Message

From: Snyder, Erik [snyder.erik@epa.gov]
Sent: 9/25/2019 7:04:41 PM
To: Imhoff, Robert [imhoff.robert@epa.gov]; Mohr, Ashley [Mohr.Ashley@epa.gov]
Subject: FW: Inside EPA: Former EPA Staff See 'Dangerous Precedent' In SO2 Designation Revision

FYI

From: Casso, Ruben <Casso.Ruben@epa.gov>
Sent: Wednesday, September 25, 2019 2:02 PM
To: Feldman, Michael <Feldman.Michael@epa.gov>; Snyder, Erik <snyder.erik@epa.gov>; Olszewski, Joshua <olszewski.joshua@epa.gov>; Miller, Michael <Miller.Michael@epa.gov>
Subject: Inside EPA: Former EPA Staff See 'Dangerous Precedent' In SO2 Designation Revision

https://insideepa.com/daily-news/former-epa-staff-see-%E2%80%98dangerous-precedent%E2%80%99-so2-designation-revision

Former EPA Staff See 'Dangerous Precedent' In SO2 Designation Revision

September 25, 2019

Former EPA air officials are warning that the agency's proposed "correction" allowing five Texas counties to escape being labeled "nonattainment" with sulfur dioxide (SO2) air standards undermines public health protections and sets an unlawful "dangerous precedent" for other areas to win weaker designations subject to less-stringent SO2 controls.

In comments submitted to the agency ahead of a Sept. 23 deadline for input on the Texas proposal, the Environmental Protection Network (EPN) of former EPA officials and staff warns that the Trump administration has misused Clean Air Act national ambient air quality standard (NAAQS) designation "error correction" power to ease pollution control requirements on three areas spanning five Texas counties. EPN says EPA must follow a lengthier notice-and-comment redesignation proposal if it wants to change the areas' status.

In its Aug. 22 proposal, EPA seeks to move the areas located in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County, from "nonattainment" status for the 2010 SO2 national ambient NAAQS of 75 parts per billion (ppb) over one hour to "unclassifiable."

In practice, this eases pollution control requirements that Texas regulators must impose on SO2 sources, here, a coal-fired power plant, because areas labeled unclassifiable need not impose more stringent requirements than those are meeting the standard and classified in "attainment" with it.

EPA in its proposal notes that two of the three power plants that were responsible for SO2 emissions in the areas have now closed, leaving only one, Martin Lake, operating in Rusk County. The agency's 2016 nonattainment designations were based in part on computer modeling conducted by environmental group Sierra Club, the proposal says.

Texas sued EPA in the U.S. Court of Appeals for the 5th Circuit to overturn the nonattainment findings, citing EPA's reliance on modeling that overestimated the amount of SO2 likely to be emitted by the power plants, and stating its preference to use monitored air data to establish attainment status. The court placed the case in abeyance, pending EPA's review of the situation and possible revision of the attainment designations.

"EPA is proposing that we erred in failing to give greater weight to the state of Texas' preference to use ambient air monitors to characterize SO2 air quality in their state for purposes of the designation, when we considered all available information at the time of designation," the agency says.

In a Sept. 24 statement, EPN member Sara Schneeberg, former Obama assistant general counsel in the EPA Air and Radiation Law Office, says, "If finalized, this action also would set a very dangerous precedent for the use of error correction rather than redesignation to change an air quality designation."

Janet McCabe, former acting head of EPA's air office during the Obama administration, said, "If finalized, this action would put residents of the areas of Texas where the power plant continues to operate at risk for continued exposure to significant amounts of pollution."

EPN's Comments

In a summary of its written comments, EPN says that by skirting the formal redesignation process, EPA is breaking the law, arguing "this would be contrary to clear direction in the Clean Air Act that areas should not be redesignated without a technical demonstration that compliance with the relevant air quality standard has been met, and an approved maintenance plan to keep the area in compliance."

EPN says the proposal "uses an error correction based on agency opinion to change the designation of these areas without presenting adequate explanations of the errors; it relies instead on comments submitted by Texas during the initial designation process that EPA considered at the time and rejected."

Further, the proposal "allows a change in designation status without any additional technical information identifying the actual air quality status of the areas," and "raises concerns about transparency related to the potential lack of impartiality by the EPA official who signed the proposed notice. The signatory worked for the state of Texas at the time the original designations were made," referring to current acting EPA air chief Anne Idsal.

In its full written comments, EPN says, "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."

The group writes, "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."

EPN says that EPA has already applied its error-correction methodology elsewhere to adjust attainment designations. "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."

The group points to EPA's Sept. 13 final rule shifting Williamson County, IL, from "nonattainment" into the "attainment/unclassifiable" category for the 2010 SO2 NAAQS. EPA describes that decision as a "reconsideration," rather than an "error correction," however.

Meanwhile, Sierra Club is threatening to sue EPA over its failure to find that Texas failed to submit the required state implementation plan (SIP) to comply with the 2016 SO2 nonattainment determination for the five Texas counties. In an Aug. 22 letter to the agency, Sierra Club gives 60 days' notice of its intent to sue the agency for violating its non-discretionary duty to issue the finding. Once EPA makes a finding of "failure to submit," the agency then has two years to either approve an adequate SIP, or impose its own federal implementation plan instead