



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA-HQ-OAR-2017-0548; FRL-10023-49-OAR]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of availability and public comment period.

SUMMARY: This notification is hereby given that the Environmental Protection Agency (EPA or Agency) has posted on our public electronic docket and Internet Web site revised responses to certain state designation recommendations for the 2015 Ozone National Ambient Air Quality Standards (NAAQS) (2015 Ozone NAAQS). These responses include our intended designations for El Paso County, Texas (associated with the previously designated Doña Ana County, New Mexico nonattainment area) and Weld County, Colorado (associated with the Denver Metro/North Front Range, Colorado nonattainment area). The EPA invites the public to review and provide input on our intended designations during the comment period specified in the **DATES** section. The EPA sent its revised responses directly to the states of Texas and Colorado on or about May 24, 2021. The EPA intends to make final designation determinations for the counties addressed by these responses no earlier than 120 days from the date the EPA notified the states of the Agency's intended designations.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2017-0548, at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and

Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via <https://www.regulations.gov>, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

Once submitted, comments cannot be edited or removed from *regulations.gov*. The EPA may publish any comment received to our public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, comments hosted on the Web, Cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: For general questions concerning this action, please contact Carla Oldham, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division, C541A, Research Triangle Park, NC 27709, telephone (919) 541-3347, email at oldham.carla@epa.gov or Andrew Leith, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division, C541A, Research Triangle Park, NC 27709, telephone (919) 541-1069, email at leith.andrew@epa.gov. The following EPA contacts can answer questions regarding areas in a particular EPA Regional office:

Regional Office Contacts:

Region VI – Carrie Paige (214) 665-6521, email at paige.carrie@epa.gov

Region VIII – Abby Fulton, (303) 312-6563, email at fulton.abby@epa.gov

The public may inspect the recommendations from the states and tribes, our recent letters notifying the affected states and tribes of our intended designations, and area-specific technical support information at the following locations:

Regional Offices	Affected State(s)
EPA Region 6 1201 Elm Street Dallas, Texas 75270	New Mexico and Texas
EPA Region 8 Air Quality Planning Branch 1595 Wynkoop Street Denver, Colorado 80202	Colorado

Most of the EPA offices are closed to reduce the risk of transmitting COVID-19, but staff remain available via telephone and email. The EPA encourages the public to review designation recommendations from states, our recent letters notifying the affected states of our intended designations, and area-specific technical support information online at <https://www.epa.gov/ozone-designations> and in the public docket for these ozone designations at <https://www.regulations.gov> under Docket ID No. EPA-HQ-OAR-2017-0548.

SUPPLEMENTARY INFORMATION:

I. What is the purpose of this action?

The purpose of this notification of availability is to solicit input from interested parties other than states on the EPA’s recent revised responses to the state designation recommendations for the 2015 Ozone NAAQS. These responses, and their supporting technical analyses, can be found at <https://www.epa.gov/ozone-designations> and in the public docket for these ozone designations at <https://www.regulations.gov> under Docket ID No. EPA-HQ-OAR-2017-0548.

On October 1, 2015, the EPA Administrator signed a notification of final rulemaking that revised the primary and secondary ozone NAAQS (80 FR 65292; October 26, 2015). The EPA

established the revised primary and secondary ozone NAAQS at 0.070 parts per million (ppm). The 2015 Ozone NAAQS are met at an ambient air quality monitoring site when the 3-year average of the annual fourth highest daily maximum 8-hour average ozone concentration (*i.e.*, the design value) is less than or equal to 0.070 ppm. The revised standards will improve public health protection, particularly for at-risk groups including children, older adults, people of all ages who have lung diseases such as asthma, and people who are active outdoors, especially outdoor workers. They also will improve the health of trees, plants and ecosystems.

After the EPA promulgates a new or revised NAAQS, the Clean Air Act (CAA) requires the EPA to designate all areas of the country as either “Nonattainment,” “Attainment,” or “Unclassifiable,” for that NAAQS. The process for these initial designations is contained in CAA section 107(d)(1) (42 U.S.C. 7407). After promulgation of a new or revised NAAQS, each governor or tribal leader has an opportunity to recommend air quality designations, including the appropriate boundaries for nonattainment areas, to the EPA. The EPA considers these recommendations as part of its duty to promulgate the formal area designations and boundaries for the new or revised NAAQS. By no later than 120 days prior to promulgating designations, the EPA is required to notify states, territories, and tribes, as appropriate, of any intended modifications to an area designation or boundary recommendation that the EPA deems necessary. Accordingly, the EPA designated all areas of the country as to whether they met, or did not meet, the NAAQS in three rounds, resulting in 52 nonattainment areas.

In Round 1 (82 FR 54232; November 6, 2017), the EPA designated 2,646 counties, two separate tribal areas and five territories as attainment/unclassifiable, and one area as unclassifiable. In Round 2 (83 FR 25776; April 30, 2018), the EPA designated 51 nonattainment areas, one unclassifiable area, and all remaining areas as attainment/unclassifiable, except for the eight counties in the San Antonio, Texas area. In Round 3 (83 FR 35136; July 17, 2018), the EPA designated one county in the San Antonio area as nonattainment and the other seven counties as attainment/unclassifiable.

Several environmental and public health advocacy groups, three local government agencies, and the state of Illinois filed a total of six petitions for review challenging the EPA's 2015 ozone NAAQS designations promulgated on April 30, 2018. The District of Columbia Circuit Court consolidated the petitions into a single case, *Clean Wisconsin v. EPA*, 964 F.3d 1145 (D.C. Cir. 2020). Collectively, the petitioners challenged aspects of the EPA's final designations associated with nine nonattainment areas. The petitioners primarily argued that the EPA improperly designated counties (in whole or part) as attainment that should have been designated as nonattainment because of contribution to nearby counties with violating monitors. In its response brief, the EPA requested voluntary remand of the final designation decisions for ten counties associated with four nonattainment areas to further review those designations.

On July 10, 2020, the District of Columbia Circuit Court granted the EPA's requests for voluntary remand and remanded several other counties. In total, the Court remanded 16 counties associated with nine nonattainment areas back to the EPA, including nearby counties that EPA designated as attainment. The Court did not vacate the initial April 30, 2018 designations, but required the EPA to "issue revised designations as expeditiously as practicable." In light of the Court decision, the EPA re-evaluated the existing technical record that was used for the initial April 2018 designations, to support either revising or reaffirming the designations for these areas.

The EPA is responding to this remand through two separate **Federal Register** documents. The first document, signed on May 24, 2021, finalizes designation decisions for 14 counties. EPA's December 2017 initial designations and April 2018 final designations aligned with Texas' and Colorado's recommendations for El Paso and Weld Counties, respectively, and so, at that time, the EPA had no need to, and did not, notify the two states that the Agency planned to modify the states' recommendations. However, the EPA's intended designations for those areas in response to the court's remand would modify the states' recommendations. As such, the EPA is acting consistently with the CAA requirement that the EPA notify the relevant

states and allow them to “demonstrate why any proposed modification is inappropriate,” and is undertaking a 120-day process.

In the EPA’s April 2018 final designations, the intended boundary for the El Paso-Las Cruces nonattainment area only contained the southeastern portion of Doña Ana County, New Mexico, and so was called the “Doña Ana County, New Mexico” nonattainment area in that final action. The EPA’s intended modification of Texas’s attainment recommendation would expand the boundary of the nonattainment area to include multiple counties and thus, become a multi-state nonattainment area. As such, in keeping with the EPA practices, the Agency intends to name the nonattainment area based on the Combined Statistical Area that comprised its area of analysis.

II. Instructions for Submitting Public Comments and Internet Web Site for Rulemaking Information

A. Invitation to Comment

The purpose of this document is to solicit input from interested parties, other than the states to which we have sent notification letters, on the EPA’s recent responses to the designation recommendations for the 2015 Ozone NAAQS. These responses, and their supporting technical analyses, can be found at <https://www.epa.gov/ozone-designations> and in the public docket for these ozone designations at Docket ID No. EPA-HQ-OAR-2017-0548. The EPA Docket Office can be contacted at (202) 566-1744, and is located at EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. However, as noted earlier, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via <https://www.regulations.gov>, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For

further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

CAA section 107(d)(1) provides a process for air quality designations that involves recommendations by states, territories, and tribes to the EPA and responses from the EPA to those parties, prior to the EPA promulgating final area designations and boundaries. The EPA is not required under the CAA section 107(d)(1) to seek public comment during the designation process, but we are electing to do so for these areas with respect to the 2015 Ozone NAAQS to gather additional information for the EPA to consider before making final designations for the specific areas addressed in the EPA's recent letters to states and tribes. The EPA is basing its final designations decisions on data and information contained in the existing designations record. As such, the EPA will not consider new information submitted by states or during the public comment process that is not a part of the existing record, although EPA will consider new analysis based on the existing record. The EPA's reliance on the existing record to support the designations is reasonable in light of the circumstances. The CAA does not specify what data the Agency must rely on in re-promulgating designations upon remand from a court. As such, the EPA's reasonable reliance on the existing record reflects the EPA's dedication to national consistency and the specific direction of the court in *Clean Wisconsin*: "to issue revised designations as expeditiously as practicable" in responding to the remand.

Section 107(d) of the CAA lays out a particular timeline for designations decisions to be made, triggered from the date a NAAQS is promulgated. For the 2015 ozone NAAQS, the designation of every area of the country apart from those remanded to the Agency relied on the existing record. As the D.C. Circuit stated in previous cases reviewing EPA's designations decisions, "inconsistency is the hallmark of arbitrary agency action."¹ Relying on the data available to the Agency at the time of the April 2018 designations action would prevent

¹ *Catawba County v. EPA*, 571 F.3d 20, 51 (D.C. Cir. 2009); see also *Mississippi Comm'n v. EPA*, 790 F.3d 138, 160 (D.C. Cir. 2015).

inconsistent treatment between the remanded counties and every other area of the country. In addition, this action proposes to expand the boundaries of existing nonattainment areas but does not create any new nonattainment areas. Understanding that it is important to treat areas across the country consistently, it is that much more important that EPA treat different portions of the same nonattainment area consistently. For example, in this action the EPA is proposing to expand the boundary of the Denver Metro/North Front Range, Colorado nonattainment area to include the entirety of Weld County, rather than excluding the northern portion of the county. It would be illogical in this type of situation for the Agency to use one set of data (e.g., 2014-2016 design values) for the previously-designated portion of the nonattainment area, which includes seven full and two partial counties, and a different set (e.g. 2017-2019 or 2018-2020 design values) for the new portion of Weld County.

The D.C. Circuit's direction to act "as expeditiously as practicable" also weighs in favor of using the existing record. Gathering and analyzing new data would necessarily have taken much longer, especially because a large portion of the data the EPA generally relies upon in its designations decision-making process is obtained outside the Agency, including from states.

Treating different portions of the same nonattainment area consistently also applies to the attainment date for the Denver Metro/North Front Range, Colorado and El Paso-Las Cruces nonattainment areas.

The EPA invites public input on our responses to states regarding these areas during the 30-day comment period provided in this notification. To receive full consideration, input from the public must be submitted to the docket by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. This notification and opportunity for public comment does not affect any rights or obligations of any state, or tribe, or of the EPA, which might otherwise exist pursuant to the CAA section 107(d).

Please refer to the **FOR FURTHER INFORMATION** section in this document for specific instructions on submitting comments and locating relevant public documents.

In establishing nonattainment area boundaries for a particular area, CAA section 107(d)(1)(A) requires the EPA to include within the boundaries both the area that does not meet the standard and any nearby area contributing to ambient air quality in the area that does not meet the NAAQS. We are particularly interested in receiving comments using data in the existing record that support a position that a specific geographic area should not be categorized as full county nonattainment. The EPA encourages commenters to support their feedback using relevant information addressing the CAA section 107(d)(1)(A) criteria.

- Describe any assumptions and provide any technical information and/or data that you used.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Provide your input by the comment period deadline identified.

The EPA intends to make final designation determinations for the counties addressed by these responses as expeditiously as practicable, but no earlier than 120 days from the date the EPA notified the states of the Agency's intended designations. This would complete the designation process for the 2015 Ozone NAAQS.

B. What should I consider as I prepare my comments for the EPA?

1. *Submitting CBI.* Do not submit CBI information to the EPA through <https://www.regulations.gov> or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI in a disk or CD ROM that you mail to the EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the

following address: Tiffany Purifoy, OAQPS CBI Officer, U.S. EPA, Office of Air Quality Planning and Standards, Mail Code C404-02, Research Triangle Park, NC 27711, telephone (919) 541-0878, email at purifoy.tiffany@epa.gov, Attention Docket ID No. EPA-HQ-OAR-2017-0548. There will be a delay in confirming receipt of CBI packages, because the EPA-RTP office is closed to reduce the risk of transmitting COVID-19. Due to the office closure, EPA is also requesting that parties notify the OAQPS Document Control Officer via telephone, (919) 541-0878, or email at purifoy.tiffany@epa.gov when mailing information identified as CBI.

2. Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

C. Where can I find additional information for this rulemaking?

The EPA has also established a Web site for this rulemaking at <https://www.epa.gov/ozone-designations>. The Web site includes the state, territorial and tribal recommendations, the EPA's intended area designations, information supporting the EPA's preliminary designation decisions, the EPA's designation guidance for the 2015 Ozone NAAQS, as well as the rulemaking actions and other related information that the public may find useful.

D. Clean Air Act Section 307(b)

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) when the Agency action consists of "nationally applicable regulations promulgated, or final action taken, by the Administrator," or (ii) when such action is locally or regionally applicable, "if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is

based on such a determination.” For locally or regionally applicable final actions, the CAA reserves to EPA complete discretion whether to invoke the exception in (ii).

If finalized, the action designating the two areas discussed in this notification for the 2015 ozone NAAQS would be “nationally applicable” within the meaning of CAA section 307(b)(1). If EPA takes final action designating these two areas, in the alternative, the Administrator intends to exercise the complete discretion afforded to him under the CAA to make and publish a finding that the final action (to the extent a court finds the action to be locally or regionally applicable) is based on a determination of “nationwide scope or effect” within the meaning of CAA section 307(b)(1).² If EPA finalizes this action, it will designate two areas for the 2015 ozone NAAQS, located in two non-adjacent states, in two different EPA regions, and in two different federal judicial circuits, that were remanded to EPA by the D.C. Circuit Court of Appeals.³ It would apply a uniform, nationwide analytical method and interpretation of CAA section 107(d)(1) to these areas across the country in a single final action, and the final action would be based on this common core of determinations. More specifically, for example, the final action would be based on a determination by the EPA to evaluate areas nationwide under a common five factor analysis in determining whether areas were in violation of or contributing to

² In deciding whether to invoke the exception by making and publishing a finding that a final action on these designations is based on a determination of nationwide scope or effect, the Administrator will also take into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit’s authoritative centralized review versus allowing development of the issue in other contexts and the best use of Agency resources.

³ In the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator’s determination that the “nationwide scope or effect” exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. See H.R. Rep. No. 95-294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402-03. Further, the EPA’s intended action is in response to a remand from the D.C. Circuit. As is the case with the EPA’s intended action on these two designations, challenges to the EPA’s original action were heard in the D.C. Circuit because the action was nationally applicable and, in the alternative, the EPA made and published a finding that the action was based on a determination of nationwide scope or effect.

an area in violation of the 2015 Ozone NAAQS at the time of the April 2018 designations final action.

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