017. This supplemental TSD took into account significant ozone contributions from upwind states and the complex, well-documented pattern for elevated ozone concentrations to be observed along the Lake Michigan shoreline and sharply decrease even a few miles inland. Within 2 years of promulgating a NAAQS, EPA must promulgate area designations, subject to a 1-year extension under the Clean Air Act. 42 U.S.C. § 7407(d)(1)(B). Because EPA's designations for Wisconsin varied from what the Governor recommended, EPA was required to provide a notification to Wisconsin 120 days in advance of the final designations, along with an opportunity to demonstrate why the proposed designations were inappropriate. Id.

EPA initially disagreed with Wisconsin's proposed designations, so EPA published an 120-day notice on January 5, 2018. Wisconsin responded to the technical information in EPA's 120-day notice by reiterating several recommendations from the April 20, 2017 TSD that EPA failed to address and providing additional data and technical analysis in support of the recommendations. 83 Fed. Reg. 651 (Jan. 5, 2018). EPA took those data and recommendations into account, and finalized the area designations on June 4, 2018. 83 Fed. Reg. 25776. Several petitioners challenged EPA's final area designations in a number of states, including Wisconsin.

During briefing in the lawsuit, EPA sought a remand of most of the Wisconsin area designations, stating "that the Court could benefit from additional explanations of the remaining designations." Clean Wisconsin v. EPA, EPA Br. 59-60 (filed May 5, 2019). EPA listed a range of potential responses should the Court grant the remand, which included "supplementing the record, additional communications with states, and undertaking the 120-day notice process." Id.

Over Wisconsin's objections, the Court granted EPA's request for a voluntary remand without vacatur. The Court directed EPA to "complete the remand as expeditiously as practicable," but left open "at least a realistic possibility that EPA [would] be able to substantiate [rather than revise] the relevant designations on remand." Clean Wisconsin, 964 F.3d at 1177 (D.C. Cir. 2020). The D.C. Circuit gave the following direction to EPA:

For the foregoing reasons, we (1) grant EPA’s motion to remand the designations of McHenry County, Porter County, El Paso County, *Manitowoc County*, and *the Milwaukee-area counties* for further explanation; (2) grant the petitions for review of the designations of Jefferson County, Monroe County, Ottawa County, Weld County, *Door County*, and *Sheboygan County*. . . . The defective designations are remanded to EPA with directions to complete the remand as expeditiously as practicable.

Id. (emphasis added).¹

The Department takes seriously its role as co-regulator with EPA under the Clean Air Act. As such, the Department made multiple requests to EPA for an opportunity to discuss how the technical information currently in the record could be used to respond to the remand. EPA failed to respond to these requests, counter to EPA’s representations in its brief that it would undertake additional communications with states and potentially initiate another 120-day notice process. See Clean Wisconsin v. EPA, EPA Br. 59-60 (filed May 5, 2019). The Department also requested that EPA offer an opportunity for the public to weigh in on this issue, given the process EPA initially followed in 2018, the 120-day process which it reinitiated in June for two of the counties at issue in the Clean Wisconsin decision, and the wide-reaching impacts of EPA’s possible decisions.²

CLEAN AIR ACT PETITIONS FOR RECONSIDERATION

Section 307 provides two separate avenues for parties to challenge final actions and rulemakings made under the Clean Air Act. One is the petition for reconsideration of a rule outlined in § 307(d)(7)(B), which EPA must grant when:

[T]he person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and [the] objection is of central relevance to the outcome of the rule.

¹ Presumably the Court meant to include Kenosha County—part of the Chicago, IL-IN-WI area along with McHenry and Porter Counties—as part of their remand instruction.

² See 86 Fed. Reg. at 31440 (“For the 14 counties that appear in Table 1, as is discussed further in Sections V and VI of this notice, the EPA is exercising its authority to take final action under section 107(d) of the CAA. For the remaining two remanded counties (El Paso County, Texas and Weld County, Colorado), a different process is required, and the EPA is addressing those two counties in a separate Federal Register document. As discussed in Section V of this document, CAA section 107(d) specifies that whenever the EPA Administrator intends to make a modification to a state’s designation recommendation, the EPA must notify the state and provide the state with the opportunity to submit additional information to demonstrate why the EPA’s intended modification is inappropriate. The EPA is required to give the notification no later than 120 days before promulgating the final designation, including any modification thereto.”).

42 U.S.C. § 7607(d)(7)(B).

DNR submits that both conditions for reconsideration are met here. First, it was clearly impracticable to raise objections to EPA’s revised area designations. Because EPA did not offer a public comment period for this rule, the Department only became aware of the expanded area designations for 9 Wisconsin counties when the rule was finalized on June 14, 2021. EPA contends that § 107(d)(2)(B) authorizes the agency to skip notice-and-comment rulemaking when issuing area designations, see 86 Fed. Reg. at 31442, but nothing in the Clean Air Act bars petitions under § 307 for those final agency actions. 42 U.S.C. §§ 7407(d)(2)(B), 7607(d)(7)(B). To say otherwise would be to give EPA unmitigated authority at the end of § 107’s essentially cooperative process.

Additionally, the grounds for the Department’s objections arose long after the only public comment period EPA provided on these designations, but within the 60 days allowed for judicial review under § 307(b). 42 U.S.C. §§ 7607(b), 7607(d)(7)(B). EPA held a 30-day public comment period on EPA’s initial designations in January 2018, during which EPA received over 1,500 comments (including from the Department). 83 Fed. Reg. 651 (Jan. 5, 2018). EPA has deemed this and the 120-day notice sufficient. 86 Fed. Reg. at 31442 (“EPA has already expressed such disagreement and provided the relevant states (Wisconsin, Indiana, and Missouri) with the statutorily-mandated opportunity to demonstrate why EPA’s intended designations were inappropriate.”). Instead of allowing for another 30-day comment period after three years of litigation and a remand from the D.C. Circuit, EPA chose to proceed to final rulemaking without further public involvement. EPA creates grounds for reconsideration “when the final rule was not a logical outgrowth of the proposed rule.” Chesapeake Climate Action Network, et al. v. Env’t Prot. Agency, 952 F.3d 310, 319 (D.C. Cir. 2020) (quoting Alon Refining Krotz Springs, Inc. v. EPA, 936 F.3d 628, 648 (D.C. Cir. 2019)). Here, it would have been impossible for anyone to predict the concerning aspects of EPA’s 2021 final rule in January of 2018, and that is enough to justify reconsideration. See Portland Cement Ass’n v. E.P.A., 665 F.3d 177, 186 (D.C. Cir. 2011) (“While we certainly require some degree of foresight on the part of commenters, we do not require telepathy.”).

The second requirement—whether the objection is of central relevance to the outcome of the rule—is met when “it provides substantial support for the argument that the regulation should be revised.” Coal. for

Responsible Regul., Inc. v. EPA, 684 F.3d 102, 125 (D.C. Cir. 2012). The Department contends that each of the objections identified below offer such support.

Where these two conditions are met, the Administrator “*shall* convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.” 42 U.S.C. § 7607(d)(7)(B) (emphasis added). With regards to the revised area designations promulgated on June 14, 2021, EPA should offer an opportunity for public comment and incorporate that feedback into a new final decision.

ISSUES FOR RECONSIDERATION AND STAY

If the Department had been given the opportunity to comment on EPA’s revised area designations, it would have raised the following concerns. These issues, considered individually and collectively, are each of “central relevance to the outcome of the rule” and therefore present grounds for the Department’s request. 42 U.S.C. § 7607(d)(7)(B).

I. EPA’s retroactive application of attainment dates and SIP due dates set two years ago to these newly revised areas as well as EPA’s direction to states to revise past due emissions inventory SIPs “as expeditiously as practicable” is contrary to the Clean Air Act.

EPA’s stated concern in the June 14, 2021 final rule was to avoid arbitrary rulemaking, but their approach in furtherance of that goal created unfortunate results. 86 Fed. Reg. 31443. In the final rule, EPA backdates SIP requirements for the new portions of the 2015 ozone nonattainment areas created in the final rule. Id. at 31443-31444. Just as in the areas of the country that were designated in June 2018, these new areas in Wisconsin have 3 years from that effective date (or until August 3, 2018) to attain the 2015 standards. Id. Under § 182 of the Clean Air Act, this meant that emissions inventories and emissions statement SIP revisions were due to EPA for these areas by August 3, 2020. Id. (citing 42 U.S.C. §§ 7511a. (a)(1) and (a)(3)(B)). Obviously, this ex post facto deadline cannot be met, and comes with potentially severe consequences. The retrospective application of effective dates denied the Department, and affected sources, the 3-year opportunity to address nonattainment concerns while at a Marginal classification, prior to a reclassification to Moderate as clearly provided for in the CAA. See 42 U.S.C. § 7611(a)(1). EPA’s response to the remand also left Wisconsin vulnerable to sanctions for

overdue SIPs. After acknowledging that the June 14, 2021 final rule creates obligations that in some cases are now a year overdue, EPA has provided only limited relief:

The EPA expects states with areas subject to this final action to work with their respective EPA Regional office to submit any necessary supplements or revisions to fulfill the Marginal area SIP revision requirements associated with the nonattainment boundaries in this final action as expeditiously as practicable.

86 Fed. Reg. at 31444.

EPA's decision to retroactively apply nonattainment requirements in the expanded areas has introduced significant uncertainty into the NAAQS planning and implementation processes, and created a regulatory landscape for which there is no historical analogue. This is already significantly constraining economic development, particularly in the Milwaukee area. For example, Wisconsin was denied the opportunity to generate and bank emissions reductions credits in these expanded nonattainment areas. The generation of these credits would have helped to facilitate the future location of new businesses (or the expansion of existing businesses) in these areas. The many existing sources in these areas also find themselves suddenly subject to costly nonattainment requirements, without having been allowed the time to develop and execute business plans accounting for this situation. Many of these consequences could have easily been avoided had EPA simply provided timely notice of its action, if it felt it had no choice but to expand its initial designations. Instead of simply committing to fulfill statutory obligations to work with states with now-overdue SIP submittals—as EPA has in the June 14 rule—EPA should postpone its expectations for areas of Wisconsin which have been in nonattainment for mere weeks.

II. EPA's "revision" of the Door County nonattainment area does not include the original area and therefore is not a revision of an existing area, but a new area.

EPA's final area designations in June 2018 established an ozone nonattainment area in Door County, Wisconsin, that consisted solely of the approximately 2,400-acre Newport State Park. 83 Fed. Reg. 25776. This designation, like nearly all of EPA's nonattainment decisions in 2018, was based on air quality monitoring data from 2014-2016. 83 Fed. Reg. at 31443. Owing to improvements in the air quality resulting from permanent and enforceable control measures, the Department submitted a redesignation request for this nonattainment area under

§ 107(d)(3)(D) on January 27, 2020, based on revised monitoring data from 2017-2019. 42 U.S.C. § 7407(d)(3)(D); 85 Fed. Reg. 35377 (June 10, 2020). On June 10, 2020, EPA redesignated the 2015 Door County nonattainment area to attainment based on this data. Id.

One year later, instead of taking this new information into account, EPA chose to limit the scope of its review to the 2014-2016 monitoring data. 86 Fed. Reg. at 31443. This was a surprising decision, since neither EPA’s briefing during the Clean Wisconsin nor the Court’s mandate pointed towards such an artificial review. While EPA limited its review in the June 14 final rule to 2014-2016 monitoring data, it also had its June 10, 2020, redesignation of the Door County nonattainment area to contend with. EPA’s approach seems to be unique in the history of § 107 decisions: despite claims to the contrary in the June 14 rule, EPA switched attainment and nonattainment areas in the portion of the county north of Sturgeon Bay and created a *new* nonattainment area. 86 Fed. Reg. at 31443 (“In addition, this action expands the boundaries of existing nonattainment areas but does not create any new nonattainment areas.”).

In doing so without providing a new 120-day notice period, EPA failed to meet its requirements under § 107(d)(1)(B). Id. at 31441. Compounding this decision was EPA’s backdating approach described above, which was not only applied to expanded nonattainment areas in Wisconsin but also to the *new* nonattainment area created in Door County. EPA should convene a proceeding to reconsider the June 14, 2021 rule and in doing so afford the new Door County nonattainment the process due under § 107(d)(1)(B). 42 U.S.C. § 7404(d)(1)(B).

III. The revised Door County nonattainment area does not contain an air quality monitor and has no clear path towards redesignation.

As mentioned above, EPA determined in June 2020 that—based on the most recent available monitoring data—the Door County nonattainment area created by the 2018 final rule could be designated to attainment. 85 Fed. Reg. 35377. The 2018 Door County nonattainment area included the only monitoring site in the County. A requirement for redesignating an area to attainment is a determination based on monitoring data that the area has attained the standard in question. Thus, it is unclear how this area could ever be redesignated to attainment. There do not seem to be any historical analogues for the Department to consider in crafting a redesignation strategy—this appears to be the only ozone nonattainment area which has no monitoring site. Without a clear path to

redesignation, Door County seems to exist in a state of regulatory purgatory because of EPA's June 2021 final rule. In reconsidering the rule, EPA should consider more recent monitoring data that shows that Door County has met its regulatory burden. At the very least, EPA should provide guidance to the Department on how to structure a redesignation request under § 107(d)(3)(D), 42 U.S.C. § 7407(d)(3)(D).

CONCLUSION

EPA erred by publishing the June 14, 2021 final rule without inviting public feedback on its decisions. The procedural defects in EPA's rulemaking have created confusion and areas with no clear path to redesignation under the Clean Air Act. EPA's action does not address the primary causes of Wisconsin's ozone nonattainment, which has repeatedly been demonstrated to be driven by out-of-state emissions. Expanding Wisconsin's nonattainment areas will have little to no impact on air quality and only serves to create regulatory uncertainty. Wisconsin's citizens deserve prompt federal action to address the emissions *primarily* responsible for Wisconsin's ozone nonattainment. EPA should also take immediate action to ensure all states located upwind of Wisconsin comply with any overdue CAA-required emissions control requirements.

The original 2015 ozone NAAQS designations in Wisconsin largely reflected WDNR's decades-long study of the complex interaction between emissions, ozone chemistry, meteorology and geography that occurs along the Wisconsin lakeshore. This scientific understanding formed the basis of WDNR's technical submittals to EPA in support of the designations process. Consistent with the analytic process outlined in EPA's designation guidance, these submittals strongly support the conclusion that local Wisconsin emissions, when considered with meteorology and other data, have only a limited impact on the nonattaining ozone monitors located along the Wisconsin lakeshore. While EPA considered this science when finalizing nonattainment areas in May 2018 that closely aligned with Wisconsin's technically supported boundary suggestions, it largely dismissed this information when revising the designations.

Fairness and the plain language of the Clean Air Act require that EPA convene a proceeding to reconsider the June 14, 2021 final rule. In doing so, EPA should provide a long-overdue opportunity for public involvement and answer questions that the Department and other stakeholders have about the ramifications of the revised area

designations. Because of the uncertainty created by the final rule, EPA should also stay the effectiveness of the Revised Area Designations as provided by § 307(d)(7)(B).