July 14, 2021

Via regulations.gov

Carla Oldham
U.S. Environmental Protection Agency
Office of Air Quality Planning and Standards
Air Quality Policy Division, C541A
Research Triangle Park, NC 27709
telephone (919) 541-3347
oldham.carla@epa.gov

Re: Comments Regarding Intended Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards; Response to the July 10, 2020, Court Decision Addressing El Paso, Texas and Weld County, Colorado: Notification of Availability and Public Comment Period, 86 Fed. Reg. 31,460 (June 14, 2021); EPA Docket No. EPA-HQ-OAR-2017-0548; FRL-10023-49-OAR.

Dear Ms. Oldham:

On behalf of Chaparral Community Coalition for Health and Environment, Earthworks, Environmental Defense Fund, Environmental Integrity Project, Familias Unidas del Chamizal, Sierra Club, Sunrise El Paso, and WildEarth Guardians (collectively "Environmental Organizations"), thank you for the opportunity to comment on EPA's proposed response to the remanded ozone designation for El Paso County, Texas ("El Paso"). Our organizations represent thousands of individuals living in El Paso and Doña Ana County, New Mexico. We are committed to protecting residents of this region from air pollution, with a special focus on eliminating disproportionate pollution impacts on low-income and minority communities.

Our organizations have consistently advocated for EPA to adopt science-based air quality designations for the El Paso-Las Cruces area. Indeed, two of our organizations were responsible for the litigation that resulted in the remand here. Following EPA's April 2018 decision to designate El Paso as attainment for the 2015 ozone NAAQS, Familias Unidas del Chamizal and Sierra Club filed petitions for review this designation. In *Clean Wisconsin v. EPA*, 964 F.3d 1145 (D.C. Cir. 2020), the court granted our petitions and remanded the El Paso designation to EPA "with directions to complete the remand as expeditiously as practicable." *Id.* at 1177.

There can be no serious question that El Paso is experiencing unsafe levels of ozone pollution and contributing to unsafe levels of ozone pollution in southern New Mexico. In its 2020 State of the Air report, the American Lung Association, ranked El Paso-Las Cruces at number 13 on a list of the most ozone-polluted metropolitan areas in the United States, worse

than New York, Chicago, and Dallas-Fort Worth.[1] This ranking reflects the fact that El Paso experiences a weighted-average of 12 high ozone days per year.[2]

These elevated pollution levels cause real harm to individuals in our community. According to analysis by researchers at New York University and the American Thoracic Society, elevated ozone levels in El Paso-Las Cruces cause, on an annual basis, about 18 premature deaths, 53 emergency room visits, and almost 60,000 missed work or school days.[3] Our members and supporters experience a variety of health problems on days with high ozone levels, including asthma attacks, difficulty breathing, and headaches.

We appreciate EPA's commitment to responding to the remand as expeditiously as practicable. In addition, we appreciate the care with which EPA has reviewed the record, and are pleased that EPA intends to designate El Paso as nonattainment, consistent with the best available science and the Clean Air Act's goals of protecting public health and welfare. We offer the following additional comments to assist EPA in finalizing the proposed designation.

LEGAL FRAMEWORK

The Clean Air Act requires EPA to designate as nonattainment "any area that does not meet" the NAAQS along with any area that "contributes to ambient air quality in a nearby area that does not meet" the NAAQS. 42 U.S.C. § 7407(d)(1).[4] A violating area is one that contains a regulatory monitor that shows a violation of the NAAQS. A contributing area is one that is contributing to a violation of the NAAQS in a nearby area, even though the contributing area itself is not violating the NAAQS.[5] EPA has consistently interpreted "contribute" to mean those areas and sources that "sufficiently" contribute to nonattainment nearby. *See Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 41 (D.C. Cir. 2009).

EPA's 2015 Guidance sets out a uniform, iterative process by which EPA must evaluate and determine nonattainment boundary designations throughout the country. Specifically, the designation process for every area of the country must be informed by five factors: air quality

---

[1] American Lung Association, Most Polluted Cities, available at https://www.lung.org/research/sota/city-rankings/most-polluted-cities.

[2] American Lung Association, Texas: El Paso Report Card, available at https://www.lung.org/research/sota/city-rankings/states/texas/el-paso.

[3] Health of the Air 2019, available at https://healthoftheair.org/. (El Paso County experienced 13 premature deaths, 42 emergency room visits, and 46,473 impacted days, while Doña Ana County experienced 5 premature deaths, 11 emergency room visits, and 13,185 impacted days).

[4] *See also* Feb. 25, 2015 Memorandum from Janet G. McCabe to Regional Administrators re: "Area Designations for the 2015 Ozone National Ambient Air Quality Standards", ("2015 Guidance") at 3, 5 ("Section 107(d) explicitly requires that the EPA designate as nonattainment not only the area that is violating the pertinent standard, but also those nearby areas that contribute to the violation in the violating area.").

[5] *Id*.

data, emissions and emissions-related data, meteorology, geography/topography, and jurisdictional boundaries.

At the first step, in areas where EPA or the states have installed certified air quality monitors, EPA must designate an area as being in nonattainment if the state-certified air quality monitoring data shows a violation of the standard. EPA makes those initial nonattainment determinations based on "the most recent complete three consecutive calendar years of quality-assured, certified air quality data in the EPA Air Quality System." 2015 Guidance at 3. If a violating monitor is identified, EPA proceeds to the second step to determine whether any nearby areas contribute to violations of the standard, and must also be designated as nonattainment. *Id.* Because ozone and its precursors are "readily transported" across geographic areas, EPA explained that it would consider a "relatively broad geographic area" in determining which areas contributed to a violation. *Id.* at 5.

As a starting point for analyzing whether nearby areas contribute to a violating monitor, EPA's Guidance Document requires the consideration of emissions and sources from each of the counties adjacent to—and connected with—the area with a violating monitor.[6] These broader geographic areas are not presumed to be the nonattainment boundaries, but provide context for understanding emission trends in a metropolitan area: population and degree of urbanization, and traffic and commuting patterns. *Id.* at *6.

The third step considers meteorological data "to assess the fate and transport of emissions." *Id.* at *7. EPA frequently uses the HYSPLIT modeling system to produce "trajectories that illustrate the 3-dimensional paths traveled by air parcels to a violating monitor." *Id.* The fourth step examines "physical features of the land that might define the airshed." *Id.* at *10. For example, "[m]ountains or other physical features may influence the fate and transport of emissions as well as the formation and distribution of ozone contributions." *Id.* In addition, "valley-type topographical features can cause local stagnation episodes where vertical temperature inversions effectively 'trap' air pollution." *Id.* At the fifth step, "existing jurisdictional boundaries may be considered for the purpose of providing a clearly defined legal boundary" and ensuring "meaningful air quality planning and regulation." *Id.* at *10–11.

Once EPA performs this five-step analysis, it considers all of the factors together and "use[s] a weight-of-the-evidence approach" for reaching its conclusion. *Id.* at *11. "The guiding principle for this evaluation should be to include, within the boundaries of the nonattainment area, nearby areas with emissions of ozone precursors (NOx and VOC) that contribute to the violating monitor on days that exceed the NAAQS." *Id.*

[6] EPA refers to these broader geographic areas as the "Combined Statistical Area" or "Core Based Statistical Area," which are collective terms that typically consist of a "county or counties associated with at least one urban core, plus adjacent counties having a high degree of social and economic integration with the county as measured through commuting ties with the counties containing the core." *Id.* at 5-6.

COMMENTS

A. The Existing Record Requires EPA to Designate El Paso as Nonattainment.

1. The Five-Factor Analysis Confirms that El Paso Is Contributing to Nonattainment in Sunland Park.

We recognize that EPA intends to base its final designation for El Paso on data and information contained in the existing administrative record. The existing record establishes, beyond reasonable debate, that El Paso is contributing to nonattainment at the Desert View monitor in Sunland Park, located just over a mile from El Paso. There is no dispute that the Desert View monitor is reporting a violation of the 2015 ozone NAAQS. EPA correctly designated Sunland Park as a nonattainment area in 2018, based on this monitored violation. Having done so, EPA was obligated to evaluate whether nearby counties, including El Paso, are contributing to this violation. Applying the five-factor test confirms that it is.

Emissions and Emissions-Related Factors. The emissions and emissions-related data factor strongly supports a finding that El Paso contributes to nonattainment in Sunland Park. The record shows that El Paso County is responsible for 58% of the domestic NOx and 68% of the domestic VOC emissions in the area that includes Sunland Park.[7] In other words, El Paso County is responsible for a ***majority*** of domestic emissions in the region. Even when foreign emissions are considered, El Paso is responsible for roughly a quarter of regional emissions.[8] As of 2015, El Paso was home to about 835,000 people, with a density of 825 individuals per square mile.[9] It has six large point sources and its roads experience nearly 6 billion VMTs per year.[10]

By contrast, Sunland Park's contribution to regional air pollution is so small that EPA did not even attempt to quantify it. Sunland Park has an estimated population of about 20,324 people,[11] while Doña Ana County as a whole has a population of about 214,000. The population

---

[7] May 25, 2021 Technical Support Document for Counties Remanded to EPA ("Remand TSD") at 10, Tbl. 3.

[8] April 30, 2018 Technical Support Document for Doña Ana County at 16 ("2018 TSD") (even when emissions from nearby areas of Mexico were included, El Paso emits 28% of regional NOx and 22% of regional VOCs).

[9] Remand TSD at 12, Tbl. 4.

[10] Remand TSD at 11 and 14, Tbl. 5.

[11] New Mexico 2015 Ozone NAAQS Recommendation – Technical Support Document, EPA-HQ-OAR-2017-0548-0035 ("New Mexico Recommendation"), at 12 (Sept. 2, 2016), available at https://www.env.nm.gov/wp-content/uploads/sites/2/2017/05/2015OzoneDesignationRequest.pdf.

density of the county is 56 individuals per square mile.[12] Sunland Park has a single point source and about 63 million VMTs.[13]

In sum, El Paso is the predominant domestic source of ozone-precursor emissions in the region. Its population is approximately 40 times larger than the population of Sunland Park and experiences about 90 times as many VMT per year. It has numerous point sources and is much denser. Thus, the emissions and emission-related data factor weigh heavily in favor of a contribution finding.

Meteorology, Geography, and Topography Factors. The meteorology, geography, and topography factors also support a contribution finding. As EPA notes, ***8 of 13 exceedance days*** show HYSPLIT trajectories passing through El Paso County before reaching the violating monitor.[14] Moreover, the violating monitor is located just over a mile from El Paso. Wind patterns are generally consistent with transport from El Paso to the violating monitor on days when that monitor exceeded the NAAQS, with airflow predominantly from the south, southeast, and east on high ozone days.[15] Finally, as EPA correctly recognizes in the Remand TSD, the Franklin Mountains are not a meaningful barrier to pollution transport from El Paso to Sunland Park.[16] Instead, pollution freely moves up the "pass" that El Paso is named for—the river valley that runs from downtown El Paso and then past Sunland Park.

Jurisdictional Boundaries. Because El Paso County and Doña Ana County share an airshed, they have long collaborated to implement air pollution control programs. As EPA notes, the El Paso Metropolitan Planning organization includes El Paso County and the southeast portion of Doña Ana County.[17] In addition, representatives from EPA, the Texas Commission on Environmental Quality, and the New Mexico Environment Department participate in the Joint Advisory Committee for the Improvement of Air Quality in the Paso del Norte Air Basin.[18]

2. EPA's Decision to Designate El Paso as Attainment in 2018 Was Arbitrary and Capricious.

In the 2018 TSD, EPA never purported to find that El Paso was *not* a contributor to nonattainment in Sunland Park. Instead, EPA cited Mexico's contribution to Sunland Park's nonattainment as a basis for discounting El Paso's contribution. EPA's reliance on Mexico's

---

[12] Remand TSD at 12, Tbl. 4.

[13] New Mexico Recommendation at 14.

[14] Remand TSD at 17.

[15] *Id.*

[16] *Id.* at 18.

[17] *Id.* at 20.

[18] *See* https://www.cccjac.org/; *see also* EPA Region 6 News Release, "Celebrating 25 Years of Binational Cooperation on the Improvement of Air Quality in Paso del Norte Region Airshed," (May 7, 2021), available at https://www.epa.gov/newsreleases/celebrating-25-years-binational-cooperation-improvement-air-quality-paso-del-norte (discussing Joint Advisory Committee).

contribution to the ozone problem in Sunland Park was misplaced, for at least two reasons. First, "a 'contributing' county need not be the but-for cause of a violation in order to warrant a nonattainment designation." *Miss. Comm'n on Env't Quality v. EPA*, 790 F.3d 138, 163 (D.C. Cir. 2015). It follows that a county may "contribute" to nonattainment even though another jurisdiction's contribution is larger. Indeed, EPA must designate as nonattainment any area that "exacerbates" nonattainment nearby, a flexible standard that courts have recognized as central to the "very purpose" of Section 107(d) area designations. *Catawba Cnty*, 571 F.3d at 39.

Second, EPA's prior reliance on foreign emissions at the designation stage was inconsistent with Section 179b of the Clean Air Act. This provision states:

> Notwithstanding any other provision of law, an implementation plan or plan revision required under this chapter shall be approved by the Administrator if—
>
> (1) such plan or revision meets all the requirements applicable to it under the chapter other than a requirement that such plan or revision demonstrate attainment and maintenance of the relevant [NAAQS] . . . and
>
> (2) the submitting State establishes to the satisfaction of the Administrator that the implementation plan of such State would be adequate to attain and maintain the relevant [NAAQS] . . . but for emissions emanating from outside of the United States.

42 U.S.C. § 7509a(a). This provision demonstrates that Congress intended for EPA to consider foreign emissions during its review of state implementation plans—i.e., *after* EPA has designated nonattainment areas and states have developed plans for bringing these areas into attainment. Moreover, the relief that Congress provided here is narrow. States must "meet[] all the requirements applicable" under the Clean Air Act other than the requirement to demonstrate attainment. *See id*. It upsets Congress's plan for dealing with foreign air pollution to excuse a county's contribution to nonattainment in a nearby area simply because a foreign country also contributes to such nonattainment.

3. Texas's Initial Recommendation that El Paso Be Designated as Nonattainment, and the Data Underlying that Recommendation, Provide Additional Support for Designating El Paso as Nonattainment.

An additional fact in the record supports EPA's proposal to designate El Paso as nonattainment: Texas initially recommended that El Paso be designated nonattainment based on the fact that El Paso's design value for 2013–2015 exceeded 70 ppb. Texas subsequently changed its recommendation after submitting an exceptional event demonstration that resulted in the exclusion of certain data from the design value. While EPA cannot consider the excluded data in deciding whether El Paso was meeting the 2015 ozone NAAQS, it can and should consider that data as part of the contribution analysis. *See* 42 U.S.C. § 7619(b)(3)(B) (providing for exclusion, in certain circumstances, of "air quality monitoring data that is directly due to exceptional events from use in determinations by the Administrator *with respect to exceedances or violations of the national ambient air quality standards*", but not providing for the exclusion of this data for the purposes of determining whether a contribution exists) (emphasis added).

The fact that El Paso is itself exceeding the NAAQS indicates that air passing through El Paso to Sunland Park on high ozone days is likely to contain ozone pollution.

4. Conclusion

For all of the foregoing reasons, the existing record compels a finding that El Paso is contributing to ozone exceedances in Sunland Park. It must be designated as nonattainment based on this contribution. *See Clean Wisconsin*, 964 F.3d at 1153 ("even an area whose ambient air concentration complies with the relevant NAAQS must be designated as nonattainment if it 'contributes' to a NAAQS violation in a 'nearby area'") (quoting 42 U.S.C. § 7407(d)(1)(A)(i)).

B. More Recent Data Confirm that El Paso Must Be Designated as Nonattainment.

1. El Paso is Violating the 2015 Ozone NAAQS.

Under Section 107 of the Clean Air Act, "any area that does not meet the [NAAQS] must be designated 'nonattainment,' even if the state initially designated it as 'attainment." *Texas v. EPA*, 983 F.3d 826, 837 (5th Cir. 2020) (quoting 42 U.S.C. § 7407(d)(1)(A)). El Paso is experiencing ozone levels well in excess of the 2015 ozone NAAQS. Using the most recent data (2018 to 2020), the University of Texas at El Paso ("UTEP") monitor is reporting an ozone design value of 76 ppb.[19] The Chamizal and Skyline Park monitors are also exceeding the NAAQS, with these monitors reporting design values of 74 and 73 ppb, respectively.[20] El Paso's three-year average design value has exceeded 70 ppb during every year on record, except for 2016, when its design value was exactly 70 ppb.[21] EPA's own certified design value data confirms that the El Paso monitors are violating the NAAQS.[22]

El Paso's ozone problem has been getting worse. El Paso experienced four violations of the ozone standard in 2016, followed by 12 in 2017, 14 in 2018, nine in 2019, and ***16*** violations in 2020.[23] On August 21, 2020, El Paso reported a design value of 102 ppb—the highest value reported in the state of Texas in 2020 and the highest value reported in El Paso in more than a

[19] TCEQ, Compliance with Eight-Hour Ozone Standard, available at https://www.tceq.texas.gov/cgi-bin/compliance/monops/8hr_attainment.pl.

[20] *Id.*

[21] EPA Region 6, Air Quality Report in the Paso del Norte, at 11 (Oct. 15, 2020), available at https://www.cccjac.org/uploads/9/1/9/2/91924192/new_proposed_changes_aq_report_10152020.pdf.

[22] *See* EPA, Ozone Design Values 2020, Tbl. 2a, available at https://www.epa.gov/sites/production/files/2021-05/o3_designvalues_2018_2020_final_05_11_21.xlsx [Attached as **Exhibit A** hereto].

[23] TCEQ, Eight-Hour Ozone High Value Days, available at https://www.tceq.texas.gov/cgi-bin/compliance/monops/8hr_exceed.pl.

decade.[24] Because El Paso "does not meet" the NAAQS, EPA must designate the area as nonattainment. 42 U.S.C. § 7407(d)(1)(A).

2. Additional Evidence Confirms El Paso is Contributing to Nonattainment in Sunland Park.

Recent analyses commissioned by the New Mexico Environment Department ("NMED") confirm that emissions from El Paso contribute substantially to nonattainment in Sunland Park. First, photochemical modeling conducted by the Western Regional Air Partnership in 2016 showed that nearby areas of Texas (those within a 12/4-km grid centered on Doña Ana County) contributed **6.9 ppb** to Sunland Park's design value in 2011, compared to 7.6 ppb from nearby areas in Mexico and 2.4 ppb from New Mexico.[25] Second, source apportionment modeling conducted by Western States Air Resources Council in 2020 found that emission from Texas were responsible for **8%** of the ozone reaching the Desert View monitor on high ozone days.[26] On two of the ten days analyzed by this study, Texas contributed *10 ppb* or greater towards the design value at the Desert View monitor.[27]

C. EPA Must Designate the Entirety of Doña Ana County as Nonattainment.

The Desert View monitor in Sunland Park continues to violate the 2015 ozone NAAQS, reporting a design value of 78 ppb based on the most recent design value (2018–2020).[28] However, recent data demonstrate that the ozone problem in Doña Ana County is not confined to Sunland Park. The most recent design value for the Santa Teresa monitor is 74 ppb, while the most recent design value for the Chapparal monitor is 72 ppb.[29] The two other monitors in the county, the Solano monitor in Las Cruces and the La Union monitor, are each on the verge of exceeding the standard, with each reporting a design value of 70 ppb.[30] None of these other monitors are included in the boundaries of the existing nonattainment area.

Because Doña Ana County, as a whole, "does not meet" the 2015 ozone NAAQS, EPA must designate the entire county as nonattainment. 42 U.S.C. § 7407(d)(1)(A). Alternatively, EPA should designate the entire county as nonattainment based on the contribution from the rest of the county to ozone exceedances at the Desert View monitor. Notably, the New Mexico

[24] TCEQ, High Ozone in Your Metro Area, available at https://www.tceq.texas.gov/cgi-bin/compliance/monops/ozone_summary.pl

[25] Air Quality Bureau, Clean Air Act 179B Demonstration, Sunland Park Ozone Nonattainment Area, at 19 (June 2, 2021), available at https://www.env.nm.gov/air-quality/wp-content/uploads/sites/2/2017/02/Sunland-Park-179B-Final.pdf [Attached as **Exhibit B** hereto].

[26] *Id.* at 21.

[27] *Id.* at 22, Figure 18 (see analysis for July 25, 2014 and August 18, 2014).

[28] *See* EPA, Ozone Design Values 2020, Tbl. 5, https://www.epa.gov/sites/production/files/2021-05/o3_designvalues_2018_2020_final_05_11_21.xlsx.

[29] *Id.*

[30] *Id.*

Environment Department recommended, in September 2016, that Santa Teresa be included in the Doña Ana County nonattainment area.[31] Accordingly, EPA could expand the nonattainment area to include Santa Teresa without initiating a 120-day process.

D. The August 2021 Attainment Deadline Should Apply to the El Paso-Las Cruces Nonattainment Area.

We strongly agree with EPA that the proposed action is properly viewed as an expansion of the existing Doña Ana County nonattainment area, rather than the creation of a new nonattainment areas. 86 Fed. Reg. at 32,463. As such, the nonattainment area should be subject to the existing August 2021 attainment date. Any other result would create inconsistency between nonattainment areas in different parts of the country, and further prejudice residents of the El Paso-Las Cruces area, who have already been denied critical public health protections for three years.

CONCLUSION

Environmental Organizations urge EPA to finalize the proposed nonattainment designation for El Paso County as quickly as possible. We further urge EPA to designate Doña Ana County in its entirety as an ozone nonattainment area.

Respectfully submitted,

/s/ David R. Baake

David R. Baake
Baake Law, LLC
2131 N Main Street
Las Cruces, NM 88001
(575) 343-2782
david@baakelaw.com

Joshua Smith
Sierra Club Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5560
joshua.smith@sierraclub.org

On behalf of:

Chaparral Community Coalition for Health and Environment
Ida Garcia, Organizer
Chaparral, NM

[31] EPA-HQ-OAR-2017-0548-0035, New Mexico Recommendation, at at 16–18.

Earthworks
Miguel Escoto, West Texas Field Associate
El Paso, TX

Environmental Defense Fund
Colin Leyden, Director, Legislative & Regulatory Affairs, Energy
Austin, TX

Environmental Integrity Project
Colin Cox, Attorney
Austin, TX

Familias Unidas del Chamizal
Cemilli de Atzlan, Guillermo Glenn, and Hilda Villegas, Organizers
El Paso, TX

Sierra Club – Rio Grande Chapter
Camilla Feibelman, Director
Albuquerque, NM

Sierra Club – Lone Star Chapter
Cyrus Reed, Ph.D, Interim Director & Conservation Director
Austin, TX

Sunrise El Paso
Angel Ulloa, HUB Coordinator
El Paso, TX

WildEarth Guardians
Jeremy Nichols, Climate and Energy Program, Director
Wheat Ridge, CO