American Lung Association ▪ Clean Air Task Force
Earthjustice ▪ Environmental Defense Fund
Natural Resources Defense Council
Southern Environmental Law Center

February 6, 2009

Lisa Jackson, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Nonattainment designations for fine particle standards

Dear Administrator Jackson:

On December 22, 2008, your predecessor signed a rule designating areas throughout the nation as attainment, nonattainment, and unclassifiable for the 24-hour national ambient air quality standard for $PM_{2.5}$. As of this writing, the rule has not been published in the Federal Register. We strongly urge that, prior to publishing the rule, you to take immediate action to correct a major deficiency in the rule that deprives millions of people the full health protection they deserve under the Clean Air Act.

Our most immediate concern is the prior Administration's refusal to designate as "nonattainment" a number of areas violating the annual $PM_{2.5}$ standard of 15 $\mu g/m^3$. As further detailed below, these areas include the metropolitan areas of Houston, Texas; Augusta, Georgia; Columbus, Georgia; Greenville, South Carolina; and Fairmont, West Virginia; as well as at least two rural counties. The prior Administration did not dispute that all of these areas violate the annual standard, but refused to designate them as nonattainment because it claimed it was not required to do so. EPA, Public Comment Summary and Response Document on EPA's Recommended Area Designations for the 2006 24-Hour $PM_{2.5}$ Designation Recommendations, EPA-HQ-OAR-2007-0562 (Dec. 22, 2008)("RTC") at 21-23. That position is not only legally incorrect, but irresponsible from the public health standpoint. Residents of these communities are exposed to $PM_{2.5}$ levels that EPA found to be associated with premature deaths, increased hospitalizations, and other severe health impacts. These people are entitled to all the protections without delay mandated by Congress for communities that violate clean air health standards.

EPA must designate all areas violating the annual standard.

EPA's duty to promulgate the latest round of $PM_{2.5}$ designations was triggered by its 2006 revision of the $PM_{2.5}$ standards. In that revision, EPA changed the level of the 24-hour $PM_{2.5}$ standard from 65 $\mu g/m^3$ to 35 $\mu g/m^3$ and revised the annual $PM_{2.5}$ standard of 15 $\mu g/m^3$ by changing the spatial averaging component of that standard, in addition to other changes. The

prior Administration claimed that it was free to ignore violations of the annual standard in promulgating the most recent designations because it did not change the level of the annual standard. RTC 21-23. But the law does not allow such an approach.

The Act triggers the EPA's duty to promulgate designations "[u]pon promulgation or revision of a national ambient air quality standard." 42 U.S.C. §7407(d)(1) Congress provided for designation as "nonattainment" any area that does not meet the national primary or secondary NAAQS for the pollutant, necessarily including any annual standard for the pollutant [defining a nonattainment area as "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant."]. *Id*. Because EPA's 2006 action revised the $PM_{2.5}$ NAAQS, including the annual standard, EPA is obligated under section 107 of the Act to promulgate designations that reflect nonattainment for the annual standard.

Contrary to the prior Administration's claim, EPA's duty to act is not limited to situations where the agency changes the "level" of the standard. Rather, EPA must promulgate designations upon any "promulgation or revision" of standards, without regard to the nature of the promulgation or revision. Such a conclusion is compelled by the plain language of section 107.

The prior Administration's refusal to make nonattainment designations for the annual standard is also manifestly arbitrary and unreasonable. Congress plainly intended that areas violating the NAAQS be designated nonattainment and subjected to the range of protections set forth in part D. There is no rational and legal basis for depriving residents of these areas of the protections mandated by Congress. The Act's deadlines for designations, SIP revision, adoption of specific controls, and timely attainment all show that Congress viewed timely attainment of standards as an urgent matter requiring strong measures and expeditious action.

It is illegal and wholly irrational to provide less protection to people breathing unhealthful annual $PM_{2.5}$ levels today than to those breathing unhealthful annual levels several years ago when EPA promulgated nonattainment designations for the 1997 $PM_{2.5}$ NAAQS – especially given the scientific evidence showing that $PM_{2.5}$ is even more dangerous than previously thought. Yet that is precisely the result of the previous Administration's approach. An area with an annual $PM_{2.5}$ design value of 15.2 $\mu g/m^3$ at the time of the previous designations is designated "nonattainment," while an area with an even higher annual design value today (e.g., 15.8 $\mu g/m^3$ in Houston) is treated as being "attainment" or "unclassifiable." There is no conceivable reasoned justification for such an outcome.

Five metropolitan areas include counties that have design values for 2005-2007 that violate the annual $PM_{2.5}$ standard, but do not violate the 24-hour standard. In addition, there are at least two rural counties that are not part of a metropolitan area that also only violate the annual $PM_{2.5}$ standard. The list below includes the counties in violation and all counties in the defined Metropolitan Statistical Areas (MSA) or Combined Statistical Areas (CSA). One of them, Houston-Baytown-Huntsville, TX Combined Statistical Area, has over 5.7 million residents and is the nation's fourth largest city. The entire MSA or CSA must be included in the

nonattainment area because $PM_{2.5}$ pollution in these communities comes from multiple counties, not just one. The sources of $PM_{2.5}$ pollution are found throughout the economic and transportation networks that are used to determine the counties included in each MSA or CSA. Congress itself endorsed this approach in the 1990 CAA Amendments. Unless all contributing sources are included in the nonattainment area and made subject to planning and clean up requirements, these states will not be able to assure attainment and protection of public health as the Act requires.

Areas in violation of the Annual $PM_{2.5}$ National Ambient Air Quality Standard (based on 2005-2007 design values)

Augusta-Richmond County, GA-SC MSA
Aiken County, SC
Burke County, GA
Columbia County, GA
Edgefield County, SC
McDuffie County, GA
Richmond County, GA (design value is 15.7 $\mu g/m^3$)

Columbus-Auburn-Opelika, GA-AL Combined Statistical Area
Chattahoochee County, GA
Harris County, GA
Lee County, AL
Macon County, AL
Marion County, GA
Muscogee County, GA (design value is 15.2 $\mu g/m^3$)
Russell County, AL (design value is 15.7 $\mu g/m^3$)

Houston-Baytown-Huntsville, TX Combined Statistical Area
Austin County, TX
Brazoria County, TX
Chambers County, TX
Fort Bend County, TX
Galveston County, TX
Harris County, TX (design value is 15.8 $\mu g/m^3$)
Liberty County, TX
Matagorda County, TX
Montgomery County, TX
San Jacinto County, TX
Walker County, TX
Waller County, TX

Greenville-Spartanburg-Anderson, SC MSA
Anderson County, SC

Cherokee County, SC
Greenville County, SC (design value is 15.3 $\mu g/m^3$)
Laurens County, SC
Oconee County, SC
Pickens County, SC
Spartanburg County, SC
Union County, SC

Fairmont, WV
Marion County, WV (design value is 15.3 $\mu g/m^3$)

Other Counties
Washington County, GA (design value is 15.2)
Wilkinson County, GA (design value is 15.1)

Unless EPA officially recognizes the failure of these areas and any others similarly situated to attain the annual standard, the people who live in those areas will fail to receive the full protection under the Clean Air Act to which they entitled. Those protections include provisions requiring plans to bring these areas into attainment of standards by deadlines set forth in the laws. EPA is legally obligated to enforce the law and provide that protection. Hundreds of thousands will suffer and many will die because the measures to clean up pollution will not be put in place.

The nation has been down this road too many times before. The Clean Air Act requires the EPA to designate nonattainment areas because Congress recognized the need for official recognition of the levels of unhealthy air quality and accountability for reducing those levels. This is not a voluntary program, but one where there is formal, affirmative responsibility for action.

The prior Administration's refusal to designate areas violating the annual standard is particularly inexcusable given that the 2006 standard was not adequate to protect public health. The prior Administration rejected a near-unanimous recommendation of the Clean Air Scientific Advisory Council (CASAC) that the annual standard be strengthened, despite substantial scientific evidence that the existing 15 $\mu g/m^3$ standard allowed significant adverse health impacts. It was truly indefensible for the prior Administration to then disregard the exposure of millions of Americans to fine particle levels that are even higher than this deficient standard.

For all the foregoing reasons, prior to publication, EPA must correct the notice of final action on $PM_{2.5}$ designations (and underlying supporting documents) to state that the action does not fully discharge EPA's designation duties because it does not specify nonattainment designations for the annual $PM_{2.5}$ standard. EPA must further immediately provide notice to each state in which the above-referenced areas are located, and to any other states having areas violating the annual standard, that EPA intends to designate such areas as nonattainment within 120 days of the notice. Once EPA corrects the federal register notice as requested above, EPA need not and

should not further delay publication of the 24-hour designations while the agency prepares and finalizes annual designations.

We ask for your immediate attention to this matter, which is critical to the lives and health of so many people. We would be happy to meet with you or your staff to discuss any of the above concerns at your earliest convenience.

Sincerely,

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