

To: Gunasekara, Amanda[gunasekara.amanda@epa.gov]
From: Stanko, Joseph
Sent: Tue 3/21/2017 2:41:08 PM
Subject: TX Request for Admin. Stay of Effective Date for SO2 Designations
Request to EPA for Admin Stay SO2 EPA ltr-c.pdf

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 15, 2017

VIA Fax: (202)501-1450

Email: Pruitt.scott@epa.gov and Hardcopy

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Request for Administrative Stay, Air Quality Designations for the 2010 Sulfur Dioxide (SO₂) Primary National Ambient Air Quality Standard - Supplement to Round 2 for Four Areas in Texas: Freestone and Anderson Counties, Milam County, Rusk and Panola Counties, and Titus County, 81 *Fed. Reg.* 89,870 (Dec. 13, 2016); Docket No. EPA-HQ-OAR-2014-0464

Dear Administrator Pruitt:

The Texas Commission on Environmental Quality (TCEQ) respectfully requests the U.S. Environmental Protection Agency (EPA) immediately stay the effective date of EPA's final action entitled Air Quality Designations for the 2010 Sulfur Dioxide (SO₂) Primary National Ambient Air Quality Standard - Supplement to Round 2 for Four Areas in Texas: Freestone and Anderson Counties, Milam County, Rusk and Panola Counties, and Titus County, published in the Federal Register on Dec. 13, 2016 (Final Rule).¹

The Governor of the State of Texas submitted recommended designations for the 2010 SO₂ NAAQS, as required under section 107 of the Federal Clean Air Act (FCAA).² In all correspondence with EPA over a three-year period,³ Texas consistently recommended EPA designate as unclassifiable all areas in Texas for which monitored data was not available.⁴ When EPA asked for additional information from States and solicited public comment to inform

¹ 81 *Fed. Reg.* 89,870 (Dec. 13, 2016)

² FCAA §107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A)

³ Letter from Governor Rick Perry to Alfredo Armendariz, Regional Administrator, U.S. EPA Region VI, June 2, 2011; Letter from Governor Rick Perry to Alfredo Armendariz, Regional Administrator, U.S. EPA Region VI, April 20, 2012; Letter from Executive Director Zak Covar to Jennifer Noonan Edmonds, Acting Director, Office of Air Quality Planning and Standard, U.S. EPA, March 18, 2013, Docket No. EPA-HQ-OAR-2012-0233

⁴ See FCAA 107(d)(1)(A); 42 USC 7407(d)(1)(A): "...the Governor of each State shall submit to the Administrator a list of all areas or portions thereof in the State designating as . . . (iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the [NAAQS] for the pollutant."

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their designations of several areas that had yet to be designated (including the three areas subject to the Final Rule), Texas again recommended an unclassifiable designation for any areas where monitored data was not available.⁵

The Final Rule, departing from years of agency practice, rejects Texas's recommended designations for three areas: Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County where monitored data was unavailable. Instead, EPA, relying on a court entered consent decree and not scientific data nor the state's recommendation,⁶ designated these areas nonattainment for the SO₂ NAAQS based on modeling data.⁷ Texas believes EPA's designations in the Final Rule were incorrect and contrary to the FCAA and has filed petitions for judicial review in the 5th Circuit and D.C. Circuit Courts of Appeal.⁸ Additionally, Texas and several states challenged entry of the consent decree upon which the Final Rule is based and have appealed the consent decree to the 9th Circuit Court of Appeals.⁹

EPA should immediately grant a stay of the effective date of the Final Rule. Section 705 of the Federal Administrative Procedures Act (APA) grants EPA authority to stay an agency order or final determination pending judicial review of such order or determination if the EPA finds that "justice so requires."¹⁰ While FCAA section 307(d) is also authority for EPA to stay the effectiveness of rules, this particular provision of the Act applies when it is reconsidering the rule to be stayed. Texas is not asking EPA to reconsider the Final Rule.

Texas is asking for a stay of the effectiveness of the Final Rule under section 705 of the APA pending judicial review of the 9th Circuit appeal and the petitions for review in the D.C. and 5th Circuits. A stay under this provision can be granted where, "at a minimum, a rational connection between [a] stay and the underlying litigation," must be articulated.¹¹

Texas and several other states intervened in the litigation that resulted in the consent decree that EPA acknowledges compelled the action taken in the Final Rule. The Federal District Court for the Northern District of California entered the consent decree over the objections of the Intervenor States and is currently on appeal to the 9th Circuit Court of Appeals. Oral arguments are scheduled for March 16, 2017. Texas and the intervenor states maintain that the consent decree was negotiated and entered without participation of the parties most affected by the designation process and the deadlines and requirements EPA must follow to make designations are beyond what is allowed under the FCAA. EPA should have taken Texas' recommendations that these three areas be designated unclassifiable. Because the Final Rule is based on a consent decree that is contrary to the FCAA, Texas has also filed challenges in the 5th Circuit and D.C. Circuits on the Final Rule.

⁵ Letter from Governor Greg Abbott to Janet McCabe, Assistant Administrator, U.S. EPA, September 18, 2015, Docket No. EPA-HQ-OAR-2014-0464; Letter from Executive Director Richard Hyde to EPA Air Docket, March 31, 2016, Docket No. EPA-HQ-OAR-2014-0464.

⁶ *Sierra Club and NRDC v. McCarthy*, No. 3:13-cv-3953-SI (N.D. Cal.)

⁷ 81 *Fed. Reg.* at 89871, "The court order required the EPA Administrator to sign a notice designating areas in a second round that contained sources meeting certain criteria no later than July 2, 2016."

⁸ *Texas and TCEQ v. U.S. EPA and Catherine McCabe*, No. 17-60088, (5th Cir.); 17-1053 (D.C. Cir.)

⁹ *Sierra Club; NRDC; EPA v. State of North Dakota et al.*, No. 15-15894 (9th Cir.)

¹⁰ 5 U.S.C. § 705

¹¹ *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 34 (D.D.C. 2012)

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The Final Rule begins an 18-month clock, from the January 12, 2017 effective date, for Texas to submit to EPA source-specific attainment demonstration state implementation plans (SIPs) for the nonattainment areas in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County. The Texas attainment demonstration SIPs must meet several requirements including: emissions inventories, implementation of all reasonably available control measures (RACM), provide for reasonable further progress, modeling of attainment, enforceable emission limits and contingency measures.¹² TCEQ must develop these plans early enough to provide adequate time to accept and respond to public comments on the proposed SIPs before submitted for commission approval and submittal to EPA for review and approval. Had EPA instead designated these areas as unclassifiable, these FCAA planning requirements would not be triggered.

Unless stayed, EPA's actions will unjustifiably force Texas to immediately expend significant staff time and resources to meet the SIP submittal deadline; therefore, "justice so requires" EPA stay the effectiveness of the Final Rule (and thus the SIP clock) pending a decision in the federal circuit courts on the legality of the consent decree. Texas must quickly begin to expend precious agency resources on the SIPs, at the expense of other important SIP work. These resources will be wasted if the consent decree is overturned and EPA is directed to re-issue designations based on the recommendations from Texas.

Thank you for consideration of this request, and please contact me at (512) 239-1317 or John Minter, the attorney on this issue, at (512) 239-0663 if we can provide any further information.

Sincerely,



Richard A. Hyde, P.E., Executive Director
Texas Commission on Environmental Quality

cc: The Honorable Ken Paxton, Attorney General of Texas

¹² FCAA § 172(c), 42 U.S.C. § 7502(c)