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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 23, 2010

VIA FAX (202) 501-0600, Email and Hardcopy

The Honorable Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Mail Code: 1101A
Washington, DC 20460

Ms. Gloria Hammond
U.S. Environmental Protection Agency
Office of Air & Radiation-Correspondence Unit
NAHE SEE Program
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Washington, DC 20460

Re: Petition for Reconsideration of Final Rule: Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35520, June 22, 2010 ("Final Rule"). EPA Docket Number EPA-HQ-OAR-2007-0352.

Dear Administrator Jackson:

The Texas Commission on Environmental Quality appreciates the opportunity to submit the attached Petition for Reconsideration of the Final Rule in the above-referenced matter.

Please accept the attached document for filing and confirm receipt. If you have any questions, please contact me at (512) 239-5525, John Minter at (512) 239-0663, or Terry Salem at (512) 239-0469.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark R. Vickery".

Mark R. Vickery, P.G.
Executive Director

Enclosure

cc: Gina McCarthy, Assistant Administrator for Air and Radiation, OAQPS, U.S. EPA
Steve Page, Director, OAQPS, U.S. EPA
Rich Ossias, Associate General Counsel, U.S. EPA
Dr. Michael J. Stewart, OAQPS, U.S. EPA
Dr. Aldredo Armendariz, Regional Administrator, U.S. EPA Region 6
Lawrence E. Starfield, Deputy Regional Administrator, U.S. EPA Region 6
Suzanne Murray, Regional Counsel, U.S. EPA Region 6
Brian Berwick, Assistant Attorney General, Office of the State Attorney General
Nancy Olinger, Assistant Attorney General, Office of the State Attorney General
Cynthia Woelk, Assistant Attorney General, Office of the State Attorney General

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In Re:)
) Docket No. EPA-HQ-OAR-2007-0352
Primary National Ambient Air Quality)
Standard for Sulfur Dioxide; Final Rule)

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S PETITION FOR
RECONSIDERATION OF THE FINAL RULE FOR THE PRIMARY NATIONAL
AMBIENT AIR QUALITY STANDARD FOR SULFUR DIOXIDE AND REQUEST FOR
ADMINISTRATIVE STAY**

Pursuant to Clean Air Act § 307(d)(7)(B), the Texas Commission on Environmental Quality (TCEQ) respectfully submits this Petition for Reconsideration, asking the Environmental Protection Agency ("EPA") to reconsider and stay the adoption and implementation of the final rule of Primary National Ambient Air Quality Standard (NAAQS) for Sulfur Dioxide (SO₂), captioned above and published at 75 *Fed. Reg.* 35520 (June 22, 2010) (Final Rule).

I. BACKGROUND AND INTRODUCTION

The Clean Air Act (CAA)¹ governs the establishment and revision of NAAQS,² and provides specific responsibilities for both the EPA and states. EPA is required to set the NAAQS³ and states are required to develop state implementation plans (SIPs) to meet the NAAQS.⁴ EPA's authority is strictly limited to establishing the NAAQS, providing for

¹ 42 U.S.C. § 7401 *et seq.* also referred to as CAA § 101 *et seq.* herein.

² 42 U.S.C. § 7408 and 7409; CAA §§ 108 and 109.

³ 42 U.S.C. § 7409, CAA § 109.

⁴ 42 U.S.C. § 7410, CAA, § 110.

designations and redesignations for states, reviewing SIPs to determine if they comply with specific statutory criteria, and determining whether areas are in compliance with the NAAQS. States have exclusive authority to determine how areas will attain and maintain the NAAQS.⁵

The EPA promulgated a revised NAAQS for SO₂.⁶ In this Final Rule, EPA establishes the revised SO₂ NAAQS and inappropriately limits how states demonstrate attainment with the standard.⁷ EPA acknowledges in the Final Rule that “[i]n setting standards that are “requisite” to protect public health and welfare, as provided in [CAA] section 109(b), EPA’s task is to establish standards that are neither more nor less stringent than necessary for these purposes.”⁸

Once EPA establishes a NAAQS, the CAA then requires EPA, upon recommendation by states, to designate areas as nonattainment, attainment, or unclassifiable.⁹ Once an area is designated for a NAAQS, the CAA requires states to develop and submit SIPs to the EPA to implement, maintain, and enforce the NAAQS.¹⁰ The TCEQ has primary responsibility for implementing and overseeing Texas’ CAA obligations, including compliance with the requirement to implement, maintain, and enforce the NAAQS,¹¹ and a permit program to regulate construction and modification of stationary sources to assure NAAQS compliance.¹² In addition, other CAA programs provide for nationwide reductions in SO₂ emissions under Title II (federal motor vehicle and motor vehicle fuel programs),¹³ new source performance standards,¹⁴ and Title

⁵ *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975). “Congress plainly left with the states, so long as the [NAAQS] were met, the power to determine which sources would be burdened by regulation and to what extent...” *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976).

⁶ 42 U.S.C. § 7409; 40 C.F.R. §§ 50.4, 50.17.

⁷ Final Rule, 75 Fed. Reg. 35520 (June 22, 2010), hereinafter cited as “Final Rule”.

⁸ Final Rule, at p.35521.

⁹ 42 U.S.C. § 7407; CAA § 107(d).

¹⁰ 42 U.S.C. § 7410(a)(1), CAA, § 110(a)(1).

¹¹ TEX. HEALTH & SAFETY CODE, §§ 382.001, *et seq.*

¹² 42 U.S.C. § 7410(a)(1) and (2), CAA § 110(a)(1) and (2).

¹³ 42 U.S.C. §§ 7521 – 7590, CAA §§ 202-250.

IV (Acid Rain).¹⁵ The Acid Rain program requires specific and substantial reductions in SO₂ from power plants by capping overall emissions and allowing trading of allowances through a market-based approach.¹⁶

In the Final Rule, EPA determined that dispersion modeling would be required to determine attainment with the SO₂ NAAQS for purposes of both designations and redesignations.¹⁷

Because there was no mention of this requirement in the proposed rule, EPA did not consider or allow comment on the impact of this decision on the form of the SO₂ standard or generally on whether dispersion modeling is appropriate or allowed under the CAA for these purposes.¹⁸

Texas, like all states, must provide information to EPA to support designations for standards and EPA will designate areas as nonattainment, attainment or unclassifiable.¹⁹ The EPA did not provide a reasoned explanation for why dispersion modeling is an appropriate comparison or “fit” for the form of the standard for purposes of designations or redesignations, or an opportunity to comment on the justification. Therefore, EPA’s final action adopting 40 C.F.R. § 50.17(b) is arbitrary and capricious.

¹⁴ 42 U.S.C. 7411, CAA § 111.

¹⁵ 42 U.S.C. 7651 – 7651o, CAA §§ 402- 416.

¹⁶ Final Rule, at p. 35522. See also EPA website on Acid Rain Programs: <http://www.epa.gov/acidrain/reducing/index.html#clean>

¹⁷ See *generally* discussion in Final Rule, at p. 35550-35554. “Partly in response to ...comments, and after reconsidering the proposal’s monitoring-focused approach in light of EPA’s historical approach to SO₂ NAAQS implementation and area designations decisions, we intend to use a hybrid analytic approach that would combine the use of monitoring and modeling to assess compliance with the new 1-hour SO₂ NAAQS.” Final Rule, at p. 35551, 1st column.

¹⁸ EPA noted in that “Any area that has monitoring and appropriate modeling data showing no violations we would expect to designate as “attainment”. All other areas, absent monitoring data and air quality modeling results showing no violations, we would expect to initially designate as “unclassifiable,” as required by the Clean Air Act.” Final Rule, at p. 35552.

¹⁹ 42 U.S.C. §7407(d)(1)(A), CAA § 107(d)(1)(A).

II. STANDARD OF REVIEW

The Administrator has authority and a duty to reconsider the Final Rule.²⁰ Section 307 of the Clean Air Act directs that the Administrator “shall convene a proceeding for reconsideration” if two things are shown:

First, it was either “impracticable” to raise the objection during the comment period, or the grounds for such objection arose after the period for public comment (but within the time specified for judicial review).²¹ Second, the objection is of central relevance to the outcome of the rule – in this case the June 22, 2010 final SO₂ NAAQS.²² The TCEQ’s Petition meets both requirements.

Because the grounds for the objections raised in this petition arose after the period for public comment and are of central relevance to the outcome of the rule, the Administrator must “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.”²³ The Administrator also has authority under its general rulemaking discretion to reconsider the Final Rule even if she concludes that the standards of CAA section 307(d)(7)(B)²⁴ have not been met.²⁵

This Petition is based on the final rule itself, and on the implementation approach that EPA intends to take, both of which differ significantly from the proposed rule and were

²⁰ 42 U.S.C. § 7607(d)(7)(B), CAA § 307(d)(7)(B).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Federal Administrative Procedures Act, 5 U.S.C. § 557.

promulgated without prior proposal and notice. Thus, the information came to light after the February 8, 2010 deadline for comment. The deadline for seeking judicial review of the new SO₂ NAAQS rule is August 23, 2010. Therefore, the grounds for the objections presented here arose after the period of public comment but within the time specified for seeking judicial review.

EPA's new approach requiring states to meet the SO₂ NAAQS by means other than monitoring, i.e., a hybrid modeling and monitoring approach, results in three problems: (1) an inappropriate form of the standard; (2) an interpretation by EPA that does not adhere to the plain meaning of the adopted rule text in 40 CFR § 50.17(b); and (3) a divergence from CAA section 110(a)(1) and (2) attainment and maintenance requirements for all areas, whether designated nonattainment or not. All of these issues are of *central relevance* to the final SO₂ rule and its eventual implementation by states.

III. ARGUMENT

A. EPA has Adopted the Wrong Form for the Standard

In the Final Rule, EPA for the first time determined that dispersion modeling would be required to determine attainment with the SO₂ NAAQS for purposes of both designations and redesignations. However, EPA's preferred model, as it exists today, is unable to directly provide values that can "fit" the probabilistic form of the NAAQS adopted in the Final Rule, meaning states will have significant difficulty meeting the requirements of the new standard, as stated.

In the Risk and Exposure Assessment (REA), EPA developed a statistical model to determine 5-minute peak SO₂ concentrations. EPA staff determined that at a given SO₂ standard

level, a 99th percentile form is effective at limiting 5-minute peak SO₂ concentrations. EPA also considered a 4th highest form of the standard. In the REA, staff stated that design values based on the 4th highest daily maximum are virtually indistinguishable from design values based on the 99th percentile. EPA chose a percentile-based form since this form results in a sampling from the same part of the annual distribution of 1-hour daily maximum SO₂ concentrations regardless of the number of 1-hour daily maximum concentrations reported in a given year for a particular location and provides more public health protection against 5-minute peaks.²⁶

The form is the air quality statistic that is compared to the level of the standard to determine if an area meets the standard, therefore the form of the standard is of central relevance to the actual standard itself. The new form adopted by EPA is the 3-year average of the 99th percentile of the annual distribution of daily maximum 1-hour average concentrations.²⁷ TCEQ commented that a “4th highest” form of the standard was preferred for ease of use and understanding but did not comment on the probabilistic form of the standard because EPA did not address any implementation issues with similar forms of the PM_{2.5} and NO₂ standards, and did not propose to use modeling as outlined in the final rule. Based on the information provided in the proposed rule, TCEQ reasonably assumed that EPA’s existing modeling guidance and procedures would apply regarding key elements such as the concept of “time and space,” evaluation of background sources, and the integration of predicted concentrations with monitoring data. However, after the proposed rule was published on December 9, 2009, EPA - in connection with the implementation of the PM_{2.5} and NO₂ standards - provided guidance that

²⁶ See Risk and Exposure Assessment to Support the Review of the SO₂ Primary National Ambient Air Quality Standard (Risk and Exposure Assessment) (EPA 2009a). Hereinafter referred to as Risk and Exposure Assessment (REA), available at: <http://www.epa.gov/nscep/>

²⁷ 40 C.F.R. § 50.17(b) and Final Rule, at p. 35539-35541.

indicates serious difficulty with integrating modeling and monitoring data. This same difficulty would also be true for the SO₂ standard.²⁸ EPA recognized the technical difficulties associated with cumulative impacts analysis given the averaging period and form of the standard and stated their intent to develop guidance for refined modeling to support "proper" implementation to include how to translate the modeling results into a form appropriate for comparison to the new standard. EPA fails to address these complications in the Final Rule. Given EPA's acknowledgement of the difficulties integrating modeling and monitoring data due to the form of the PM_{2.5} and NO₂ standards, there was no reason for TCEQ to expect that EPA would adopt a form of the SO₂ standard with similar problems, without an opportunity for public comment.

The difficulties integrating modeling and monitoring data due to the form of the SO₂ standard adopted by EPA will require that modeling procedures be refined to realistically address the frequency of peak short-term impacts in order to appropriately implement the new 1-hour SO₂ NAAQS. The joint frequency of worst-case cumulative emissions and adverse dispersion conditions becomes more important for probabilistic ambient standards. The new SO₂ NAAQS adopted by EPA is a *probabilistic* standard.

The American Meteorological Society/Environmental Protection Agency Regulatory Model (AERMOD)²⁹ is EPA's preferred model for SO₂ implementation. AERMOD is a *deterministic* model (that is, provides point estimates) and is not suitable to provide probabilistic short-term concentrations for a NAAQS that requires a probabilistic modeling approach. A deterministic model, such as AERMOD, provides a single result based on a worst-case set of

²⁸ March 23, 2010 memorandum, Steve Page, "Modeling Procedures for Demonstrating Compliance with PM_{2.5} NAAQS" and June 28, 2010 memorandum, Tyler Fox, "Applicability of Appendix W Modeling Guidance for the 1-hour NO₂ NAAQS"

²⁹ American Meteorological Society/Environmental Protection Agency Regulatory Model (AERMOD), available at:

input parameters, while a probabilistic model will have results that vary. A probabilistic model uses a method that considers the probability of events occurring; for example, the occurrence of maximum emissions and worst-case meteorology in order to provide an assessment of the uncertainty of results.

Use of peak emissions for all sources on a continuous basis will lead to overestimates of the frequency of peak total impacts. Therefore, modeling procedures used in the exposure assessment for a 1-hour probabilistic NAAQS that were based on 5-minute peaks must consider the use of a frequency distribution of emissions for the sources being considered in a Monte-Carlo (or equivalent)³⁰ type of approach. This is necessary to properly characterize the probabilistic nature of the intended result in order to “match” the adopted form of the standard. The use of peak 1-hour emissions for all sources on a continuous basis, as required by AERMOD, is not a valid procedure to evaluate compliance with a probabilistic 1-hour standard.

AERMOD is EPA’s preferred model for near-field dispersion (50 kilometers or less).³¹ While a state can propose other models, EPA requires an arduous demonstration before they will approve the use of other models. Also, while EPA evaluated the performance of the model³² only ten of seventeen field study data bases addressed 1-hour impacts in some way.³³ One hour is the shortest averaging time for which the model can calculate average calculations. EPA’s preferred air dispersion models have not been specifically developed or evaluated to predict short-term locations of maximum concentration or account for the probabilistic standard. In

http://www.epa.gov/ttn/scram/dispersion_prefrec.htm and Final Rule, at p. 35558.

³⁰ Generally, a problem solving technique used to approximate the probability of certain outcomes by running multiple trial runs, called simulations, using random variables.

³¹ Appendix W of 40 CFR part 51, 4.1a, 6.1(c), 6.2.3(a) and Final Rule, at p. 35560. Most steady-state Gaussian plume models are considered accurate for setting emission limits using 50km.

³² Final Rule, at p. 35560.

³³ EPA-454/R-03-003, June 2003, AERMOD: Latest Features and Evaluation Results.

contrast, monitoring reflects both emissions and meteorological variability, whereas modeling is conducted assuming maximum emissions persist continuously. For cases where the probability of simultaneous occurrence of peak emissions and worst-case meteorology is very low, the standard modeling approach will unrealistically exaggerate peak ambient concentrations. Modeling a constant, peak emission rate will produce an unrealistic estimate of the probabilistic daily 1-hour peak concentration. This is particularly true for sources that do not operate continuously, such as conditions during startup and shutdown, or testing. Adding monitored background concentrations to modeled maximum concentrations will most likely be overly conservative,³⁴ which would make those modeled projections inappropriate for use as a basis for designations or redesignations under the CAA.

B. EPA Adopted a Final Rule That It Specifically States It Will Not Implement In Accordance With The Rule's Plain Meaning

In the Final Rule, EPA adopted changes (that were not proposed for comment) to add the phrase "at an ambient monitoring site" to 40 C.F.R. § 50.17(b) and to section 1.1 of Appendix T to part 50. EPA also added a new subsection (c) to 40 C.F.R. § 50.17, stating that the level of the standard is to be measured by an approved reference method at a monitor.³⁵ EPA specifically noted in the preamble to the Final Rule that the Administrator interprets these language changes as follows: "[t]his text does not restrict or otherwise address approaches which EPA or States may use to implement the new 1-hour NAAQS, which may include, for example, use of

³⁴ In this case, the model will predict violations of the NAAQS where none would be reasonably predicted to occur otherwise.

³⁵ Final Rule, at p. 35582, 40 CFR § 50.17.

modeling.”³⁶ This specific statement commits EPA to interpret their adopted rule language in a way that inherently conflicts with the plain language of the rule. This stated intention to interpret rule language inconsistent with its plain meaning is not within EPA’s discretion, is arbitrary and capricious, and was never proposed for comment.³⁷ Texas had no notice that the rule language could be changed, nor could it have had any knowledge that EPA intended to interpret this rule language in a manner inconsistent with its plain meaning, and thus, could not have commented on this issue during proposal. This error is compounded by the fact that EPA interprets the rule language as permissive,³⁸ while stating elsewhere in the Final Rule³⁹ that monitoring data demonstrating attainment will not be deemed adequate for an area to be designated or redesignated attainment for the SO₂ standard unless dispersion modeling also predicts attainment.

C. EPA Adopted Requirements for Maintenance Plans Without Notice

As a consequence of the adopted hybrid monitoring and modeling approach, EPA also significantly changed the planning requirements for attainment and ‘unclassifiable’ areas – those areas that do not have sufficient monitoring or modeling data to show attainment of the NAAQS.⁴⁰ EPA readily admits most of the country will be designated unclassifiable⁴¹ and will now be required to submit maintenance plans, to show maintenance and attainment of the

³⁶ Final Rule, at p. 35582, third column.

³⁷ “To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements.” *Paralyzed Veterans of America, et. al. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir 1997)

³⁸ Final Rule, at p. 35582. Texas notes that EPA spent not even one full column of text on this issue out of an 83-page triple columned rulemaking.

³⁹ Final Rule, at p. 35551, second column, “[w]e have explained that for an area to be designated “attainment,” dispersion modeling regarding such sources needs to show the absence of violations even if monitoring does not show a violation.”

⁴⁰ Final Rule, at p. 35573.

⁴¹ Final Rule, at p. 35574.

NAAQS, containing elements that were not clearly discussed in the proposed rule.⁴² This is a direct contradiction to the proposal.⁴³ EPA acknowledges the significance of this change, in stating “[i]n short, under such an approach, all areas, whether designated as attainment, nonattainment, or unclassifiable, would need to submit SIPs under CAA § 110(a) that show that they are attaining and maintaining the 1-hour SO₂ NAAQS as expeditiously as practicable through permanent and enforceable measures. In other words, the duty to show maintenance of the SO₂ NAAQS would not be limited to areas that are initially designated as nonattainment, but instead, would apply regardless of designation.”⁴⁴

EPA further states that “[h]istorically, EPA has determined this to be sufficient to demonstrate maintenance absent other available information to suggest the area would have difficulty maintaining the NAAQS.”⁴⁵ Texas could not have foreseen that EPA would change its admitted historical interpretation of the maintenance requirement upon adoption of the final SO₂ NAAQS, and thus could not have commented on this change. The effect of this new interpretation is unprecedented.

D. EPA has Adopted a Final Rule That Was Not Properly Noticed Under the Federal APA and Is Not A Logical Outgrowth of the Proposed Rule

The final SO₂ rule states: “The 1-hour primary standard is met at an ambient air quality *monitoring* site.....” based on a three year average daily maximum 1-hour average less than or

⁴² Final Rule, at p. 35574.

⁴³ As discussed in the final rule preamble, EPA did not receive comments on the CAA, § 110(a) planning requirements, because it only discussed the infrastructure requirements in CAA, § 110(a)(2). EPA’s determination that it will impose the maintenance plan requirements in CAA, § 110(a)(1) for attainment and unclassifiable areas was never mentioned in the proposal. See Final Rule, at p. 35574.

⁴⁴ Final Rule, at p. 35573, 2nd and 3rd columns.

⁴⁵ Final Rule, at p. 35573.

equal to 75 parts per billion.⁴⁶ EPA never proposed using anything but monitoring to determine compliance with the NAAQS. Only upon final promulgation did EPA, for the first time, diverge significantly from this approach by emphasizing modeling over monitoring in determining compliance and designations.⁴⁷ In the preamble to the final rule, EPA states: “Our ultimate intention is to place greater emphasis on modeling than did the proposed rule....”⁴⁸ For initial designations, states would be required to designate an area as not attaining the standard if modeling shows a violation, even if there are no actual monitored violations.⁴⁹

EPA acknowledges in the final rule preamble that the hybrid modeling / monitoring approach to designations and implementation is “significantly different than that in the approach discussed in the proposal,”⁵⁰ EPA does this in spite of the fact that the rule language “clarified” in section 50.17 specifically emphasizes monitoring for determining compliance with the standard that will in turn determine each area’s attainment status. EPA explains the unannounced about-face from proposal as being more in line with its ‘historical practice’ for SO₂.⁵¹ This change from proposal could not have been anticipated by Texas or other stakeholders given that the use of modeling to determining nonattainment areas was explicitly removed by Congress in the 1990 Amendments to the Clean Air Act.

The definition of ‘nonattainment areas’ was changed by Congress in the 1990 CAA amendments. Prior to 1990, section 171(2) of the Act defined a ‘nonattainment area’ as “an area which is shown by monitored data or which is calculated by air quality modeling (or other

⁴⁶ 40 CFR § 50.17(b).

⁴⁷ Final Rule, at p. 35550-35551.

⁴⁸ Final Rule, at p. 35551.

⁴⁹ Final Rule, at p. 35552.

⁵⁰ Final Rule, at p. 35551.

⁵¹ *Id.*

methods determined by the Administrator to be reliable) to exceed any [NAAQS].⁵² Congress amended this language in 1990, deleting any reference to "calculated by air quality modeling (or other methods determined by the Administrator to be reliable)" in designating nonattainment areas."⁵³ Given this clear direction by Congress that modeling is not to be used to determine nonattainment areas for a NAAQS pollutant, there is no possible way the final rule, interpreted as it is by EPA to require modeling for compliance and implementation, could have been anticipated from what was proposed.⁵⁴

In other words, EPA's final rule is not a logical outgrowth of its proposal. Interpreting the Clean Air Act, the D.C. Circuit had noted that, "Given the strictures of notice-and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former."⁵⁵ This rule exists because the public "must be able to trust an agency's representations about which particular aspects of its proposal are up for consideration."⁵⁶ Consequently, courts will strike down that agency action that seeks to "use the rulemaking process to pull a surprise switcheroo on regulated entities."⁵⁷

The proposed rule gave no indication that the statutory requirement for meeting a NAAQS through monitoring data was now open for discussion. In this respect, this rule is much like the one rejected *National Mining Association v. Mine Safety and Health Administration*,⁵⁸ in which the D.C. Circuit rejected an agency argument that final rules that changed longstanding

⁵² 42 U.S.C. § 7501, as it existed July 14, 1955, ch. 360, title I, § 171, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 129(b), 91 Stat. 746.

⁵³ 42 U.S.C. 7501, as amended Nov. 15, 1990, Pub. L. 101-549, title I, § 102(a), 104 Stat. 2412.

⁵⁴ Indeed, the proposal preamble discussed at length the expanded monitoring network requirements that would be imposed on States, with Texas requiring six SO₂ monitors. See Proposed Rule, 74 *Fed. Reg.* pages 64846-64855, and Table 5. There is no discussion of modeling.

⁵⁵ *Env'tl. Integrity Project v. EPA*, 425 F. 3d 992, 996 (D.C. Cir. 2005).

⁵⁶ *Id.* at 998.

⁵⁷ *Id.*

pre-shift examination requirement for miners could be a logical outgrowth of a proposal that left that aspect of the rules unchanged.

The D.C. Circuit elaborated on this rule in another analogous decision, *Environmental Integrity Project v. EPA*. In that case, EPA argued that it met its notice-and-comment obligations “because its final interpretation was also mentioned (albeit negatively) in the Agency’s proposal.”⁵⁹ The Court emphatically rejected this argument:

However, this argument proves too much. If the APA’s notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency’s representations about *which particular* aspects of its proposal are open for consideration. A contrary rule would allow an agency to reject innumerable alternatives in its Notice of Proposed Rulemaking only to justify *any* final rule it might be able to devise by whimsically picking and choosing within the four corners of a lengthy “notice.”⁶⁰

The court concluded that “Whatever a ‘logical outgrowth’ of [EPA’s] proposal may include, it certainly does not include the Agency’s decision to repudiate its proposed interpretation and adopt its inverse.”⁶¹ The same is true in this case. EPA’s complete about-face on NAAQS compliance was not a logical outgrowth of its proposal, particularly when EPA gave no warning that it was considering a different tack, and did not allow an opportunity for comment on the impacts of this decision on the level and form of the standard, or the suitability of dispersion modeling for the new purpose assigned to it in the Final Rule.

⁵⁸ 116 F. 3d 520, 531 (D.C. Cir. 1997).

⁵⁹ *Envtl. Integrity Project v. EPA*, 425 F. 3d at 998.

⁶⁰ *Id.* (internal citations and quotations omitted).

⁶¹ *Id.*

IV. EPA Must Reconsider the SO₂ NAAQS Rule and Must Stay Implementation of the Rule Pending Reconsideration

In general, administrative reconsideration requires balancing the desirability of finality versus the public interest in reaching the right result.⁶² Any argument that finality concerns somehow trump reaching the right result is without merit. EPA was under a judicially established deadline for final rulemaking concerning the SO₂ NAAQS.⁶³ But EPA met its obligation when the Administrator signed for publication the final rule on June 2, 2010. Thus, the only relevant consideration is the public interest in reaching the right result. The public interest in reaching the right result weighs heavily in favor of reconsideration. EPA has deviated from the statutory regime. This final rule places all states in an untenable position. Though EPA promises future implementation guidance that states will be able to provide comment on, it will be too late. Designation recommendations are due to EPA in less than one year from the effective date of the Final Rule.

Pending reconsideration, the Administrator should stay the application of the SO₂ rule. Under the Administrative Procedure Act (“APA”), “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.”⁶⁴ EPA applies this standard to Clean Air Act cases.⁶⁵ The standard for such an administrative stay is significantly different from the standard for a stay used by the courts because it does not require a demonstration of irreparable harm. This is clear from the text of the APA:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be

⁶² *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961).

⁶³ See *Center for Biologic Diversity v. Johnson* (Civ. No. 05-1814)(D.D.C. 2007); discussed in Final Rule, at p. 35523.

⁶⁴ 5 U.S.C. § 705.

⁶⁵ Ohio: Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 8581, 8582 n.1 (Jan. 27, 1981).

required and to the extent necessary to prevent irreparable injury, the reviewing court may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Thus, the APA deliberately contrasts what is required for an administrative stay—"justice so requires" - and a judicial stay - "conditions as may be required" and "irreparable harm." Such differences must be given effect,⁶⁶ so there is no irreparable harm requirement for an administrative stay.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the TCEQ respectfully requests that the Administrator grant this Petition and promptly convene a proceeding for reconsideration of the SO₂ NAAQS rule and stay its implementation pending reconsideration.

Respectfully submitted,



Mark R. Vickery, P.G.
Executive Director

⁶⁶ [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks and citation omitted; alteration in original).

CERTIFICATE OF SERVICE

We certify that on August 23, 2010, a copy of the foregoing Petition for Reconsideration and Request for Administrative Stay was served by electronic mail, and by first-class mail, postage prepaid on the following:

The Honorable Lisa P. Jackson, Administrator
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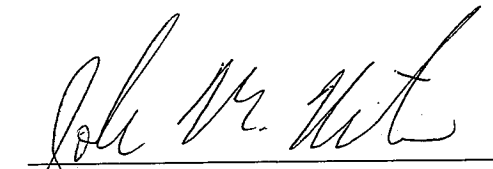
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